In re Kellogg Brown & Root, Inc.

United States Court of Appeals for the District of Columbia Circuit

May 7, 2014, Argued; June 27, 2014, Decided

No. 14-5055

Reporter
756 F.3d 754; 410 U.S. App. D.C. 382; 2014 U.S. App. LEXIS 12115; 38 I.E.R. Cas. (BNA) 1109; 94 Fed. R. Evid. Serv. (Callaghan) 1078; 94 Fed. R. Evid. Serv. (Callaghan) 1129; 2014 WL 2895939

IN RE: KELLOGG BROWN & ROOT, INC., ET AL., PETITIONERS

Subsequent History: Judgment entered by *In re Kellogg Brown & Root, Inc., 2014 U.S. App. LEXIS 12447 (D.C. Cir., June 27, 2014)*
Rehearing, en banc, denied by *In re Kellogg Brown & Root, Inc., 2014 U.S. App. LEXIS 17077 (D.C. Cir., Sept. 2, 2014)*
On remand at, Request denied by, Motion granted by *United States ex rel. Barko v. Halliburton Co., 2014 U.S. Dist. LEXIS 174607 (D.D.C., Dec. 17, 2014)*
US Supreme Court certiorari denied by *United States ex rel. Barko v. Kellogg Brown & Root, Inc., 190 L. Ed. 2d 914, 2015 U.S. LEXIS 668 (U.S., Jan. 20, 2015)*

Prior History: **[***1]** On Petition for Writ of Mandamus. (No. 1:05-cv-1276).
United States ex rel. Barko v. Halliburton Co., 37 F. Supp. 3d 1, 2014 U.S. Dist. LEXIS 36490 (D.D.C., Mar. 6, 2014)

Core Terms

attorney-client, district court, mandamus, internal investigation, legal advice, cases, communications, purposes, documents, primary purpose, confidential, courts, circumstances, regulations, attorneys, employees, disclosure, privileged, interlocutory appeal, defense contractor, court's decision, interviews, undertaken, company's, reassign

Case Summary

Overview

HOLDINGS: [1]-Petitioners were entitled to mandamus relief under *28 U.S.C.S. § 1651*, because the district court employed the wrong legal test in refusing to apply the attorney-client privilege under *Fed. R. Evid. 501* to confidential employee communications made during a corporation's internal investigation led by company lawyers; [2]-So long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, the attorney-client privilege applied even if the investigation was mandated by a regulation; [3]-The first condition for mandamus was met, because there was no other adequate means to obtain relief; [4]-The court of appeals refused to reassign the case to a different district court judge, because there was no reason to doubt that the district court would render a fair judgment in further proceedings.

Outcome

Granted and vacated.

LexisNexis® Headnotes

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > Applicability

Evidence > Privileges > Attorney-Client Privilege > Scope

Governments > Courts > Common Law

Legal Ethics > Client Relations > Attorney Duties to Client > Duty of Confidentiality

HN1 *Fed. R. Evid. 501* provides that claims of privilege in federal courts are governed by the common law — as interpreted by United States courts in the light of reason and experience. The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. The privilege applies to a confidential communication between attorney and client if that communication was made for the purpose of obtaining or providing legal advice to the client. Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged.

Business & Corporate Law > Corporations > General Overview

Evidence > Privileges > Attorney-Client Privilege > Scope

Legal Ethics > Client Relations > Attorney Duties to Client > Duty of Confidentiality

HN2 The attorney-client privilege applies to corporations. The attorney-client privilege for business organizations is essential in light of the vast and complicated array of regulatory legislation confronting the modern corporation, which requires corporations to constantly go to lawyers to find out how to obey the law. The attorney-client 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.

Business & Corporate Law > Corporations > General Overview

Evidence > Privileges > Attorney-Client Privilege > Scope

Legal Ethics > Client Relations > Attorney Duties to Client > Duty of Confidentiality

HN3 Upjohn does not hold or imply that the involvement of outside counsel is a necessary predicate for the attorney-client privilege to apply. On the contrary, the general rule is that a lawyer's status as in-house counsel does not dilute the privilege. Inside legal counsel to a corporation or similar organization is fully empowered to engage in privileged communications.

Evidence > Privileges > Attorney-Client Privilege > Scope

HN4 Communications made by and to non-attorneys serving as agents of attorneys in internal investigations are routinely protected by the attorney-client privilege. If internal investigations are conducted by agents of the client at the behest of the attorney, they are protected by the attorney-client privilege to the same extent as they would be had they been conducted by the attorney who was consulted.

Evidence > Privileges > Attorney-Client Privilege > Scope

Legal Ethics > Client Relations > Attorney Duties to Client > Duty of Confidentiality

HN5 The primary purpose test to determine whether the attorney-client privilege applies, sensibly and properly applied, cannot and does not draw a rigid distinction between a legal purpose on the one hand and a business purpose on the other. After all, trying to find the one primary purpose for a communication motivated by two sometimes overlapping purposes can be an inherently impossible task. It is often not useful or even feasible to try to determine whether the purpose was A or B when the purpose was A and B. It is thus not correct for a court to presume that a communication can have only one primary purpose. It is likewise not correct for a court to try to find the one primary purpose in cases where a given communication plainly has multiple purposes. Rather, it is clearer, more precise, and more predictable to articulate the test as follows: Was obtaining or providing legal advice a primary purpose of the communication, meaning one of the significant purposes of the communication?

Evidence > Privileges > Attorney-Client Privilege > Scope

HN6 In general, American decisions agree that the attorney-client privilege applies if one of the significant purposes of a client in communicating with a lawyer is that of obtaining legal assistance. The United States Court of Appeals for the District of Columbia Circuit agrees with and adopts that formulation — one of the significant purposes — as an accurate and appropriate description of the primary purpose test. Sensibly and properly applied, the test boils down to whether obtaining or providing legal advice was one of the significant purposes of the attorney-client communication.

Evidence > Privileges > Attorney-Client Privilege > Scope

HN7 In the context of an organization's internal investigation, if one of the significant purposes of the internal investigation was to obtain or provide legal advice, the privilege will apply. That is true regardless of whether an internal investigation was conducted pursuant to a company compliance program required by statute or regulation, or was otherwise conducted pursuant to company policy.

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

HN8 Mandamus is a drastic and extraordinary remedy reserved for really extraordinary causes. In keeping with that high standard, the United States Supreme Court in Cheney stated that three conditions must be satisfied before a court grants a writ of mandamus: (1) the mandamus petitioner must have no other adequate means to attain the relief he desires; (2) the mandamus petitioner must show that his right to the issuance of the writ is clear and indisputable; and (3) the court, in the

exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.

Civil Procedure > ... > Discovery > Privileged Communications > Attorney-Client Privilege

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

HN9 A mandamus petitioner must have no other adequate means to attain the relief he desires. That initial requirement will often be met in cases where a petitioner claims that a district court erroneously ordered disclosure of attorney-client privileged documents. That is because (1) an interlocutory appeal is not available in attorney-client privilege cases ---absent district court certification; and (2) appeal after final judgment will come too late because the privileged communications will already have been disclosed pursuant to the district court's order.

Civil Procedure > Sanctions > Contempt > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > Certified Questions

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

Evidence > Privileges > Attorney-Client Privilege > Scope

HN10 An interlocutory appeal under the collateral order doctrine is not available in attorney-client privilege cases. To be sure, a party may ask the district court to certify the privilege question for interlocutory appeal. *28 U.S.C.S. § 1292(b)*. But that avenue is available only at the discretion of the district court. It is also true that a party may defy the district court's ruling and appeal if the district court imposes contempt sanctions for non-disclosure. But forcing a party to go into contempt is not an "adequate" means of relief for purposes of requesting a petition for mandamus relief.

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > General Overview

HN11 Post-release review of a ruling that documents are unprivileged is often inadequate to vindicate a privilege the very purpose of which is to prevent the release of those confidential documents. A remedy after final judgment cannot unsay the confidential information that has been revealed.

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

Evidence > Privileges > Attorney-Client Privilege > General Overview

HN12 The first condition for mandamus — no other adequate means to obtain relief — will often be satisfied in attorney-client privilege cases.

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

Civil Procedure > Appeals > Appellate Jurisdiction > Collateral Order Doctrine

Evidence > Privileges > Attorney-Client Privilege > General Overview

HN13 Mohawk holds that attorney-client privilege rulings are not appealable under the collateral order doctrine because postjudgment appeals generally suffice to protect the rights of litigants and ensure the vitality of the attorney-client privilege. The United States Supreme Court has repeatedly and expressly reaffirmed that mandamus — as opposed to the collateral order doctrine — remains a useful safety valve in some cases of clear error to correct some of the more consequential attorney-client privilege rulings.

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Evidence > Privileges > Attorney-Client Privilege > General Overview

HN14 A mandamus petitioner must show that his right to the issuance of the writ is clear and indisputable. Although the first mandamus requirement is often met in attorney-client privilege cases, this second requirement is rarely met. An erroneous district court ruling on an attorney-client privilege issue by itself does not justify mandamus. The error has to be clear. As a result, appellate courts will often deny interlocutory mandamus petitions advancing claims of error by the district court on attorney-client privilege matters.

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

HN15 Before granting mandamus, the appellate court must be satisfied that the writ is appropriate under the circumstances.

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

HN16 Mandamus can be appropriate to forestall future error in trial courts and eliminate uncertainty in important areas of law.

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

Governments > Courts > Judges

HN17 Fed. R. App. P. 21(b)(4) provides that in a mandamus proceeding the trial-court judge may request permission to address the petition but may not do so unless invited or ordered to do so by the court of appeals.

Civil Procedure > ... > Inability to Proceed > Disqualification & Recusal > Federal Judges

Civil Procedure > ... > Disqualification & Recusal > Grounds for Disqualification & Recusal > General Overview

Civil Procedure > Appeals > Appellate Briefs

HN18 Ordinarily, the appellate court does not consider a request for relief that a party failed to clearly articulate in its briefs. To be sure, appellate courts on rare occasions will reassign a case sua sponte. But whether requested to do so or considering the matter sua sponte, the appellate court will reassign a case only in the exceedingly rare circumstance that a district judge's conduct is so extreme as to display clear inability to render fair judgment.

Evidence > Privileges > Attorney-Client Privilege > Scope

Legal Ethics > Client Relations > Attorney Duties to Client > Duty of Confidentiality

HN19 The attorney-client privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.

Counsel: John P. Elwood argued the cause for petitioners. With him on the petition for writ of mandamus and the reply were John M. Faust, Craig D. Margolis, Jeremy C. Marwell, and Joshua S. Johnson.

Rachel L. Brand, Steven P. Lehotsky, Quentin Riegel, Carl Nichols, Elisebeth C. Cook, Adam I. Klein, Amar Sarwal, and Wendy E. Ackerman were on the brief for amicus curiae Chamber of Commerce of the United States of America, et al. in support of petitioners.

Stephen M. Kohn argued the cause for respondent. With him on the response to the petition for writ of mandamus were David K. Colapinto and Michael Kohn.

Judges: Before: GRIFFITH, KAVANAUGH, and SRINIVASAN, Circuit Judges. Opinion for the Court filed by Circuit Judge KAVANAUGH.

Opinion by: KAVANAUGH

Opinion

[*756] **[**384]** KAVANAUGH, *Circuit Judge*: More than three decades ago, the Supreme Court held that the attorney-client privilege protects confidential employee communications made during a business's internal investigation led by company lawyers. *See* Upjohn Co. v. United States, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981). In this case, the District Court denied the protection of the privilege to a company that had conducted just such an internal investigation. **[***2]** The District Court's decision has generated substantial uncertainty about the scope of the attorney-client privilege in the business setting. We conclude that the District Court's decision is irreconcilable with *Upjohn*. We therefore grant KBR's petition for a writ of mandamus and vacate the District Court's March 6 document production order.

I

Harry Barko worked for KBR, a defense contractor. In 2005, he filed a False Claims Act complaint against KBR and KBR-related corporate entities, whom we will collectively refer to as KBR. In essence, Barko alleged that KBR and certain subcontractors defrauded the U.S. Government by inflating costs and accepting kickbacks while administering military contracts in wartime Iraq. During discovery, Barko sought documents related to KBR's prior internal investigation into the alleged fraud. KBR had conducted that internal investigation pursuant to its Code of Business Conduct, which is overseen by the company's Law Department.

KBR argued that the internal investigation had been conducted for the purpose of obtaining legal advice and that the internal investigation documents therefore were protected by the attorney-client privilege. Barko responded that **[***3]** the internal investigation documents were unprivileged business records that he was entitled to discover. *See generally* Fed. R. Civ. P. 26(b)(1).

After reviewing the disputed documents *in camera*, the District Court determined that the attorney-client privilege protection did not apply because, among other reasons, KBR had not shown that "the communication would not have been made 'but for' the fact that legal advice was sought." *United States ex rel. Barko v. Halliburton Co., No. 05-cv-1276, 37 F. Supp. 3d 1, 2014 U.S. Dist. LEXIS 36490, 2014 WL 1016784, at *2 (D.D.C. Mar. 6, 2014)* (quoting *United States v. ISS Marine Services, Inc., 905 F. Supp. 2d 121, 128 (D.D.C. 2012))*. KBR's internal investigation, the court concluded, was "undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice." *2014 U.S. Dist. LEXIS 36490, [WL] at *3*.

KBR vehemently opposed the ruling. The company asked the District Court to certify the privilege question to this Court for interlocutory appeal and to stay its order pending a petition for mandamus in this Court. The District Court denied those requests and ordered KBR to produce the disputed documents to Barko within a matter of days. *See United States ex rel. Barko v. Halliburton Co., No. 05-cv-1276, 4 F. Supp. 3d 162, 2014 U.S. Dist. LEXIS 30866, 2014 WL 929430 (D.D.C. Mar. 11, 2014)* **[***4]** . KBR promptly filed a petition for a writ of mandamus in this Court. A number of business organizations and trade associations also objected to the District Court's decision and filed an amicus brief in support of KBR. We stayed the District Court's document production order and held oral argument on the mandamus petition.

The threshold question is whether the District Court's privilege ruling constituted legal error. If not, mandamus is of course inappropriate. If the District Court's ruling was erroneous, the remaining **[*757]** **[**385]** question is whether that error is the kind that justifies mandamus. *See Cheney v. U.S. District Court for the District of Columbia, 542 U.S. 367, 380-81, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004)*. We address those questions in turn.

II

We first consider whether the District Court's privilege ruling was legally erroneous. We conclude that it was.

HN1 *Federal Rule of Evidence 501* provides that claims of privilege in federal courts are governed by the "common law — as interpreted by United States courts in the light of reason and experience." *Fed. R. Evid. 501*. The attorney-client privilege is the "oldest of the privileges for confidential communications **[***5]** known to the common law." *Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)*. As relevant here, the privilege applies to a confidential communication between attorney and client if that communication was made for the purpose of obtaining or providing legal advice to the client. *See* 1 *Restatement (Third) of the Law Governing Lawyers §§ 68-72* (2000); *In re Grand Jury, 475 F.3d 1299, 1304, 374 U.S. App. D.C. 428 (D.C. Cir. 2007)*; *In re Lindsey, 158 F.3d 1263, 1270, 332 U.S. App. D.C. 357 (D.C. Cir. 1998)*; *In re Sealed Case, 737 F.2d 94, 98-99, 237 U.S. App. D.C. 312 (D.C. Cir. 1984)*; *see also Fisher v. United States, 425 U.S. 391, 403, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976)* ("Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged.").

In *Upjohn*, the Supreme Court held that ***HN2*** the attorney-client privilege applies to corporations. The Court explained that the attorney-client privilege for business organizations was essential in light of "the vast and complicated array of regulatory legislation confronting the modern corporation," which required corporations to "constantly go to lawyers to find out how to obey the law, . . . particularly since compliance with the law in this area is hardly an instinctive matter." *449 U.S. at 392* (internal **[***6]** quotation marks and citation omitted). The Court stated, moreover, that the attorney-client 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." *Id. at 390*. That is so, the Court said, because the "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." *Id. at 390-91*. In *Upjohn*, the communications were made by company employees to company attorneys during an attorney-led internal investigation that was undertaken to ensure the company's "compliance with the law." *Id. at 392*; *see id. at 394*. The Court ruled that the privilege applied to the internal investigation and covered the communications between company employees and company attorneys.

KBR's assertion of the privilege in this case is materially indistinguishable from Upjohn's assertion of the privilege in that case. As in *Upjohn*, KBR initiated an internal investigation to gather facts and ensure compliance with the law after being informed of potential misconduct. And as in *Upjohn*, KBR's **[***7]** investigation was

conducted under the auspices of KBR's in-house legal department, acting in its legal capacity. The same considerations that led the Court in *Upjohn* to uphold the corporation's privilege claims apply here.

The District Court in this case initially distinguished *Upjohn* on a variety of grounds. But none of those purported distinctions takes this case out from under *Upjohn*'s umbrella.

[*758] **[**386]** *First*, the District Court stated that in *Upjohn* the internal investigation began after in-house counsel conferred with outside counsel, whereas here the investigation was conducted in-house without consultation with outside lawyers. But ***HN3*** *Upjohn* does not hold or imply that the involvement of outside counsel is a necessary predicate for the privilege to apply. On the contrary, the general rule, which this Court has adopted, is that a lawyer's status as in-house counsel "does not dilute the privilege." *In re Sealed Case, 737 F.2d at 99*. As the Restatement's commentary points out, "Inside legal counsel to a corporation or similar organization . . . is fully empowered to engage in privileged communications." *1 Restatement § 72, cmt. c, at 551*.

Second, the District Court noted that in *Upjohn* the interviews **[***8]** were conducted by attorneys, whereas here many of the interviews in KBR's investigation were conducted by non-attorneys. But the investigation here was conducted at the direction of the attorneys in KBR's Law Department. And ***HN4*** communications made by and to non-attorneys serving as agents of attorneys in internal investigations are routinely protected by the attorney-client privilege. *See FTC v. TRW, Inc., 628 F.2d 207, 212, 202 U.S. App. D.C. 207 (D.C. Cir. 1980)*; *see also* 1 Paul R. Rice, Attorney-Client Privilege in the United States § 7:18, at 1230-31 (2013) ("If internal investigations are conducted by agents of the client at the behest of the attorney, they are protected by the attorney-client privilege to the same extent as they would be had they been conducted by the attorney who was consulted."). So that fact, too, is not a basis on which to distinguish *Upjohn*.

Third, the District Court pointed out that in *Upjohn* the interviewed employees were expressly informed that the purpose of the interview was to assist the company in obtaining legal advice, whereas here they were not. The District Court further stated that the confidentiality agreements signed by KBR employees did not mention that the purpose of **[***9]** KBR's investigation was to obtain legal advice. Yet nothing in *Upjohn* requires a company to use magic words to its employees in order to gain the benefit of the privilege for an internal investigation. And in any event, here as in *Upjohn* employees knew that the company's legal department was conducting an investigation of a sensitive nature and that the information they disclosed would be protected. *Cf. Upjohn, 449 U.S. at 387* (Upjohn's managers were "instructed to treat the investigation as 'highly confidential'"). KBR employees were also told not to discuss their interviews "without the specific advance authorization of KBR General Counsel." *United States ex rel. Barko v. Halliburton Co., No. 05-cv-1276, 2014 U.S. Dist. LEXIS 36490, 2014 WL 1016784, at *3 n.33 (D.D.C. Mar. 6, 2014)*.

In short, none of those three distinctions of *Upjohn* holds water as a basis for denying KBR's privilege claim.

More broadly and more importantly, the District Court also distinguished *Upjohn* on the ground that KBR's internal investigation was undertaken to comply with Department of Defense regulations that require defense contractors such as KBR to maintain compliance programs and conduct internal investigations into allegations of **[***10]** potential wrongdoing. The District Court therefore concluded that the purpose of KBR's internal investigation was to comply with those regulatory requirements rather than to obtain or provide legal advice. In our view, the District Court's analysis rested on a false dichotomy. So long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, the attorney-client **[*759]** **[**387]** privilege applies, even if there were also other purposes for the investigation and even if the investigation was mandated by regulation rather than simply an exercise of company discretion.

The District Court began its analysis by reciting the "primary purpose" test, which many courts (including this one) have used to resolve privilege disputes when attorney-client communications may have had both legal and business purposes. *See 2014 U.S. Dist. LEXIS 36490, [WL] at *2*; *see also In re Sealed Case, 737 F.2d at 98-99*. But in a key move, the District Court then said that the primary purpose of a communication is to obtain or provide legal advice only if the communication would not have been made "but for" the fact that legal advice was sought. *2014 U.S. Dist. LEXIS 36490, 2014 WL 1016784, at *2*. In other words, if there was any other purpose **[***11]** behind the communication, the

attorney-client privilege apparently does not apply. The District Court went on to conclude that KBR's internal investigation was "undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice." *2014 U.S. Dist. LEXIS 36490, [WL] at *3*; *see 2014 U.S. Dist. LEXIS 36490, [WL] at *3 n.28* (citing federal contracting regulations). Therefore, in the District Court's view, "the primary purpose of" the internal investigation "was to comply with federal defense contractor regulations, not to secure legal advice." *United States ex rel. Barko v. Halliburton Co., No. 05-cv-1276, 2014 U.S. Dist. LEXIS 30866, 2014 WL 929430, at *2 (D.D.C. Mar. 11, 2014)*; *see id.* ("Nothing suggests the reports were prepared to obtain legal advice. Instead, the reports were prepared to try to comply with KBR's obligation to report improper conduct to the Department of Defense.").

The District Court erred because it employed the wrong legal test. The but-for test articulated by the District Court is not appropriate for attorney-client privilege analysis. Under the District Court's approach, the attorney-client privilege apparently would not apply unless the sole purpose of the communication was to obtain or provide legal advice. **[***12]** That is not the law. We are aware of no Supreme Court or court of appeals decision that has adopted a test of this kind in this context. The District Court's novel approach to the attorney-client privilege would eliminate the attorney-client privilege for numerous communications that are made for both legal and business purposes and that heretofore have been covered by the attorney-client privilege. And the District Court's novel approach would eradicate the attorney-client privilege for internal investigations conducted by businesses that are required by law to maintain compliance programs, which is now the case in a significant swath of American industry. In turn, businesses would be less likely to disclose facts to their attorneys and to seek legal advice, which would "limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." *Upjohn, 449 U.S. at 392*. We reject the District Court's but-for test as inconsistent with the principle of *Upjohn* and longstanding attorney-client privilege law.

Given the evident confusion in some cases, we also think it important to underscore that ***HN5*** the primary purpose test, sensibly and properly applied, cannot and **[***13]** does not draw a rigid distinction between a legal purpose on the one hand and a business purpose on the other. After all, trying to find *the* one primary purpose for a communication motivated by two sometimes overlapping purposes (one legal and one business, for example) can be an inherently impossible task. It is often not useful or even feasible to try to determine whether the purpose was A or B when the purpose was A and B. It is thus not correct for a court to presume that a communication can have only one primary purpose. **[*760]** **[**388]** It is likewise not correct for a court to try to find *the* one primary purpose in cases where a given communication plainly has multiple purposes. Rather, it is clearer, more precise, and more predictable to articulate the test as follows: Was obtaining or providing legal advice *a* primary purpose of the communication, meaning one of the significant purposes of the communication? As the Reporter's Note to the Restatement says, ***HN6*** "In general, American decisions agree that the privilege applies if one of the significant purposes of a client in communicating with a lawyer is that of obtaining legal assistance." *1 RESTATEMENT § 72, Reporter's Note, at 554*. We agree with **[***14]** and adopt that formulation — "one of the significant purposes" — as an accurate and appropriate description of the primary purpose test. Sensibly and properly applied, the test boils down to whether obtaining or providing legal advice was one of the significant purposes of the attorney-client communication.

HN7 In the context of an organization's internal investigation, if one of the significant purposes of the internal investigation was to obtain or provide legal advice, the privilege will apply. That is true regardless of whether an internal investigation was conducted pursuant to a company compliance program required by statute or regulation, or was otherwise conducted pursuant to company policy. *Cf.* Andy Liu et al., *How To Protect Internal Investigation Materials from Disclosure*, 56 GOVERNMENT CONTRACTOR ¶ 108 (Apr. 9, 2014) ("Helping a corporation comply with a statute or regulation — although required by law — does not transform quintessentially legal advice into business advice.").

In this case, there can be no serious dispute that one of the significant purposes of the KBR internal investigation was to obtain or provide legal advice. In denying KBR's privilege claim on the ground **[***15]** that the internal investigation was conducted in order to comply with regulatory requirements and corporate policy and not just to obtain or provide legal advice, the District Court applied the wrong legal test and clearly erred.

III

Having concluded that the District Court's privilege ruling constituted error, we still must decide whether that error

justifies a writ of mandamus. *See* 28 U.S.C. § 1651. ***HN8*** Mandamus is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Cheney v. U.S. District Court for the District of Columbia, 542 U.S. 367, 380, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004)* (quoting *Ex parte Fahey, 332 U.S. 258, 259-60, 67 S. Ct. 1558, 91 L. Ed. 2041 (1947))*. In keeping with that high standard, the Supreme Court in *Cheney* stated that three conditions must be satisfied before a court grants a writ of mandamus: (1) the mandamus petitioner must have "no other adequate means to attain the relief he desires," (2) the mandamus petitioner must show that his right to the issuance of the writ is "clear and indisputable," and (3) the court, "in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Id. at 380-81* (quoting and citing *Kerr v. United States District Court for the Northern District of California, 426 U.S. 394, 403, 96 S. Ct. 2119, 48 L. Ed. 2d 725 (1976))*. **[***16]** We conclude that all three conditions are satisfied in this case.

A

First, ***HN9*** a mandamus petitioner must have "no other adequate means to attain the relief he desires." *Cheney, 542 U.S. at 380*. That initial requirement will often be met in cases where a petitioner claims that a district **[*761]** **[**389]** court erroneously ordered disclosure of attorney-client privileged documents. That is because (i) an interlocutory appeal is not available in attorney-client privilege cases (absent district court certification) and (ii) appeal after final judgment will come too late because the privileged communications will already have been disclosed pursuant to the district court's order.

The Supreme Court has ruled that ***HN10*** an interlocutory appeal under the collateral order doctrine is not available in attorney-client privilege cases. *See Mohawk Industries, Inc. v. Carpenter, 558 U.S. 100, 106-13, 130 S. Ct. 599, 175 L. Ed. 2d 458 (2009)*; *see also* 28 U.S.C. § 1291. To be sure, a party in KBR's position may ask the district court to certify the privilege question for interlocutory appeal. See 28 U.S.C. § 1292(b). But that avenue is available only at the discretion of the district court. And here, the District Court denied KBR's request for certification. *See* **[***17]** *United States ex rel. Barko v. Halliburton Co., No. 05-cv-1276, 2014 U.S. Dist. LEXIS 30866, 2014 WL 929430, at *1-3 (D.D.C. Mar. 11, 2014)*. It is also true that a party in KBR's position may defy the district court's ruling and appeal if the district court imposes contempt sanctions for non-disclosure. But as this Court has explained, forcing a party to go into contempt is not an "adequate" means of relief in these circumstances. *See In re Sealed Case, 151 F.3d 1059, 1064-65, 331 U.S. App. D.C. 385 (D.C. Cir. 1998)*; *see also In re City of New York, 607 F.3d 923, 934 (2d Cir. 2010)* (same).

On the other hand, appeal after final judgment will often come too late because the privileged materials will already have been released. In other words, "the cat is out of the bag." *In re Papandreou, 139 F.3d 247, 251, 329 U.S. App. D.C. 210 (D.C. Cir. 1998)*. As this Court and others have explained, ***HN11*** post-release review of a ruling that documents are unprivileged is often inadequate to vindicate a privilege the very purpose of which is to prevent the release of those confidential documents. *See id.; see also In re Sims, 534 F.3d 117, 129 (2d Cir. 2008)* ("a remedy after final judgment cannot unsay the confidential information that has been revealed") (quoting *In re von Bulow, 828 F.2d 94, 99 (2d Cir. 1987))*.

For **[***18]** those reasons, ***HN12*** the first condition for mandamus — no other adequate means to obtain relief — will often be satisfied in attorney-client privilege cases. Barko responds that the Supreme Court in *Mohawk*, although addressing only the availability of interlocutory appeal under the collateral order doctrine, in effect also barred the use of mandamus in attorney-client privilege cases. According to Barko, *Mohawk* means that the first prong of the mandamus test cannot be met in attorney-client privilege cases because of the availability of post-judgment appeal. That is incorrect. It is true that ***HN13*** *Mohawk* held that attorney-client privilege rulings are not appealable under the collateral order doctrine because "postjudgment appeals generally suffice to protect the rights of litigants and ensure the vitality of the attorney-client privilege." *558 U.S. at 109*. But at the same time, the Court repeatedly and expressly reaffirmed that *mandamus* — as opposed to the collateral order doctrine — remains a "useful safety valve" in some cases of clear error to correct "some of the more consequential attorney-client privilege rulings." *Id. at 110-12* (internal quotation marks and alteration omitted). It would **[***19]** make little sense to read *Mohawk* to implicitly preclude mandamus review in all cases given that *Mohawk* explicitly preserved mandamus review in some cases. Other appellate courts that have considered this question have agreed. *See Hernandez v. Tanninen, 604 F.3d 1095, 1101 (9th Cir. 2010)*; *In re Whirlpool Corp., 597 F.3d 858, 860 (7th Cir. 2010)*; *see also In* **[*762]** **[**390]**

re Perez, 749 F.3d 849 (9th Cir. 2014) (granting mandamus after *Mohawk* on informants privilege ruling); *City of New York, 607 F.3d at 933* (same on law enforcement privilege ruling).

B

Second,***HN14*** a mandamus petitioner must show that his right to the issuance of the writ is "clear and indisputable." *Cheney, 542 U.S. at 381*. Although the first mandamus requirement is often met in attorney-client privilege cases, this second requirement is rarely met. An erroneous district court ruling on an attorney-client privilege issue by itself does not justify mandamus. The error has to be clear. As a result, appellate courts will often deny interlocutory mandamus petitions advancing claims of error by the district court on attorney-client privilege matters. In this case, for the reasons explained at length in Part II, we conclude that the District **[***20]** Court's privilege ruling constitutes a clear legal error. The second prong of the mandamus test is therefore satisfied in this case.

C

Third, ***HN15*** before granting mandamus, we must be "satisfied that the writ is appropriate under the circumstances." *Cheney, 542 U.S. at 381*. As its phrasing suggests, that is a relatively broad and amorphous totality of the circumstances consideration. The upshot of the third factor is this: Even in cases of clear district court error on an attorney-client privilege matter, the circumstances may not always justify mandamus.

In this case, considering all of the circumstances, we are convinced that mandamus is appropriate. The District Court's privilege ruling would have potentially far-reaching consequences. In distinguishing *Upjohn*, the District Court relied on a number of factors that threaten to vastly diminish the attorney-client privilege in the business setting. Perhaps most importantly, the District Court's distinction of *Upjohn* on the ground that the internal investigation here was conducted pursuant to a compliance program mandated by federal regulations would potentially upend certain settled understandings and practices. Because defense contractors **[***21]** are subject to regulatory requirements of the sort cited by the District Court, the logic of the ruling would seemingly prevent any defense contractor from invoking the attorney-client privilege to protect internal investigations undertaken as part of a mandatory compliance program. *See 48 C.F.R. § 52.203-13 (2010)*. And because a variety of other federal laws require similar internal controls or compliance programs, many other companies likewise would not be able to assert the privilege to protect the records of their internal investigations. *See, e.g.*, *15 U.S.C. §§ 78m(b)(2)*, *7262*; *41 U.S.C. § 8703*. As KBR explained, the District Court's decision "would disable *most public companies* from undertaking confidential internal investigations." KBR Pet. 19. As amici added, the District Court's novel approach has the potential to "work a sea change in the well-settled rules governing internal corporate investigations." Br. of Chamber of Commerce et al. as Amici Curaie 1; *see* KBR Reply Br. 1 n.1 (citing commentary to same effect); Andy Liu et al., *How To Protect Internal Investigation Materials from Disclosure*, 56 GOVERNMENT CONTRACTOR ¶ 108 (Apr. 9, 2014) (assessing broad impact of ruling **[***22]** on government contractors).

To be sure, there are limits to the impact of a single district court ruling because it is not binding on any other court or judge. But prudent counsel monitor court decisions closely and adapt their **[*763]** **[**391]** practices in response. The amicus brief in this case, which was joined by numerous business and trade associations, convincingly demonstrates that many organizations are well aware of and deeply concerned about the uncertainty generated by the novelty and breadth of the District Court's reasoning. That uncertainty matters in the privilege context, for the Supreme Court has told us that an "uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn Co. v. United States, 449 U.S. 383, 393, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)*. More generally, this Court has long recognized that ***HN16*** mandamus can be appropriate to "forestall future error in trial courts" and "eliminate uncertainty" in important areas of law. *Colonial Times, Inc. v. Gasch, 509 F.2d 517, 524, 166 U.S. App. D.C. 184 (D.C. Cir. 1975)*. Other courts have granted mandamus based on similar considerations. *See In re Sims, 534 F.3d 117, 129 (2d Cir. 2008)* (granting **[***23]** mandamus where "immediate resolution will avoid the development of discovery practices or doctrine undermining the privilege") (quotation omitted); *In re Seagate Technology, LLC, 497 F.3d 1360, 1367 (Fed. Cir. 2007)* (en banc) (same). The novelty of the District Court's privilege ruling, combined with its potentially broad and destabilizing effects in an important area of law, convinces us that granting the writ is "appropriate under

the circumstances." *Cheney, 542 U.S. at 381*. In saying that, we do not mean to imply that all of the circumstances present in this case are necessary to meet the third prong of the mandamus test. But they are sufficient to do so here. We therefore grant KBR's petition for a writ of mandamus.

IV

We have one final matter to address. At oral argument, KBR requested that if we grant mandamus, we also reassign this case to a different district court judge. *See* Tr. of Oral Arg. at 17-19; *28 U.S.C. § 2106*. KBR grounds its request on the District Court's erroneous decisions on the privilege claim, as well as on a letter sent by the District Court to the Clerk of this Court in which the District Court arranged to transfer the record in the case and identified certain **[***24]** documents as particularly important for this Court's review. *See* KBR Reply Br. App. 142. KBR claims that the letter violated ***HN17*** *Federal Rule of Appellate Procedure 21(b)(4)*, which provides that in a mandamus proceeding the "trial-court judge may request permission to address the petition but may not do so unless invited or ordered to do so by the court of appeals."

In its mandamus petition, KBR did not request reassignment. Nor did KBR do so in its reply brief, even though the company knew by that time of the District Court letter that it complains about. ***HN18*** Ordinarily, we do not consider a request for relief that a party failed to clearly articulate in its briefs. To be sure, appellate courts on rare occasions will reassign a case sua sponte. *See Ligon v. City of New York, 736 F.3d 118, 129 & n.31 (2d Cir. 2013)* (collecting cases), *vacated in part*, *743 F.3d 362 (2d Cir. 2014)*. But whether requested to do so or considering the matter sua sponte, we will reassign a case only in the exceedingly rare circumstance that a district judge's conduct is "so extreme as to display clear inability to render fair judgment." *Liteky v. United States, 510 U.S. 540, 551, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994)*; *see also United States v. Microsoft Corp., 253 F.3d 34, 107, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* **[***25]** (en banc). Nothing in the District Court's decisions or subsequent letter reaches that very high standard. Based on the record before us, we have no reason to doubt that the District Court will **[*764]** **[**392]** render fair judgment in further proceedings. We will not reassign the case.

* * *

In reaching our decision here, we stress, as the Supreme Court did in *Upjohn*, that***HN19*** the attorney-client privilege "only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney." *Upjohn Co. v. United States, 449 U.S. 383, 395, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)*. Barko was able to pursue the facts underlying KBR's investigation. But he was not entitled to KBR's own investigation files. As the *Upjohn* Court stated, quoting Justice Jackson, "Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary." *Id. at 396* (quoting *Hickman v. Taylor, 329 U.S. 495, 515, 67 S. Ct. 385, 91 L. Ed. 451 (1947)* (Jackson, J., concurring)).

Although the attorney-client privilege covers only communications and not facts, we acknowledge that the privilege carries costs. The privilege means that potentially critical evidence may be withheld from the factfinder. **[***26]** Indeed, as the District Court here noted, that may be the end result in this case. But our legal system tolerates those costs because the privilege "is intended to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.'" *Swidler & Berlin v. United States, 524 U.S. 399, 403, 118 S. Ct. 2081, 141 L. Ed. 2d 379 (1998)* (quoting *Upjohn, 449 U.S. at 389*).

We grant the petition for a writ of mandamus and vacate the District Court's March 6 document production order. To the extent that Barko has timely asserted other arguments for why these documents are not covered by either the attorney-client privilege or the work-product protection, the District Court may consider such arguments.

So ordered.

United States ex rel. Barko v. Halliburton Co.

United States District Court for the District of Columbia

November 20, 2014, Decided; November 20, 2014, Filed

CASE NO. 1:05-CV-1276

Reporter
2014 U.S. Dist. LEXIS 181353

UNITED STATES OF AMERICA ex rel. HARRY BARKO, Plaintiff-Relator, v. HALLIBURTON COMPANY et al., Defendants.

Subsequent History: Writ of mandamus granted, Vacated by, Request denied by *Simmons v. Colvin, 2015 U.S. Dist. LEXIS 14066 (D. Utah, Feb. 5, 2015)*

Prior History: *United States ex rel. Barko v. Halliburton Co., 270 F.R.D. 26, 2010 U.S. Dist. LEXIS 109630 (D.D.C., 2010)*

Core Terms

documents, investigations, subpoena, attorney-client, waived, disclosure, argues, kickbacks, privileged, deposition, contents, reasonable ground, court of appeals, privilege log, says, files, work-product, allegations, crime-fraud, mandamus petition, communications, summary judgment motion, requires, subcontractors, withholding, attorneys, advice, Anti-Kickback, contracts, matters

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For HALLIBURTON COMPANY, KELLOGG BROWN & ROOT SERVICES, INC., KELLOGG BROWN & ROOT SERVICES, INC., KBR TECHNICAL SERVICES INC, KELLOGG BROWN & ROOT ENGINEERING CORPORATION, KELLOGG BROWN & ROOT INTERNATIONAL, INC., A Delaware Corporation, KELLOGG BROWN & ROOT INTERNATIONAL, INC., A Panamanian Corporation; And any other entities doing business under the name Kellogg Brown and Root, Defendants: Craig D. Margolis, LEAD ATTORNEY, Alden Lewis Atkins, Tirzah S. Lollar, VINSON & ELKINS, LLP, Washington, DC; John Martin Faust, LEAD ATTORNEY, LAW OFFICES OF JOHN M. FAUST, PLLC, Washington, DC; John Randall Warden, U.S. DEPARTMENT OF JUSTICE, Criminal Division, Washington, DC.

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Judges: JAMES S. GWIN, UNITED STATES DISTRICT JUDGE.

Opinion by: JAMES S. GWIN

Opinion

OPINION & ORDER

[Resolving Docs. 135, 180, 181, 187, 188, 193, 194]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

Plaintiff-Relator moves to compel the production of a series of internal investigative statements, reports, and emails. In support of his request, the Plaintiff argues that Defendants waived any work-product protection and attorney-client privilege over the documents. Plaintiff first argues that Defendants have put the contents of the documents at issue in the litigation. In a related argument, Plaintiff claims that he should be permitted to examine privileged documents that

Defendants' Civil Rule 30(b)(6) witness reviewed before testifying at a deposition.

Plaintiff next says that the documents are subject to the crime-fraud exception to attorney-client privilege. Finally, Plaintiff says that any privilege has been waived because, in response to a Department of Defense Criminal Investigative Service ("DCIS") subpoena, Defendants did not produce documents that the subpoena required and did not provide **[*3]** a privilege log to identify documents Defendants were withholding.

For the following reasons, the Court **GRANTS** Plaintiff's motion to compel production of the discussed documents. Because Defendant may seek Court of Appeals review of this order, the Court also orders Plaintiff not to disclose the contents of the documents, and requires the Plaintiff to file any briefing discussing the documents under seal.

I. Background

This is a qui tam case alleging that Defendants Kellogg Brown & Root Services, Inc., KBR Technical Services, Inc., Kellogg, Brown & Root Engineering Corporation, Kellogg, Brown & Root International, Inc., and Halliburton Company (collectively "KBR") made false claims while serving as contractors in Iraq under the United States's LOGCAP III program. In general, Plaintiff Harry Barko claims that KBR presented inflated and fraudulent bills to the United States for work done by subcontractors who received preferential treatment from KBR despite their terrible on-the-ground performance.[1]

Barko moved to compel production of interviews, reports, and documents that KBR prepared while investigating tips KBR had received that involved the same allegations found in Barko's complaint.[2] KBR opposes the production, and argues that the documents are attorney-client privileged or work-product protected.[3]

KBR investigated reports of kickbacks and contract steering under KBR's internal Code of Business Conduct ("COBC"). KBR's investigation focused on allegations that two KBR subcontractors, Daoud **[*5]** & Partners, Inc. ("Daoud") and EAMAR Combined for General Trading and Contracting Company ("EAMAR"), received preferential treatment despite poor performance because they may have paid kickbacks to KBR employees.

The documents withheld include witness statements from employees at several contract sites, investigator reports to KBR attorneys summarizing facts and witness statements, and communications among KBR lawyers and investigators regarding their findings.[4] The statements and reports provided KBR with background

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[1] For example, former KBR Subcontractor Administrator George Covelli's affidavit states:

> I had come to the conclusion that Mr. Gerlach was intentionally interfering with my ability to properly administer **[*4]** the B6 Man Camp subcontract. I reached this conclusion based not only on the events occurring on the B6 Man Camp occurring up to that point in time, but also on my observations before I moved to B6. I observed that Mr. Gerlach spent more time in Daoud's offices than in KBR's offices; that every time a bid came in on a contract action that was lower than D&P' s bid Mr. Gerlach would brow beat SCA into awarding the contract to D&P; and because no corrective action was taken on a D&P subcontract when it was apparent that D&P was in long-standing default. My observations caused me to conclude that Mr. Gerlach had established an improper relationship with D&P.

Doc. 180-2 at 4.

[2] Doc. 135.

[3] Doc. 139.

[4] *Id*. at 23-24 ("The vast majority of documents comprising a COBC File are communications among counsel and investigators. These communications document the attorney management of COBC investigations, summarizing and analyzing tips from employees, assigning investigations, checking in on the progress of investigations, directing investigators to perform certain tasks, and discussing the findings of investigations. The COBC File may often contain handwritten notes reflecting the thoughts of attorneys as they reviewed and reacted to the documents in the file. After the conclusion of investigations, **[*6]** KBR attorneys (particularly Mr. Heinrich) review the investigative COBC Reports to determine whether there are potential legal claims or disclosure obligations.").

investigatory materials that KBR used to decide whether to report evidence of fraud or kickbacks.

Previously, after reviewing the documents in camera, the Court ordered all 89 of the COBC documents produced.[5] The Court found that the documents were created to comply with antikickback requirements found in *48 C.F.R. § 52.203-7(c)*. This Court concluded that the documents were created to show compliance with fraud reporting requirements and were not created to obtain legal advice.[6] Because this Court had found the documents not privileged as business records, the Court reserved ruling on whether, even assuming the documents were privileged, KBR had nonetheless waived any privilege over the documents.[7]

Upon a petition for mandamus, the Court of Appeals ordered that the order compelling production be vacated. The Court of Appeals found the COBC documents to be attorney-client privileged. The Court of Appeals held that "[i]n the context of an organization's internal investigation, if one of the significant purposes of the internal investigation was to obtain or provide legal advice, the privilege will apply. That is true regardless of whether an internal investigation was conducted pursuant to a company compliance program required by statute or regulation, or was otherwise conducted pursuant to company policy."[8]

The Court of Appeals then remanded the case for further proceedings.

II. Proceedings After the Mandamus Order

Following the remand, this Court ordered several rounds of briefing for each side to make and respond to arguments regarding the potential waiver of attorney-client privilege.

In seeking to compel production of the COBC documents, Barko first argues that KBR waived any privilege by putting the contents of the COBC documents **[*8]** at issue. In a related argument, Barko argues that he should get access to the documents because they were used to refresh a witness's recollection before a 30(b)(6) deposition. Barko next argues that the documents are discoverable under the crime-fraud exception to the attorney-client privilege. Barko finally argues that KBR waived any privilege when it failed to produce or identify the COBC documents in response to a DCIS subpoena broadly seeking documents related to the contracts in this case.

In response, KBR first argues that Barko cannot make any waiver argument that he did not raise before KBR obtained a stay during the processing of its mandamus petition. KBR next argues that it did not put the contents of the COBC documents at issue, nor did its 30(b)(6) witnesses testify about privileged material from the documents the witness reviewed. KBR then denies that the crimefraud exception to the attorney-client privilege has been established. Finally, KBR says that its failure to identify the COBC documents to the DCIS Inspector General should not waive the attorney-client privilege in this case.

Before reaching the substance of the waiver arguments, the Court first considers KBR's **[*9]** argument that the Court of Appeals decision on KBR's mandamus petition stops Barko from offering different arguments to support his position.

KBR maintains that "the plain text of the D.C. Circuit's mandamus decision precludes this Court from considering arguments regarding the documents at issue that Relator did not properly raise before the mandamus proceedings."[9] For support, KBR points to the final lines of the Court of Appeals's opinion: "We grant the petition for a writ of mandamus and vacate the District Court's March 6 document production order. To

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[5] Doc. 150.

[6] Department of Defense contracting regulations require contractors to have internal control systems to "[f]acilitate timely discovery and disclosure of improper conduct in connection with Government contracts." These regulations further require a "written code of business ethics," "internal controls for compliance," "[a] mechanism, such as a hotline, by which employees may report suspected instances of improper conduct," "[i]nternal and/or external audits," "[d]isciplinary action **[*7]** for improper conduct," "[t]imely reporting to appropriate Government officials," and "[f]ull cooperation with any Government agencies." 48 C.F.R.§ 1503.500-71(a) (10-1-2002 edition).

[7] Doc. 155 at 6.

[8] *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760, 410 U.S. App. D.C. 382 (D.C. Cir. 2014).

[9] Doc. 199 at 2.

the extent that Barko has timely asserted other arguments for why these documents are not covered by either the attorney-client privilege or the work-product protection, the District Court may consider such arguments."[10]

To a large degree, KBR's argument on this issue is not important. Long before the mandamus petition had been filed, Barko had argued that KBR waived any attorney-client privilege by characterizing COBC documents to suggest that they supported KBR's defense that no fraud or kickbacks occurred.[11] Before KBR filed the mandamus petition, Barko had also argued that KBR waived the attorney-client privilege by having **[*10]** "KBR's Rule 30(b)(6) corporate representative review[ed] the COBC investigative reports in preparation for his testimony."[12] Before KBR filed the mandamus petition, Barko had also argued that the COBC documents were discoverable under the crime-fraud exception.[13]

After the Court of Appeals mandate, Barko did raise a new argument that KBR failed to respond to a DCIS subpoena and that this failure should waive the privilege. But for other reasons, Barko's argument regarding the DCIS subpoena fails anyway.

Neither the Court of Appeals's opinion, nor the case's background support KBR's limiting interpretation. The opinion says "[t]o the extent that Barko has timely asserted other arguments . . . the District Court may consider such arguments." Even if the "timely asserted" language is part of the mandate, it does not suggest that this Court can consider only arguments that Barko made before KBR petitioned for mandamus relief. Before the mandamus **[*11]** petition was filed, this Court had not set any deadlines for motions to compel. At the time the mandamus petition was filed, no Court order limited when motions or briefing should be filed. At the time the mandamus petition was filed, discovery was ongoing.

Under Rule 15, Barko could ask to amend any pleading with KBR's consent or with "the court's leave." And under Rule 15, "[t]he court should freely give leave when justice so requires."[14] The Court finds Barko's additional arguments to be timely raised under the case management schedule earlier established for the case. The Court of Appeals's opinion should not be read to divest this Court of its authority to set deadlines and manage discovery.[15]

The case background gives further support for this conclusion. KBR's petition for mandamus never sought relief from any case management ruling. Before the Court of Appeals, KBR and Barko argued over whether this Court erred when it found that the COBC documents were not privileged. KBR did not seek a ruling on what evidence or arguments could be considered on the waiver issue.[16] Neither party briefed the issue to the Court of **[*12]** Appeals, although the Court's order compelling production had expressly reserved ruling on the waiver issue.[17] Except for the concluding sentence, the Court of Appeals opinion does not discuss any

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[10] In re Kellogg Brown & Root, Inc., 756 F.3d at 764.

[11] Barko argued: "KBR places the substance of the investigation at issue in its summary judgment motion by claiming that it investigated the allegations and the investigations did not result in a finding of wrongdoing that was reported to the Government." Doc. 143 at 16.

[12] Doc. 143 at 3.

[13] *Id*. at 17.

[14] Fed. R. Civ. P. 15.

[15] *Food Lion, Inc. v. United Food & Commercial Workers Int'l Union, AFL CIO CLC* , 103 F.3d 1007, 1012, 322 U.S. App. D.C. 301 (D.C. Cir. 1997) ("Trial courts exercise considerable discretion in handling discovery matters . . . .").

[16] KBR petitioned for mandamus relief from this Court's March 6, 2014 order. "KBR respectfully requests a writ of mandamus directing the district court to vacate its Order of March 6, 2014 (attached as sealed Appendix A), compelling disclosure of 89 documents related to KBR's COBC investigations." USCA Case 14-5055, Amended Petition at 3.

[17] Doc. 155 at 7 ("[T]his Court makes no final conclusion whether KBR waived any attorney-client privilege . . . .").

limitations on waiver arguments that Barko could make.[18]

Therefore, this Court can consider the arguments made in recent briefs regarding KBR's waiver of attorney-client privilege and work product protection. But repeating an earlier point, Plaintiff Barko had already made the waiver argument and the crime-fraud argument before KBR filed the mandamus petition.

III. Waiver Arguments.

A. Implied or At Issue Waiver

The doctrine of implied, or at issue waiver, is an extension of the axiom that privilege cannot be used both as a sword and a shield.[20] "[W]hile the sword stays sheathed, the privilege stands." **[*15]** [21] However, "litigants cannot hide behind the privilege if they are relying upon privileged communications to make their case."[22]

Although a party does not waive the privilege "merely by taking a position that the [privileged] evidence might contradict,"[23] "[i]t is well established doctrine that in certain circumstances a party's assertion of factual claims can, out of considerations of fairness to the party's adversary, result in the involuntary forfeiture of privileges for matters pertinent to the claims asserted."[24]

"Under the common-law doctrine of implied waiver, the attorney-client privilege is waived when the client places otherwise privileged matters in controversy."[25] "A simple principle unites the various applications of the implied waiver doctrine. Courts need not allow a claim of privilege when the party claiming the privilege seeks to use it in a way that is not consistent with the purpose of the privilege."[26] This Circuit has elaborated that:

> Implied waiver deals with an abuse of a privilege . . . . Where society has subordinated its interest in the search for truth in favor of allowing certain information to remain confidential, it need not allow **[*17]** that confidentiality to be used as a tool for manipulation of the truth-seeking process . . . . [A party asserting attorney-client privilege] cannot be

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[18] This indicates that the Court of Appeals did not, in granting the petition for mandamus, also intend to freeze the arguments this Court could consider after the remand.[19] This Court does not read the Court of Appeals opinion to grant KBR relief that KBR never requested.

See Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, § 4478.3 (2d ed.) ("The reach of the mandate is generally limited to matters actually decided . . . . Matters simply not considered also are likely to be outside the mandate.") **[*13]** (citations omitted).

[20] The Court's analysis of at-issue waiver will apply to both the attorney-client privilege and work-product protection. KBR itself has suggested a combined analysis for these questions: "KBR has asserted that many of the COBC documents at issue are also protected by the work-product doctrine. This position paper thus refers both to attorney-client privilege and work-product protection. As relevant here, the waiver analysis for both is the same." Doc. 181 at fn. 2 (citing cases). The Court additionally relies upon Judge Bates' skillful analysis of this question in Feld v. Fireman's Fund Ins. Co., 991 F. Supp. 2d 242, 252 53 (D.D.C. 2013) ("Based on these general principles, the Court finds that recognizing the attorney work-product privilege is not required to maintain a healthy adversary system when the proponent of the privilege has placed prior attorney work product squarely 'at issue' in the case. Indeed, allowing the privilege to shield documents at the heart of the proponent's case would undermine the adversary system, and would let the work-product privilege be used as a tool for manipulation of the truth-seeking process. The vast **[*16]** majority of federal courts to have considered this question have come to the same (or a similar) conclusion.") (internal quotation marks and citations omitted).

[21] In re Lott, 424 F.3d 446, 454 (6th Cir. 2005).

[22] *Id*.

[23] *United States v. Salerno*, 505 U.S. 317, 323, 112 S. Ct. 2503, 120 L. Ed. 2d 255 (1992).

[24] *John Doe Co. v. United States*, 350 F.3d 299, 302 (2d Cir. 2003).

[25] *Ideal Elec. Sec. Co. v. Int'l Fid. Ins. Co.*, 129 F.3d 143, 151, 327 U.S. App. D.C. 60 (D.C. Cir. 1997). At-issue waiver most frequently, but not exclusively, arises in cases of legal malpractice or where advice of counsel is raised as a defense. *Minebea Co. v. Papst*, 355 F. Supp. 2d 518, 522 (D.D.C. 2005).

[26] *In re Sealed Case*, 676 F.2d 793, 818, 219 U.S. App. D.C. 195 (D.C. Cir.1982).

allowed, after disclosing as much as he pleases, to withhold the remainder.[27]

In a leading case, the court found an at issue waiver where "the party asserting the privilege placed information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information would have been manifestly unfair to the opposing party."[28] Or, put another way, "[i]mplied waiver may be found where the privilege holder asserts a claim that in fairness requires examination of protected communications."[29] Determining whether fairness requires disclosure is a case-by-case, context specific determination.[30]

While a party need not intend to waive the privilege,[31] privilege **[*18]** is not waived merely because the contents of the communication are relevant to the litigation, or of interest to the opposing party. The party asserting the privilege must put a communication at issue through some affirmative act.[32]

i. Establishing At-Issue Waiver

According to Barko, KBR intentionally put the contents of the COBC investigation at issue when it represented that its internal investigation of Barko's allegations yielded no reasonable grounds to believe fraud may have occurred. Even before the mandamus petition, Barko argued that "KBR cannot place the substance and results of the investigation to support its defense and shield the underlying investigative reports and facts contained in [sic] investigative record on the grounds of privilege."[33]

Barko argues that KBR first **[*20]** put the contents of the COBC files at issue at a Rule 30(b)(6) deposition noticed and taken by Barko. The deposition notice required KBR to designate a representative to testify regarding a wide swath of the KBR contracts in Iraq as well as KBR's dealings with Daoud and EAMAR.

KBR presented Christopher Heinrich to testify. Heinrich serves as Vice-President, Legal for KBR. KBR (or its predecessor) has employed Heinrich since 1987. Heinrich had responsibility for KBR's federal government contracting activities, including the contracts involved with this case. Heinrich provided "legal advice to KBR in connection with COBC investigations regarding allegations of kickbacks, bribery, fraud or other potential COBC violations

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[27] *Id.* at 807 (internal quotation marks and citation omitted).

[28] *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975). The court in *United States v. Exxon Corp.*, 94 F.R.D. 246, 248 (D.D.C.1981) called Hearn "perhaps the most exhaustive treatment of this subject . . . ."

[29] *In re Grand Jury Proceedings*, 219 F.3d 175, 182 (2d Cir. 2000) (internal quotation marks and citation omitted).

[30] *Id.*

[31] "A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not." *In re Sealed Case*, 676 F.2d at 807 (quoting 8 J. Wigmore, Evidence in Trials at Common Law § 2327 at 636 (J. McNaughton rev. 1961)).

[32] *Rhone Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 863 (3d Cir. 1994) ("Advice is not in issue merely because it is relevant, and does not necessarily become in issue merely because the attorney's advice might affect the client's state of mind in a relevant manner. The advice of counsel is placed in issue where the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney client communication."); *Feld v. Fireman's Fund Ins. Co.*, 292 F.R.D. 129, 141 (D.D.C. 2013) ("This Court agrees that relevance cannot be the sole benchmark for determining implied waiver. But it is not just relevance that counsels a finding of implied waiver **[*19]** here.") (applying D.C. law); *Trustees of Elec. Workers Local No. 26 Pension Trust Fund v. Trust Fund Advisors, Inc.*, 266 F.R.D. 1, 13 (D.D.C. 2010) ("I believe that the court of appeals for this Circuit would agree with the decisions of the Second and Third Circuits and with the courts and academics that have criticized Hearn and would conclude that a party must put the advice in issue before she forfeits the privilege. There is no such claim here . . . ."); *The Navajo Nation v. Peabody Holding Co.*, 255 F.R.D. 37, 50 (D.D.C. 2009) (finding no at-issue waiver because "[a]lthough Defendants describe at length how privileged communications are relevant to the Navajo's claims, the undersigned has not located anything in the Navjo's pleadings to suggest that the Navajo affirmatively placed these communications at issue.").

[33] Doc. 143 at 16-17.

involving KBR employees and its subcontractors."[34] Before testifying on KBR's behalf, Heinrich "reviewed the COBC Files at issue in this litigation."[35]

Excerpts from Heinrich's February 5, 2014, deposition are attached to KBR's motion for summary judgment. This deposition is notable in two ways. First, after Heinrich testified that he had reviewed the privilege log, the tip sheets and the investigative reports, KBR's attorney blocked each of Barko's attempt to question Heinrich regarding why KBR did not report potential kickbacks to the Department of Defense.[36] Second, after stopping Heinrich from testifying regarding what reports and evidence supported KBR's decision not to give the Department of Defense notice of potential kickbacks or fraud, KBR's attorney took the unusual step of examining his own witness during a discovery deposition called by the Plaintiff.[37]

KBR's attorney, Craig Margolis, took the following testimony from his own witness, Heinrich:

> Q [By KBR Attorney Margolis] So, Mr. Heinrich, are you looking now at Exhibit 11?
>
> A Yes.
>
> Q Do you recognize it?
>
> A Yes.
>
> Q What is it?
>
> A It is a *Federal Acquisition Regulation Clause 52.203-7*, known as the Anti-Kickback Act procedures.
>
> Q Was 52.203-7 incorporated into the LOGCAP III base contract between the government and KBR?
>
> A. Yes.
>
> * * *
>
> Q And do you see there the source of the reporting obligation you have just described?
>
> A Yes.
>
> Q I'm going to read this, and you let me know if I've read it correctly. "When the contractor has reasonable grounds to believe that a violation described in paragraph B of this clause may have

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[34] Doc. 139-1 at 2-3. A separate and complete copy of Heinrich's Rule 30(b)(6) deposition is found at Doc. 144-3.

[35] Heinrich testified:

> Q What documents have you reviewed in preparation of your testimony for today?
>
> A I reviewed the privilege log, TIP sheets, and the complaint. And I reviewed --looked at the Code of Business Conduct, the investigative reports. **[*21]**
>
> Q And the investigative reports, did you say?
>
> A Well, the COBC investigative reports.

Doc. 144-3 at 4. *See also* Doc. 139-1 at 6.

[36] As only one example of the Rule 30(b)(6) testimony:

> MR. KOHN: Was anyone disciplined as a result of the COBC investigation?
>
> MR. MARGOLIS: I'll allow you to answer that question. It's fine.
>
> THE WITNESS: No.
>
> MR. KOHN: What was the basis of that - how was that decision made?
>
> MR. MARGOLIS: Objection. Instruct the witness not to answer on the grounds of attorney-client privilege **[*22]** and attorney work product.

Doc. 144-3 at 54.

[37] *Id*.

occurred, the contractor shall promptly report in writing the possible violation. Such report shall be made to the Inspector General of the contracting agency, the head of the contracting agency if the agency does have an Inspector General, or the Department of Justice. Did I read that correctly?

A That's correct.

Q Did KBR adhere to that contract clause?

A Yes, we did.

Q And were there instances where KBR did make disclosures pursuant to this FAR clause?

A Yes, we did.

* * *

Q The **[*23]** COBC investigation reports, would those include findings of investigations typically?

A Yes.

Q Would it include, for example, whether or not the investigation -- excuse me, an allegation was substantiated or not substantiated?

A It would produce, you know, the facts that were related to it, and then, yes, allow us to determine whether or not a violation had occurred.

Q And, among other things, would that information be used to determine whether or not the company should make a disclosure pursuant to the FAR clause that we just looked at?

A Yes.

* * *

Q Now, I've permitted you [sic] testify here today of the fact that certain hotline complaints or tips relating to Mr. Gerlach and Daoud & Partners were investigated pursuant to the COBC Program, is that correct?

A That's correct.

Q And that there were reports of investigation that were done relating to those tips, is that correct?

A That's correct.

Q And those were assigned -- excuse me, were sent to you. Is that correct?

A That's correct.

Q Now, you've testified that in other instances where there were COBC investigations those COBC investigations have resulted in disclosures to the DoD IG pursuant to the Anti-Kickback Act FAR clause, correct?

A **[*24]** That's correct.

Q And, in some instances, have resulted in credits being offered to the United States Government pursuant to the LOGCAP contract, correct?

A Correct.

Q And as we have shown you earlier today, the trigger under the FAR clause is whether there is reasonable grounds to believe that there has been a violation or disclosure, is that correct?

A That's correct.

Q With respect to the matters that we have testified about and that are indicated on the privilege log, did KBR make a disclosure to the Department of Defense Inspector General that there was reasonable grounds to believe that a kickback had been paid or received?

A No.

Q Did KBR offer or tender any credit to the United States Government relating to the COBC investigations about which you have -- well, excuse me, that are listed on the privilege log and that there has been some testimony about here today?

A No.[38]

After stopping Heinrich from being questioned regarding the COBC statements and reports, KBR then had Heinrich testify that KBR's normal practice and contract terms required it to report any reasonable evidence of kickbacks; however after investigating the allegations **[*25]** in this case, KBR made no report and gave the Department of Defense no refunds.

On February 10, 2014, five days after Heinrich's deposition, KBR moved for summary judgment.[39] In doing so, KBR attached a document titled "Statement of Material Facts as to Which There Is No Genuine Dispute." This statement again stated that KBR reports kickback allegations when any reasonable grounds

[38] Doc. 136-3 at 283-285, 289, 294-296 (emphasis added).

[39] Doc. 136.

supporting these allegations exist, but KBR made no report in this case. The Statement says, in part:

> When a COBC investigation provides reasonable grounds to believe a violation of 41 U.S.C. §§ 51-58 ("the Anti-Kickback Act") may have occurred requiring disclosure to the Government under *FAR 52.203-7*, KBR makes such disclosures. KBR has made reports to the Government when it has reasonable grounds to believe that a violation of the Anti-Kickback Act may have occurred. KBR conducted COBC investigations related to D&P and Gerlach, and made no reports to the Government following those investigations.[40]

KBR used Heinrich's testimony to support this statement of material fact.

In the text of its motion for summary judgment, KBR made essentially the same point. KBR argued that it reports potential fraud or kickbacks whenever there are **[*26]** any reasonable grounds to believe a violation has occurred. KBR again said that, after investigation, KBR made no report here. KBR argued:

> KBR has an internal Code of Business Conduct ("COBC") investigative mechanism that provides a means of identifying any potentially illegal activities within the company. When a COBC investigation reveals reasonable grounds to believe that a violation of 41 U.S.C. §§ 51-58 (the "Anti-Kickback Act") may have occurred requiring disclosure to the government under *FAR 52.203-7*, KBR makes such disclosures. Stmt. ¶27. KBR has made reports to the Government when it had reasonable grounds to believe that a violation of the Anti-Kickback Act occurred. Id. KBR intends for these investigations to be protected by the attorney-client privilege and attorney work product privilege (indeed, they are not even given to the Government as part of disclosures), but has not asserted privilege over the fact that such investigations occurred, or the fact of whether KBR made a disclosure to the Government based on the investigation. Therefore, with respect to the allegations raised by Mr. Barko, KBR represents that KBR did perform COBC investigations related to D&P and Mr. Gerlach, and made no reports **[*27]** to the Government following those investigations.[41]

KBR again used Heinrich's testimony to support this summary judgment argument.[42]

KBR also made use of the same inference to oppose Barko's February 3, 2014, motion to compel production **[*28]** of the COBC documents.[43] KBR opposed the motion to produce, arguing that COBC reports were attorney-client privileged.[44] Although the attorney-client privilege argument had no apparent connection with Heinrich's COBC file review, KBR again interjected the inference that the COBC files showed no reasonable ground to believe there had been a violation of the Anti-Kickback Act:

> At all times relevant to the lawsuit, KBR had the obligation under LOGCAP III to report to the Department of Defense Inspector General ("DoD-IG") or the Department of Justice where it had reasonable grounds to believe that a violation of the Anti-Kickback Act occurred. KBR has in the past made such disclosures, which were preceded by COBC investigations, and where warranted has

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[40] *Id*. at 44.

[41] *Id*.

[42] In a similar vein, KBR used the affidavit of Cheryl Ritondale, KBR's Global Director of Procurement, to support its motion for summary judgment. With her affidavit, Ritondale suggested the inference that the Army had approved $3.3 million payment to Daoud on the B-6 Mancamp with knowledge of 1) how Daoud received the B-6 Mancamp contract and 2) with knowledge of Daoud's contract performance on that project. KBR suggested that the Army received "documents regarding the competition and award of the B6 Mancamp subcontract, the quality of D&P's workmanship, the percentage of work completed by D&P, and KBR's settlement with D&P." After the Army knew the details of the B-6 Mancamp contract with Daoud, KBR says "KBR was [then] authorized to invoice the Government the $3,326,832.24." Doc. 136-2 at 8 (emphasis added).

The Army received many documents describing Daoud's poor performance on the B-6 Mancamp but did not receive any of the COBC documents and reports.

[43] Doc. 135.

[44] Doc. 139.

> tendered credits to the U.S. government where there was evidence that potential misconduct may have resulted in an overcharge under LOGCAP . . . . With respect to the COBC investigations subject to the present motion to compel, these practices were followed . . . . .At the close of the investigations, two separate COBC Reports were generated. Unlike in some other instances as noted, at the close of these investigations, KBR neither made a report **[*29]** under the Anti-Kickback Act nor tendered credits to the Government.[45]

KBR carefully used the inference that the COBC documents do not support any reasonable belief that fraud or kickbacks may have occurred. KBR has, on multiple occasions, advanced a chain of reasoning. First, whenever KBR has reasonable grounds to believe that a kickback or fraud had occurred, its contracts and federal regulation required it to report the possible violation. Second, KBR abides by this obligation and reports possible violations. Third, KBR investigated the alleged kickbacks that are part of Barko's complaint. Fourth, after the investigation of the allegations in this case, KBR made no report to the Government about an alleged kickback or fraud.

KBR's message is obvious: KBR's COBC reports — which are a privileged investigation of Barko's allegations — contain no reasonable grounds to believe a kickback occurred. And KBR gives a second message: do not worry about the production of the COBC documents because they show nothing. KBR does not state this conclusion explicitly. It does not need to. KBR's statements make its preferred conclusion both unspoken and unavoidable. The following **[*30]** exchange, already listed above, captures this point:

> Q [by KBR Attorney Margolis] "With respect to the matters that we have testified about and that *are indicated on the privilege log*, did KBR make a disclosure to the Department of Defense Inspector General that there was reasonable grounds to believe that a kickback had been paid or received?
>
> A No."[46]

In his questioning, KBR's attorney makes a direct reference to privileged communications. The question is virtually identical to "Did KBR's privileged internal investigation find reasonable grounds that a kickback was paid?" Heinrich's deposition and KBR's use of his testimony puts the COBC investigation at issue.

ii. KBR's Response

KBR advances several arguments to counter the finding of an at-issue waiver. Most centrally, KBR somehow argues that it had never implied the COBC documents did not contain evidence of fraud or kickbacks: "KBR further has not impliedly waived attorney-client privilege or work product protection by contesting fraudulent intent or by raising - in a footnote in its summary judgment brief - the clearly non-privileged facts that KBR conducted an investigation and did not make a self-report **[*31]** to the Government."[47]

But, of course, KBR did more than simply say that it had conducted a COBC investigation and had not reported fraud to the Department of Defense. With each use of the investigation and non-report, KBR joined the argument that, under its contracts and practices, KBR reports possible infractions when a COBC investigation raises any reasonable evidence that fraud or kickbacks had occurred. And KBR consistently argued that it reported any reasonable evidence of kickbacks to the Department of Defense even when doing so cost KBR money.

KBR first states that KBR is only "denying it committed fraud or knowingly violated the law."[48] KBR states that it has disclosed only non-privileged facts, the disclosure of which cannot give rise to an at-issue waiver.[49] KBR relies heavily on this Circuit's opinion in *United States v. White*, noting that "[a] general assertion lacking substantive content that one's attorney has examined a

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[45] *Id*. at 10-11.

[46] Doc. 136-3 at 295 (emphasis added).

[47] Doc. 181 at 1.

[48] Doc. 187 at 4.

[49] Doc. 181 at 2.

certain matter is not sufficient to waive the attorney-client privilege."[50]

A closer reading of *White*, however, cuts against KBR's argument. In *White*, criminal defendants appealed their convictions on charges of conspiracy **[*32]** to defraud the United States. Defendant White objected to the introduction of evidence that his attorney had told him a certain consulting arrangement was illegal. The court found that the district court erred when it admitted this evidence: the district court had conflated "[Defendant] White's denial of criminal intent with a reliance-on-advice-of-counsel defense, which would have waived the privilege."[51]

KBR's potential waiver of attorney-client privilege is not, however, based on the advice of counsel defense, nor does it arise in the criminal context. The White Court stated that "[t]o be acquitted for lack of criminal intent, White did not need to introduce any evidence of communications to and from [his lawyer], and he did not do so."[52] KBR could have generally denied that it made false claims, and filed its summary judgment motion without making extended and repeated references to the end results of its privileged internal investigation. That KBR chose to make extended and repeated references to the results of its privileged internal investigation makes a comparison to *White* inapt.

White does state that "[a]n averment that lawyers have looked into a matter does not imply an intent to **[*33]** reveal the substance of the lawyers' advice."[53] However, the *White* Court is clear that anything more than a statement that an attorney has looked into a matter can result in a waiver.[54] KBR has done far more than state that its attorneys looked into the matters underlying Barko's allegations. As described above, KBR has made repeated reference to the fact that its internal investigation, which was supposed to identify and report reasonably substantiated allegations of fraud, yielded no such report.

In *White*, the court found that the Defendant had not waived any privilege because he "never released any substantive information about his attorney's review of the arrangement," nor did he "refer to any particular instance of review."[55] KBR has done precisely the opposite: it has, in effect, revealed the substantive conclusion of its COBC investigations and referred to this finding on multiple occasions. Barko is certainly prejudiced by this conduct: KBR lays out an **[*34]** inference in its favor based on evidence that it forbids Barko from examining.

Second, KBR argues that its references to the results of the COBC investigation are not grounds for a waiver. KBR contends its characterization of the COBC investigation are minimal, and merely in response to Barko's repeated efforts to gain access to the reports. KBR argues that its statements are "literally marginal" and that it "does not rely" on them in moving for summary judgment.[56] KBR maintains that it "makes no representations whatsoever regarding the contents of the COBC documents" and that a footnote in its summary judgment motion "is simply too thin a reed" to find an implied waiver.[57]

KBR's statements are not rendered unimportant by being placed in a footnote. The Court is additionally unpersuaded that KBR does not rely on the passages outlined above in moving for summary judgment: one passage comes from the summary judgment motion itself, another from a statement of *material* undisputed facts, and another from a deposition attached to the summary judgment motion. As important, KBR suggested the same inference to stop the production of the COBC documents. The inference - that Barko's **[*35]** claims were long ago investigated and discredited - is not marginal, but rather goes to the thesis of KBR's motion for summary judgment. KBR labels Barko a "highly biased, amateur auditor" and generally alleges

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[50] 887 F.2d 267, 272, 281 U.S. App. D.C. 39 (D.C. Cir. 1989).

[51] *Id.* at 270.

[52] *Id.*

[53] *Id.*

[54] *Id.* at 271 ("Where a defendant neither reveals substantive information, nor prejudices the government's case, nor misleads a court by relying on an incomplete disclosure, fairness and consistency do not require the inference of waiver.").

[55] *Id.*

[56] Doc. 181 at 3.

[57] *Id.* at 12.

that he lacks the knowledge, context, and expertise to question KBR's contracting decisions after the fact.[58] The conclusion that the same claims have been thoroughly investigated and not substantiated helps KBR establish an absence of genuine issue of material fact.

Furthermore, these references and suggested inferences are from KBR's own filings. While Barko obviously sought the COBC documents, KBR did not need to use the contents of the COBC documents to respond to Barko's document production effort. And most important, KBR injected the COBC contents into the litigation by itself soliciting Heinrich's Rule 30(b)(6) testimony. KBR's own counsel solicited Heinrich's testimony in Barko's Rule 30(b)(6) cross-examination. KBR's argument that Barko put the COBC reports at issue is therefore unavailing.[59] KBR's filings constitute affirmative acts, for KBR's own benefit, that use the otherwise privileged materials to make KBR's case.

KBR is correct that Barko has aggressively sought to discover **[*36]** the contents of the COBC reports. KBR argues that "fairness dictates that KBR should be granted some latitude to discuss its investigative procedures without risking a broad waiver."[60] Perhaps this is so, but KBR has far exceeded whatever latitude it might be entitled to. The Court will not repeat its earlier discussion, but again finds that KBR did far more than discuss its investigative procedures in a general or defensive fashion.

Finally, KBR argues that if this Court finds a waiver, KBR should be allowed to amend its pleadings to strike the sections creating the waiver. KBR cites to a Ninth Circuit opinion for the proposition that "[t]he court imposing the waiver does not order disclosure of the materials categorically; rather, the court directs the party holding the privilege to produce the privileged materials if it wishes to go forward with its claims implicating them."[61]

A complete reading of the cited opinion reveals that the court is not permitting parties to strike certain *statements*. Rather, if a waiver is found, the Ninth Circuit allowed parties to drop entire claims or causes of action instead of turning over documents.[62]

Under KBR's interpretation, a party can retract statements **[*37]** that create an implied waiver with virtually no consequence. The Ninth Circuit's *Bittaker's* decision would only suggest that KBR can default instead of disclosing the documents it has otherwise waived privilege over.

In summary, KBR's filings affirmatively use the COBC contents and create an implied waiver. KBR has placed the contents of the documents in question through its own actions; KBR has actively sought a positive inference in its favor based on what KBR claims the documents show.

The Court finds that the appropriate scope of the at-issue waiver to include all 89 documents considered to be COBC files. Heinrich's deposition refers to the COBC files collectively, and thus puts all of them at issue. The purpose of an at-issue waiver is to reestablish fairness regarding discovery in a case. Therefore, fairness dictates that all the documents in question be produced so that Barko be able to examine the documents to challenge whether the withheld documents actually support the inferences that KBR attorneys suggested to this Court.

iii Waiver based on use of documents by 30(b)(6) witness.

In a related argument, Barko says KBR waived any attorney-client privilege when Heinrich examined **[*38]** the COBC documents to refresh his recollection before testifying as KBR's Rule 30(b)(6) witness. Heinrich did not use the documents to refresh his recollection at the deposition but he examined the documents beforehand.[63]

Barko argues that "Mr. Heinrich is no different from any other witness, and the COBC reports that he testified he

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[58] Doc. 136 at 1.

[59] *Id*. at 13.

[60] *Id*. at 15.

[61] Bittaker v. Woodford, 331 F.3d 715, 720 (9th Cir. 2003).

[62] *Id*.

[63] Doc. 144-3 at 4.

reviewed are discoverable pursuant to *Fed. R. Evid. 612* . . . ."[64] *Rule 612* allows an opposing party to inspect writings a witness used to refresh his memory. If the writing was examined before the testimony, the opposing party may examine the writing "if the court decides that justice requires" this outcome.[65] "This rule has been extended to deposition proceedings where documents otherwise protected by the qualified work product privilege are used to refresh a witness's recollection."[66]

As outlined above, the Court is not persuaded by KBR's argument that "[n]either Ms. Ritondale nor Mr. Heinrich testified as to the results of the COBC investigations, the substantive findings of those investigations, or any other privileged element having to do with those investigations."[67] Additionally, the Court is unpersuaded that KBR had been presented "an impossible choice" between **[*39]** offering an unprepared 30(b)(6) witness or waiving attorney-client privilege because the witness reviewed privileged materials.[68] KBR stopped all testimony regarding the COBC documents but then solicited conclusions that the COBC documents showed no evidence of fraud or kickbacks.

A leading treatise notes that "[w]hile *Rule 612* recognizes rights in the adverse party to writings used to refresh memory, the rule does not make clear the extent of those rights where the writings are protected by a privilege or the work-product doctrine."[69] Most courts balance the rights of adverse parties under *Rule 612* against the interest in preserving work-product protection and attorney-client privilege, and analyze a series of factors in doing so.[70]

Among those factors, several support disclosure. The majority of the COBC documents are investigatory statements and summaries of those statements. Also, major discrepancies exist between Heinrich's testimony and the contents of the writings Heinrich had reviewed. Third, Heinrich necessarily relied upon the COBC documents for his testimony because he had no personal, firsthand knowledge of whether fraud or kickbacks occurred, even though he supervised KBR's COBC investigations and reporting..[71]

Several factors do not support disclosure under *Rule 612*. Heinrich examined the COBC documents before, but not at the **[*41]** Rule 30(b)(6) deposition. And, Barko arguably has some ability to otherwise discover the evidence.

At its essence, this analysis requires a context-specific determination about the fairness of the proceedings and whether withholding the documents is consistent with the purposes of attorney-client privilege and work-product protection.[72] This analysis is effectively the same as the one the Court has already gone through regarding at-issue waiver.

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[64] Doc 143 at 23.

[65] Fed. R. Evid. 612.

[66] *Eckert v. Fitzgerald*, 119 F.R.D. 297, 299 (D.D.C. 1988) (citing cases).

[67] Doc. 187 at 23. KBR also directed the Court to its proposed sur-reply to Barko's motion to compel, in which it argued "KBR did not waive privilege because Mr. Heinrich's Rule 30(b)(6) testimony did not rely on the privileged contents of the files." Doc. 144-2 at 4.

[68] Doc. 187 at 23.

[69] Privilege and Work-Product Limits on Adverse-Party Rights, 28 Fed. Prac. & Proc. Evid. § 6188 (2d ed.).

[70] Factors which act in favor of disclosure to the adverse party include the inability of the party to gain access to the information **[*40]** by other means, the absence of opinion work-product, discrepancies between a witness' testimony and the contents of the writings used, and heavy reliance on a particular document. Factors in favor of non-disclosure include review of documents before, rather than during, testimony and indications that the request for the document is merely a fishing expedition. *Id*.

[71] *Nutramax Lab., Inc. v. Twin Lab., Inc.*, 183 F.R.D. 458, 468 (D. Md. 1998) ("There is a greater need to know what materials were reviewed by expert and designee witnesses in preparation for deposition since the substance of their testimony may be based on sources beyond personal knowledge."); *see also Coryn Grp. II, LLC v. O.C. Seacrets, Inc.*, 265 F.R.D. 235, 242 (D. Md. 2010).

[72] With regard "to Rule 612, the relevant inquiry is not simply whether the documents were used to refresh the witness's recollection, but rather whether the documents were used in a manner which waived the attorney-client privilege." *Suss v. MSX*

As a result, this Court finds that similar fairness considerations support disclosure. Heinrich reviewed the COBC documents before testifying. The COBC documents have almost no attorney opinion materials; instead investigator-taken statements and investigator reports predominate. Given Heinrich's and KBR's testimony and repeated suggestion that the documents contain nothing, fairness requires disclosure.

While disclosure under *Rule 612* will be required, this should not be understood as a blanket rule. In most cases, Rule 30(b)(6) witnesses who have examined privileged materials before testifying will not waive the privilege.

B. Crime Fraud Exception

Plaintiff-Relator additionally makes a convoluted argument that the COBC documents are not protected by the attorney-client privilege **[*42]** because of the crime-fraud exception. In summary, Barko argues "the crime-fraud waiver applies here because KBR used its attorney-client privilege to 'whitewash' the content of the COBC investigative reports by burying evidence of fraud in its reports and not reporting it to the government, and then overtly misled this Court."[73]

Attorney-client communications are not privileged if they "are made in furtherance of a crime, fraud, or other misconduct."[74] Finding a crime-fraud waiver requires "a prima facie showing of a violation sufficiently serious to defeat the privilege."[75] The movant must "establish some relationship between the communication at issue and the prima facie violation. A prima facie violation is shown if it is established that the **[*43]** client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme."[76] Barko repeatedly argues that he has shown "some relationship" between privileged communications and alleged crime or fraud.

Determining whether a prima face case exists is within the sound discretion of the trial court.[77] The weight of case law suggests that a movant must show more than a mere connection between a communication and an alleged crime: otherwise, far too many attorney-client communications would yield to the crime-fraud waiver. The relationship required is one where a privileged communication is made or received in order to further a criminal or fraudulent scheme.[78] "[T]he exception does not apply even though, at one time, the client had bad intentions."[79]

Barko's first argument is that the crime-fraud exception applies because KBR mischaracterized the findings of the COBC reports. Barko asserts that there is "a scheme to ask the Court to grant KBR's motion for summary judgment based on false factual assertions and inferences that the KBR defendants have asked this Court to draw."[80]

With knowledge of what the COBC documents actually show, KBR and **[*44]** its counsel went to great effort to suggest that the COBC documents showed no reasonable evidence of fraud or kickbacks. Whether KBR's suggestion was true, or untrue, does not create a prima facie showing that the COBC reports were drafted to further a crime or fraud.

At best, even if Barko shows that KBR misrepresented the COBC documents, this does not mean that the COBC documents were created to further any crime-fraud. The COBC interview notes and reports were created years before this case was filed. Nothing

Int'l Eng'g Servs., Inc., 283 F. Supp. 2d 469, 212 F.R.D. 159, 164 (S.D.N.Y. 2002); "[B]efore Rule 612 is applicable with respect to documents reviewed by a witness to prepare for a deposition . . . the court must determine that, in the interest of justice, the adverse party is entitled to see the writing.." *Nutramax Lab., Inc. v. Twin Lab., Inc,.*, 183 F.R.D. 458, 468 (D. Md. 1998).

73 Doc. 180 at 8.

74 *In re Sealed Case*, 754 F.2d 395, 399, 244 U.S. App. D.C. 11 (D.C. Cir. 1985).

75 *Id.*

76 *Id.*

77 *Id.*

78 *In re Grand Jury*, 475 F.3d 1299, 1305, 374 U.S. App. D.C. 428 (D.C. Cir. 2007).

79 *In re Sealed Case*, 107 F.3d 46, 49, 323 U.S. App. D.C. 233 (D.C. Cir. 1997).

80 Doc. 180 at 9.

suggests any connection between the creation of the COBC reports and later arguments to this Court. To the contrary, the COBC statements and reports work against a crime or fraud.

Barko's second argument is that the COBC documents are subject to the crime-fraud exception because KBR, in its motion for summary judgment, made reference to a certified claim submitted to the Government for work done by one of the subcontractors at the center of the case.[81] In its motion for summary judgment, KBR argued that the Government approved payment to Daoud on the B-6 Mancamp subcontract, with knowledge of how and why KBR gave the contract to Daoud and with knowledge of the deficiencies **[*45]** in the subcontractor's work.

Barko states "KBR made several extremely serious material misrepresentations aimed at deceiving the government to accept that D&P's performance was not so poor as to keep the government from paying $3.3 million on the claim" and then used this fact in support of summary judgment.[82]

Barko's claim is largely illogic. Barko appears to be saying that the COBC documents work against KBR's efforts to receive payment on the Daoud B-6 Mancamp contract. While the failure to share the substance of the COBC reports with the Defense Department arguably furthered false claims, the creation of the COBC reports did not.

Again, Barko's claim does not establish that the COBC reports were made in furtherance of this alleged fraud. Barko does not create a sufficient showing for the crime-fraud exception to apply.[83]

Barko's final argument is that KBR's documents are subject to the crime-fraud exception because KBR allowed Robert Gerlach, a KBR employee at the center of the alleged kickbacks, to resign instead of firing him. Barko argues that "the intent to cover up Mr. Gerlach's improper relationship with D&P can be inferred" from the decision to allow his resignation. **[*46]** [84]

As above, even if the Barko can show the COBC documents undercut KBR's decision to allow Gerlach to resign, this does not show that the COBC reports were created to further any scheme to let Gerlach resign. Barko does not establish a prima facie case that KBR's attorney-client privileged documents were created in order to further these allegedly criminal or fraudulent schemes.

C. DCIS Subpoena

Barko further says KBR waived the attorney-client privilege and work-product protection when it responded to a March 2007 DCIS subpoena. At the time the subpoena was issued, Barko's complaint had been filed, but not unsealed. KBR says the Defense Department Inspector General likely served the DCIS subpoena to decide whether the United States should take over the prosecution of this case.

The subpoena required KBR to produce documents related to the contracts involved with this case. The Defense Department told KBR that KBR was required to produce "notes, memoranda, or other documents initiating or overseeing services to be performed . . . by the Subcontractors."[85] Subcontractors was defined to include Daoud and EAMAR. The subpoena also requested that KBR list any responsive documents withheld, and **[*47]** the reasons for withholding them.[86]

In producing documents responsive to the subpoena, KBR did not produce a privilege log, nor did it produce or even acknowledge the existence of the COBC

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81 Doc. 180 at 11.

82 Id.

83 *Id*. at 15.

84 *Id*. at 17.

85 Doc 181-1 at 17.

86 *Id*.

documents.[87] KBR appears not to have produced or identified documents created by a third-party vendor that KBR hired to receive "tips" of potential fraud or kickbacks.[88]

The COBC documents are filled with "notes, memoranda or other documents . . . overseeing services" that Daoud and other subcontractors performed and were within the scope of the DCIS subpoena. KBR never told **[*49]** DCIS that it was withholding documents based on attorney-client privilege.[89]

Barko argues that the nature of this response itself merits the finding that attorney-client privilege has been waived over the documents. Barko argues that if KBR was going to object to the production of its COBC investigative reports, it was required to submit written objections. Barko's argument says the failure to do so is fatal to KBR's privilege claim because none of KBR's responses to the subpoena identify the existence of the COBC investigations, object to production of any documents on privilege grounds, or claim the subpoena was over-broad.[90] Barko seems to argue that KBR, under holdings interpreting Civil Rules 26(b)(5) and 45(e)(2), waived any privilege as to the documents not produced or identified in a privilege log. Barko seems to argue that the failure to fully produce or identify withheld COBC documents waived privilege claims as to both DCIS and Barko.

KBR makes several unsupported arguments as to the background of its production to DCIS. KBR first argues that a privilege log was not required despite the DCIS's cover letter telling KBR to identify any withheld or not produced documents. Next, KBR argues that **[*50]** the scope of the DCIS subpoena was not broad enough to included the COBC documents. Finally, KBR argues that it had redacted portions of some documents that were produced to DCIS. Having made partial redactions in the produced documents, KBR says the DCIS must have known that KBR was withholding hundreds of pages of other statements and reports.[91] These arguments seem to defy common sense and the language of the subpoena.[92]

KBR first argues that "KBR was not asked for, nor did it provide the Government with, a privilege log."[93] This argument is not plausible. The cover letter that accompanied the DCIS subpoena said: "If for any

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[87] KBR argues that this Court should not, *sua sponte*, have required parties to produce document to help decide the waiver issue. But Civil Rule 26(b)(1) says "For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action." Fed. R. Civ. P. 26(b)(1).

Any disclosure to the Government of kickbacks involved with this case and any response to the Government's subpoena were closely related to the waiver issue this Court needed to decide. Although KBR had disclosed the subpoena to Barko, it did not provide Barko a copy of its response to the subpoena. Barko had requested production of KBR's communications and production to the DCIS subpoena. KBR produced some, but not all of the documents that it had provided the Inspector General but did not produce any of KBR's communications with the DCIS about the subpoena.

Against **[*48]** this backdrop, the Court asked KBR to describe what disclosures it had made to the Government and asked the United States to describe whether KBR had produced the COBC documents or had described documents it had refused to provide the Defense Department under some privilege claim. KBR complains that the Court could not direct the discovery request to the United States after the United States had declined to prosecute this case.

The Court understood that the United States Attorney's Office had continued an inactive appearance in the case. On December 13, 2013, an Assistant United States Attorney had entered an appearance in this case. Doc. 132. And on October 2, 2014, the United States filed a consent to the proposed settlement with Daoud. Doc. 178. The Court's requests seem obviously relevant to determining the waiver issue. And although KBR received notice of this Court's request to the United States, KBR made no objection until after the United States had responded.

[88] Doc. 200 at 9.

[89] Doc. 190.

[90] Doc. 194 at 7.

[91] Doc. 200.

[92] Doc. 193 at 11-12.

[93] *Id*. at 4.

reason any portion of the required materials is not furnished. provide a written explanation as to the location of each item and the reason for non production." The subpoena and accompanying letter told KBR to identify any document that was not being produced.[94]

KBR next argues: "KBR does not concede that its COBC files are or ever were responsive to the subpoena."[95] This argument is also not plausible.[96] The subpoena required production of "internal . . . documents relating to [subcontracts] . . . including, but **[*51]** not limited to . . . notes, memoranda, or other documents initiating or overseeing services . . . ."[97] The withheld COBC files are almost all "notes, memoranda, or other documents" "overseeing [Daoud and other subcontractors's] services."[98] The COBC files were easily within the scope of the DCIS subpoena.

Further, KBR contends the DCIS investigators explicitly or implicitly agreed that the COBC documents would not need to be produced: "The Government was fully aware that KBR was withholding certain information, as evidenced by redactions in the productions made to the Government."[99] Apparently, KBR is arguing that some of the documents it produced had redacted portions. From this, KBR seemingly reasons that the **[*52]** DCIS would have known that KBR was withholding hundreds of pages of responsive documents on privilege grounds.

This argument, of course, makes no sense. The DCIS subpoena directions directed KBR to provide "a written explanation as to the location of each item [that was not being produced] and the reason for non production." Also, KBR never explains how the DCIS could have tacitly agreed to the non-production of documents the DCIS apparently never knew existed.

Finally, KBR suggests that after receiving the DCIS subpoena, its attorneys communicated with DCIS investigators about the production and KBR says its communications with the DCIS investigator "demonstrates that KBR and the DCIS agent managing the subpoena (Michael Alexander) conferred after the subpoena was received, and agreed to narrow its scope as the process of production continued."

But the letters KBR relies upon to suggest the DCIS agreed to forgo the COBC documents do not support KBR's argument. KBR first relies upon an April 23, 2007, letter from KBR counsel Michael Buxton and Alden Atkins to DCIS Investigator Michael Alexander. Contrary to KBR's argument that the letter reflects an agreement to narrow the **[*53]** production, Buxton's letter simply advises DCIS that additional time might be required to complete the rolling production. Buxton's letter also says that the number of requested employee personnel files would be huge and says "We discussed the possible narrowing of this list as a first prioritization of this task. You advised that you will discuss some prioritization with your colleagues."[100] The document KBR relies upon does not support its suggestion that the DCIS agreed to allow KBR not identify or produce the most relevant COBC documents.

In suggesting that the DCIS explicitly or implicitly agreed to forgo production of the COBC documents, KBR also relies upon a July 30, 2007, letter from KBR's attorney Christine Durney to DCIS Agent Michael Alexander.[101] This letter offers even less support for KBR's argument. Instead, Durney's letter says nothing about KBR withholding documents required by the DCIS subpoena. Instead, Durney provides Alexander with some portion of the subpoened documents and tells DCIS: "KBR is continuing to gather and review other documents that may be responsive to the subpoena, and will produce

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[94] Doc. 188-1 at 17.

[95] Doc. 193 at 4.

[96] The subpoena broadly described the documents to be produced, which included "any and all internal and/or external documents relating to KBR Subcontracts for the period of January 1, 2003, to the date of this subpoena, including, but not limited to, the following: all . . . notes, memoranda, or other documents initiating or overseeing services to be performed or product to be sold by the Subcontractors . . . ." Doc. 188-1 at 19 (emphasis added).

[97] *Id*. (emphasis added).

[98] *Id*. at 20.

[99] Doc. 193 at 4.

[100] Doc. 191-2 at 12 (emphasis added).

[101] *Id*. at 13-14.

any additionally responsive documents **[*54]** as soon as possible."[102]

KBR has produced some, but not all of its attorneys's communications with DCIS about KBR's response to the subpoena. Contrary to KBR's suggested inference, its attorneys's letters to DCIS do not tell DCIS that it was withholding documents. Apart from waiver, many of the COBC documents may have been privileged. But KBR should have identified withheld documents if it wanted to claim the documents as privileged.

In general, a party's failure to provide a privilege log in civil litigation can waive any claim of privilege to the documents not produced or identified in a privilege log.[103] Waiver serves as a penalty when a party has failed to identify requested documents.

However, the Court here considers KBR's failure to identify withheld documents required to be produced under an administrative subpoena. The Court finds no authority using waiver as a sanction for a failure to comply with an administrative subpoena. Presumptively, a failure to comply with an administrative subpoena could be sanctioned by contempt. But penalizing noncompliance of an administrative subpoena with a waiver sanction does not seem to fit.

Barko seems to generally argue that KBR's failure to provide a privilege log waived any attorney client privilege as to DCIS. Continuing this argument, Barko then claims that any waiver to the DCIS stops KBR from recovering the privilege.

KBR correctly argues that "Relator cites no case imposing the 'penalty' of waiver based on a failure to provide a privilege log, where the *subpoenaing party* never requested that penalty."[104] Moreover, KBR's argument seems especially true when the production or identification of withheld documents involves an administrative subpoena.

The question of **[*56]** whether a failure to provide a privilege log in response to an investigative subpoena could later waive privilege for a civil litigant appears to be an issue of first impression. The Court will not head into this uncharted territory.

IV. Conclusion

For the foregoing reasons, the Court GRANTS Barko's motion to compel production of the 89 COBC documents. Previously, KBR appealed the compelled production of these documents when the Court ordered production on other grounds. The Court nonetheless intends to direct this case towards resolution. For that reason, the Court orders Barko not to disclose the contents of the documents. If Barko uses or refers to the documents in subsequent filings in this case, the Court orders that such filings be made under seal. This order will remain in effect unless modified or lifted by the Court.

KBR will produce the documents by November 25, 2014.

IT IS SO ORDERED

Dated: November 20, 2014

/s/ James S. Gwin

JAMES S. GWIN

UNITED STATES DISTRICT JUDGE

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[102] *Id*. at 14.

[103] Fed. R. Civ. P. 45(d)(2)(A); Fed. R. Civ. P. 26(b)(5)(A); Charles Wright & Arthur Miller, Federal Practice and Procedure, § 2464 ("Federal Courts consistently have held that such a party is required to produce a document index or privilege log and that the failure to produce a log of sufficient detail constitutes a waiver of the underlying privilege or work product claim."). *See also SEC v. Yorkville Advisors, LLC*, 300 F.R.D. 152, 157-58 (S.D.N.Y. 2014) ("[A] party's failure to comply with the requirements of Fed.R.Civ.P. 26(b)(5) or Local Civil Rule 26.2 may result in a waiver of privilege. *See* Fed. R. Civ. P. 26(b)(5), Advisory Committee Notes ("To withhold materials without such notice is **[*55]** contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection.").

[104] Doc. 199 at 6 (emphasis in original).

Caution
As of: Aug 21, 2015

Debra A. and George Simon, et al., Appellees, v. G.D. Searle & Co., Appellant

No. 85-5334

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

816 F.2d 397*; *1987 U.S. App. LEXIS 4820*; *22 Fed. R. Evid. Serv. (Callaghan) 1754*; *7 Fed. R. Serv. 3d (Callaghan) 410

March 13, 1986, Submitted
April 13, 1987, Filed

SUBSEQUENT HISTORY: Petition for Rehearing En Banc and Petition for Rehearing by the Panel Denied July 7, 1987.

PRIOR HISTORY: [**1] Appeal from the United States District Court for the District of Minnesota.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant sought review of an order by the United States District Court for the District of Minnesota permitting discovery by appellee of certain documents. The district court certified two controlling questions of law relating to attorney work product and attorney-client privilege for immediate appeal.

OVERVIEW: The district court certified two questions of law to the court for interlocutory review after ordering appellant to produce certain in-house business documents in discovery. Appellant argued that the documents were protected by the attorney work product doctrine, the attorney-client privilege, and *Fed. R. Civ. P. 26(b)(2)*. On appeal, the court held that risk management documents that were not prepared in anticipation of specific litigation but only for general business planning purposes were not protected by the attorney work product doctrine because they did not reveal individual case reserves calculated by appellant's legal department. The documents were not protected by the attorney-client privilege; merely providing attorneys with informational copies of business documents did not make the documents privileged communications because there was no underlying purpose of obtaining legal advice. Insurance reserve information maintained by appellant was discoverable under *Fed. R. Civ. P. 26(b)(2)*. The court affirmed.

OUTCOME: The court affirmed the district court's order requiring appellant to provide in-house business documents in discovery because insurance reserve information was not protected by the attorney work product doctrine, the attorney-client privilege, or federal rules.

LexisNexis(R) Headnotes

Civil Procedure > Discovery > General Overview
Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders
[HN1] *28 U.S.C.S. § 1292(b)* allows appeals, at the discretion of the court of appeals, when the district judge believes that his action involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation.

Civil Procedure > Appeals > Appellate Jurisdiction > Certified Questions
Civil Procedure > Appeals > Standards of Review > De Novo Review

[HN2] An appellate court reviews de novo the questions of law certified by the district court. Where certified questions embody both factual and legal considerations, the appellate court should endeavor to give deference to the district court's factual determinations. However, the nature and scope of the review are not rigidly determined by the certified questions.

Civil Procedure > Discovery > Methods > Requests for Production & Inspection
Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview
[HN3] See *Fed. R. Civ. P. 26(b)(3).*

Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview
[HN4] The work product doctrine will not protect documents from discovery unless they were prepared in anticipation of litigation. *Fed. R. Civ. P. 26(b)(3).* Whether documents were prepared in anticipation of litigation is clearly a factual determination. The test is 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 litigation.

Civil Procedure > Judicial Officers > Masters > General Overview
Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview
[HN5] Materials assembled in the ordinary course of business or for other non-litigation purposes are not under the qualified immunity provided by *Fed. R. Civ. P. 26(b)(3).*

Civil Procedure > Discovery > Privileged Matters > Work Product > Opinion Work Product
[HN6] Individual case reserve figures reveal the mental impressions, thoughts, and conclusions of an attorney in evaluating a legal claim. By their very nature they are prepared in anticipation of litigation and, consequently, they are protected from discovery as opinion work product.

Civil Procedure > Discovery > Privileged Matters > General Overview
Evidence > Privileges > Attorney-Client Privilege > General Overview
[HN7] *Fed. R. Evid. 501* provides that evidentiary privileges are to be determined in accordance with state law in diversity actions.

Civil Procedure > Discovery > Privileged Matters > General Overview
Evidence > Privileges > Attorney-Client Privilege > Waiver
[HN8] See *Minn. Stat. § 595.02 (1)(b)* (Supp. 1987).

Civil Procedure > Discovery > Privileged Matters > General Overview
[HN9] When a client acts on privileged information from his attorney, the results are protected from discovery to the extent that they disclose the privileged matter, directly or inferentially.

Civil Procedure > Judicial Officers > Masters > General Overview
Civil Procedure > Discovery > Privileged Matters > General Overview
Evidence > Privileges > Attorney-Client Privilege > General Overview
[HN10] A business document is not made privileged by providing a copy to counsel. Thus, those documents from one corporate officer to another with a copy sent to an attorney do not qualify as attorney client communications.

Civil Procedure > Discovery > Privileged Matters > General Overview
Evidence > Privileges > General Overview
[HN11] An attorney-client communication must relate to the purpose of obtaining legal advice before it is protected. Moreover, the attorney-client privilege does not protect client communications that relate only business or technical data.

Civil Procedure > Judicial Officers > Masters > General Overview
Civil Procedure > Discovery > Privileged Matters > General Overview
Evidence > Privileges > Attorney-Client Privilege > General Overview
[HN12] Client communications intended to keep the attorney apprised of business matters may be privileged if they embody an implied request for legal advice based thereon.

Civil Procedure > Discovery > Privileged Matters > General Overview
[HN13] Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.

Civil Procedure > Discovery > Relevance
[HN14] See *Fed. R. Civ. P. 26(b)(2).*

Civil Procedure > Discovery > Methods > General Overview
Civil Procedure > Discovery > Relevance
[HN15] The discovery of matters pertaining to insurance depends on whether such information is relevant to the subject matter or reasonably calculated to lead to admissible evidence. This standard, which comes from *Fed. R. Civ. P. 26(b)(1),* is applicable to insurance documents other than agreements.

COUNSEL: Gregory L. Wilmes presented argument on behalf of the Appellant.

Roger Brosnahan presented argument on behalf of the Appellee.

JUDGES: John R. Gibson and Wollman, Circuit Judges, and Harris, * Senior District Judge. John R. Gibson, Circuit Judge, dissenting.

> * The HONORABLE OREN HARRIS, Senior United States District Judge for the Eastern and Western Districts of Arkansas, sitting by designation.

OPINION BY: WOLLMAN

OPINION

[*398] WOLLMAN, Circuit Judge.

G.D. Searle & Co. appeals the district court's order permitting discovery of certain Searle documents. Pursuant to *28 U.S.C. § 1292(b) (Supp. III 1985),* the district court found that its order involved controlling questions of law as to which there was substantial ground for difference of opinion and certified two questions for appeal. The issues in this appeal, reflected in the district court's certified questions, are, first, whether corporate risk management documents prepared by nonlawyer corporate officials, but revealing aggregate information compiled from individual case reserve figures determined by lawyers, are protected from discovery by the work product doctrine or the attorney-client privilege, and, second, whether [**2] *Rule 26(b)(2) of the Federal Rules of Civil Procedure* limits discovery of corporate risk management documents that relate to insurance.

Searle manufactures an intrauterine contraceptive device known as the "Cu-7." Approximately forty products liability actions pending against Searle in the United States District Court for the District of Minnesota and seeking damages for injuries alleged to have resulted from use of the Cu-7 were consolidated for discovery and have generated this appeal. The district [*399] court appointed a special master to supervise the discovery process in these cases.

The district court [1] originally ordered Searle to produce "each and every document contained in its files which relates to the Cu-7 IUD." Although Searle produced approximately 500,000 documents to appellees and has continued to provide documents, it resisted the discovery of certain documents from its risk management department. Searle's risk management department monitors the company's products liability litigation and analyzes its litigation reserves, apparently utilizing individual case reserve figures determined by the legal department's assessment of litigation expenses. The risk management department [**3] also has responsibility for the company's insurance coverage. Insofar as Searle's products liability insurance has a high deductible amount, the company is in some respects self-insured.

> 1 The Honorable Miles W. Lord, United States District Judge for the District of Minnesota, retired September 11, 1985. All of the orders relevant to this appeal were issued prior to Judge Lord's retirement. The cases have since been assigned to the Honorable Robert G. Renner, United States District Judge for the District of Minnesota.

Pursuant to a district court order, the documents at issue were provided to the special master for *in camera* review. The special master filed with the court his Reports I and II, containing his recommendations concerning the individual documents. He found that the risk management documents were protected by the work product doctrine to the extent that they revealed "specific litigation strategy or mental impressions of attorneys in evaluating cases, or setting a reserve for a specific case," and by the attorney-client privilege if they included communications between an attorney and client concerning legal advice made and kept in confidence. Report I of Special [**4] Master, *Simon v. G.D. Searle & Co.*, No. 4-80-160, at 5-7 (D. Minn. Aug. 22, 1984). Documents

that revealed aggregate reserve information not identified with individual cases were found discoverable. *Id.* at 5-6. The district court adopted the special master's reports and granted Searle's request for certification pursuant to *28 U.S.C. § 1292(b)* in an order issued June 7, 1985. The special master's Report III proposed the questions for appeal, which the district court accepted and certified. The district court also stayed its June 7 order so far as it related to risk management and insurance documents, pending the outcome of this appeal. We granted Searle's petition for permission to appeal.

The questions certified for appeal are as follows:

> 1. To what extent, if any, should Searle's "Risk Management" documents, prepared by nonlawyer corporate officials in an attempt to keep track of, control and anticipate costs of product liability litigation for business planning purposes (including budgetary, profitability and insurance analysis), be protected from discovery by the Work Product Doctrine or the Minnesota attorney-client privilege because some portions of the documents reveal [**5] aggregate case reserves and aggregate litigation expenses for all pending cases when each individual case reserve is determined by Searle's lawyers on a confidential basis in anticipation of litigation?
>
> 2. To what extent, if any, does *Fed.R.Civ.P. 26(b)(2)* limited [sic] the discoverability of Searle's "Risk Management" documents that relate to insurance considerations?

I

STANDARD OF REVIEW

A preliminary question confronting us is the standard of review applicable to an appeal of discovery orders under *28 U.S.C. § 1292(b)*. [HN1] That section allows appeals, at the discretion of the court of appeals, when the district judge believes that his action "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal * * * may materially advance the ultimate termination of the litigation." *28 U.S.C. § 1292(b) (Supp. III 1985)*. Appellees argue that we should not [*400] disturb the district court's discretion in discovery matters absent a "gross abuse of discretion resulting in fundamental unfairness." *Voegeli v. Lewis, 568 F.2d 89, 96 (8th Cir. 1977)*; *see also Prow v. Medtronic, Inc., 770 F.2d 117, 122 (8th Cir. 1985)*. Searle [**6] contends that our role is not so restricted in an appeal under *section 1292(b)* and cites *Sperry Rand Corp. v. Larson, 554 F.2d 868, 871 (8th Cir. 1977)*. In *Sperry Rand* the court stated that the petitioner's choice of a mandamus action, for which the standard of review is whether the district court exceeded the "'sphere of its discretionary power,'" *id. at 872* (quoting *Will v. United States, 389 U.S. 90, 104, 19 L. Ed. 2d 305, 88 S. Ct. 269 (1967)*), instead of a *section 1292(b)* appeal, seriously narrowed the scope of appellate review. We agree with Searle that our review in this *section 1292(b)* appeal is not confined to determining whether the district court abused its discretion. *See* 9 J. Moore, *Moore's Federal Practice* para. 110.22[5] (2d ed. 1986) (review for abuse of discretion not suited to *section 1292(b)* because there is no controlling question of law). *Section 1292(b)* permits the appeal of orders otherwise unappealable and thus provides an avenue for resolving disputed and controlling questions of law, the resolution of which will materially further the litigation. Therefore, [HN2] we review *de novo* the questions of law certified by the district court. Where, as here, the certified questions [**7] embody both factual and legal considerations, we should endeavor to give deference to the district court's factual determinations. We note, however, that the nature and scope of our review are not rigidly determined by the certified questions. *In re Oil Spill by the Amoco Cadiz, 659 F.2d 789, 793 n.5 (7th Cir. 1981)*. We remain free to consider """such questions as are basic to and underlie""" the questions certified by the district court. *Id.* (quoting *Helene Curtis Indus., Inc. v. Church & Dwight Co., 560 F.2d 1325, 1335 (7th Cir. 1977)* (quoting 9 J. Moore, *Moore's Federal Practice* para. 110.25[1], at 270)); *Merican, Inc. v. Caterpillar Tractor Co., 713 F.2d 958, 962 n.7 (3d Cir. 1983), cert. denied, 465 U.S. 1024, 79 L. Ed. 2d 682, 104 S. Ct. 1278 (1984)*; *United States v. Connolly, 716 F.2d 882, 885 (Fed. Cir. 1983), cert. denied, 465 U.S. 1065, 79 L. Ed. 2d 740, 104 S. Ct. 1414 (1984)*.

II

WORK PRODUCT DOCTRINE

Searle's first argument is that its risk management documents are protected from discovery by the work product doctrine. That doctrine was established in *Hickman v. Taylor, 329 U.S. 495, 91 L. Ed. 451, 67 S. Ct. 385 (1947)*, and is now expressed in *Rule 26(b)(3) of the Federal Rules of Civil Procedure*, which provides that [HN3] "a party may [**8] obtain discovery of documents and tangible things * * * prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative * * * only upon a showing that the party seeking discovery has substantial need of the materials." Our application of the work product doctrine to specific documents is guided by the pur-

poses of the doctrine set out in *Hickman. See In re Murphy, 560 F.2d 326, 333-34 (8th Cir. 1977).* The work product doctrine was designed to prevent "unwarranted inquiries into the files and mental impressions of an attorney," *Hickman, 329 U.S. at 510,* and recognizes that it is "essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Id. at 510-11.*

The special master found that the risk management documents at issue were generated in an attempt to keep track of, control, and anticipate the costs of Searle's products liability litigation; the documents have been so identified in the district court's first certified question. Report I of Special Master, *supra*, at 2. Many of the documents include products liability litigation reserve [**9] information that is based on reserve estimates obtained from Searle's legal department. When Searle receives notice of a claim or suit, a Searle attorney sets a case reserve for the matter. Case reserves embody the attorney's estimate of [*401] anticipated legal expenses, settlement value, length of time to resolve the litigation, geographic considerations, and other factors. Affidavit of Eugene W. Bader, *Simon v. G.D. Searle & Co.*, No. 4-80-160, at 2 (D. Minn.) (Bader oversees Searle's risk management program). The individual case reserves set by the legal department are then used by the risk management department for a variety of reserve analysis functions, which the special master found were motivated by business planning purposes including budget, profit, and insurance considerations.

[HN4] The work product doctrine will not protect these documents from discovery unless they were prepared in anticipation of litigation. *Fed. R. Civ. P. 26(b)(3)*; *see In re Grand Jury Subpoena, 784 F.2d 857, 862 (8th Cir. 1986), cert. dismissed sub nom. See v. United States, 479 U.S. 1048, 107 S. Ct. 918, 93 L. Ed. 2d 865 (1987).* Our determination of whether the documents were prepared in anticipation of litigation is clearly [**10] a factual determination:

> 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 litigation.

8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2024, at 198-99 (1970) (footnotes omitted); *see Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 604 (8th Cir. 1977), on rehearing, 572 F.2d 596 at 606 (8th Cir. 1978)* (en banc); *The Work Product Doctrine, 68 Cornell L. Rev. 760, 844-48 (1983).* The advisory committee's notes to *Rule 26(b)(3)* affirm the validity of the Wright and Miller test: [HN5] "Materials assembled in the ordinary course of business * * * or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision." *Fed. R. Civ. P. 26(b)(3)* advisory committee notes. Applying this test, we do not believe it can be said that the risk management documents were prepared for [**11] purposes of litigation. We are no better qualified to evaluate the facts of this case than the special master and the district court, [2] and we believe their conclusion that the risk management documents are in the nature of business planning documents is a reasonable factual conclusion. The risk management department was not involved in giving legal advice or in mapping litigation strategy in any individual case. The aggregate reserve information in the risk management documents serves numerous business planning functions, but we cannot see how it enhances the defense of any particular lawsuit. Searle vigorously argues that its business is health care, not litigation, but that is not the point. Searle's business involves litigation, just as it involves accounting, marketing, advertising, sales, and many other things. A business corporation may engage in business planning on many fronts, among them litigation.

> 2 The special master, with the aid of affidavits, document summaries, and briefs from the parties, reviewed all of the documents at issue *in camera* and in his Reports I and II made recommendations as to each document and in some instances as to sections within the documents. The district court adopted the special master's recommendations after a hearing that included oral argument by the parties and testimony by the special master. Our review has been informed by a record containing all of these materials, with the exception that only six sample documents have been submitted to us *in camera* out of the approximately 400 documents that were provided to the special master.

[**12] Although the risk management documents were not themselves prepared in anticipation of litigation, they may be protected from discovery to the extent that they disclose the individual case reserves calculated by Searle's attorneys. The [HN6] individual case reserve figures reveal the mental impressions, thoughts, and conclusions of an attorney in evaluating a legal claim. By their very nature they are prepared in anticipation of litigation and, consequently, they are protected from dis-

covery as opinion work product. *Hickman, 329 U.S. at 512*; *In re Murphy, 560 F.2d 326, 336 (8th Cir. 1977)*. We do not [*402] believe, however, that the aggregate reserve information reveals the individual case reserve figures to a degree that brings the aggregates within the protection of the work product doctrine. The individual figures lose their identity when combined to create the aggregate information. Furthermore, the aggregates are not even direct compilations of the individual figures; the aggregate information is the product of a formula that factors in variables such as inflation, further diluting the individual reserve figures. Certainly it would be impossible to trace back and uncover the reserve [**13] for any individual case, and it would be a dubious undertaking to attempt to derive meaningful averages from the aggregates, given the possibility of large variations in case estimates for everything from frivolous suits to those with the most serious injuries. The purpose of the work product doctrine -- that of preventing discovery of a lawyer's mental impressions -- is not violated by allowing discovery of documents that incorporate a lawyer's thoughts in, at best, such an indirect and diluted manner. [3] Accordingly, we hold that the work product doctrine does not block discovery of Searle's risk management documents or the aggregate case reserve information contained therein.

3 This conclusion is consistent with the holding of *In re Murphy, 560 F.2d 326, 336 n.20 (8th Cir. 1977)*, that opinion work product is discoverable only in "rare and extraordinary circumstances." The individual case reserve figures are nondiscoverable opinion work product, but when gathered into the aggregates no identifiable opinion work product remains.

The same observation also applies to *Sporck v. Peil, 759 F.2d 312 (3d Cir.), cert. denied, 474 U.S. 903, 106 S. Ct. 232, 88 L. Ed. 2d 230 (1985)*, and to this court's recent decision in *Shelton v. American Motors Corp., 805 F.2d 1323 (8th Cir. 1986)*. *Sporck* involved discovery attempts relating to a group of documents that were used to prepare for a deposition. The court held that defense counsel's selection of certain documents, out of the thousands involved in the litigation, to prepare a deponent was protected by the work product doctrine, because allowing identification of the documents as a group would reveal counsel's mental impressions. *Shelton* involved a deposition of defendant's in-house counsel, who was questioned as to the existence of certain documents. The court held that the work product doctrine protected knowledge of the existence of the documents, because any recollection of a document's existence would mean that it was important enough to remember, and thus "necessarily would reveal [counsel's] mental selective process." *Shelton, 805 F.2d at 1329*. As we have said, the nature of the aggregate reserve figures at issue here is such that revealing them will not necessarily reveal the specific case reserves and the protected mental impressions embodied therein. In both *Sporck* and *Shelton*, counsel's mental impressions, namely the impressions that certain documents were important or significant, would have been exposed to the world. Clairvoyants aside, no one will learn from the aggregate reserve figures what Searle's attorneys were thinking when they set individual case reserves.

[**14] **III**

ATTORNEY-CLIENT PRIVILEGE

Searle also argues that its risk management documents are protected by the attorney-client privilege. *Rule 501 of the Federal Rules of Evidence* [HN7] provides that evidentiary privileges are to be determined in accordance with state law in diversity actions. Consequently, the Minnesota attorney-client privilege, codified at *Minn. Stat. Ann. § 595.02 subd. 1(b)* (West Supp. 1987), [4] is applicable here.

4 *Minn. Stat. Ann. § 595.02 subd. 1(b)* (West Supp. 1987) provides:

> [HN8] An attorney cannot, without the consent of the attorney's client, be examined as to any communication made by the client to the attorney or the attorney's advice given thereon in the course of professional duty; nor can any employee of the attorney be examined as to the communication or advice, without the client's consent.

The risk management documents reflect attorney-client communications running in two directions. First, the aggregate reserve information contained in the documents incorporates the individual case reserve figures communicated by the legal department to the risk management department -- an attorney-to-client communication. Second, the record indicates that some of the risk management documents [**15] themselves were delivered to Searle attorneys -- a client-to-attorney communication.

Assuming *arguendo* that the attorney-client privilege attaches to the individual case reserve figures com-

municated [*403] by the legal department to the risk management department, [5] we do not believe the privilege in turn attaches to the risk management documents simply because they include aggregate information based on the individual case reserve figures. For the reasons that we have already stated in relation to the work product doctrine, we do not believe that the aggregate information discloses the privileged communications, which we are assuming the individual reserve figures represent, to a degree that makes the aggregate information privileged. [6] The attorney-to-client communications reflected in the risk management documents are therefore not protected by the attorney-client privilege.

5 We state no view whether the attorney-client privilege in fact attaches to the individual case reserve figures, other than to note that such a determination would require analysis of whether the individual reserve figures are based on confidential information provided by Searle. *United States v. Amerada Hess Corp., 619 F.2d 980, 986 (3d Cir. 1980)*; *Mead Data Central, Inc. v. United States Dep't of the Air Force, 184 U.S. App. D.C. 350, 566 F.2d 242, 254 (D.C. Cir. 1977)*; *see also Hickman v. Taylor, 329 U.S. 495, 508, 91 L. Ed. 451, 67 S. Ct. 385 (1947)*; *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)*. We need not decide whether the individual case reserve figures are protected in the light of our determination that even if they are it does not follow that the aggregate information in the risk management documents also is protected.

[**16]

6 [HN9] When a client acts on privileged information from his attorney, the results are protected from discovery to the extent that they disclose the privileged matter, directly or inferentially. *Cf. Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1977)*. Our holding is faithful to this principle. As we have discussed, the individual case reserve figures cannot be traced or inferred from the aggregate information.

Although the aggregate reserve information does not confer attorney-client privilege protection to the risk management documents, those documents that were given to Searle attorneys may still be privileged client-to-attorney communications. The special master devoted only a very brief discussion to this matter. Relying on *Brown v. St. Paul City Ry., 241 Minn. 15, 62 N.W.2d 688 (Minn. 1954)*, the special master stated: [HN10] "A business document is not made privileged by providing a copy to counsel. * * * Thus, those documents from one corporate officer to another with a copy sent to an attorney do not qualify as attorney client communications." Report I of Special Master, *supra*, at 7 (citation omitted). We perceive no error in this statement of the law, which [**17] appears to have been carefully applied by the special master to the point of redacting sections of privileged material from within individual documents.

Minnesota adheres to Professor Wigmore's classic statement of the attorney-client privilege, which requires that [HN11] an attorney-client communication relate to the purpose of obtaining legal advice before it is protected. [7] *Brown v. St. Paul City Ry., 241 Minn. 15, 62 N.W.2d 688, 700 (1954)* (quoting 8 Wigmore, *Evidence* § 2292 (3d ed.)); *see National Texture Corp. v. Hymes, 282 N.W.2d 890, 895-96 (Minn. 1979)*. Moreover, a number of courts have determined that the attorney-client privilege does not protect client communications that relate only business or technical data. *See First Wis. Mortgage Trust v. First Wis. Corp., 86 F.R.D. 160, 174 (E.D. Wis. 1980)*; *SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 515 (D. Conn.)* ("legal departments are not citadels in which public, business or technical information may be placed to defeat discovery and thereby ensure confidentiality"), *appeal dismissed, 534 F.2d 1031 (2d Cir. 1976)*. Just as the minutes of business meetings attended by attorneys are not automatically privileged, *see* [**18] *International Tel. & Tel. Corp. v. United Tel. Co., 60 F.R.D. 177, 185 (M.D. Fla. 1973)*; *Air-Shield, Inc. v. Air Reduction Co., 46 F.R.D. 96, 97 (N.D. Ill. 1968)*, business documents sent to corporate officers and employees, as well as the corporation's attorneys, do not become privileged automatically. Searle argues, however, that [*404] the special master formulated a *per se* rule barring privilege claims where a document is sent to corporate officials in addition to attorneys. We do not read the special master's report as establishing such an approach. [HN12] Client communications intended to keep the attorney apprised of business matters may be privileged if they embody "an implied request for legal advice based thereon." *Jack Winter, Inc. v. Koratron Co., 54 F.R.D. 44, 46 (N.D. Cal. 1971)*. Based on this view of the special master's report, we do not understand the district court to have taken an errant position on the law of the attorney-client privilege. Having stated the applicable law, and noting that there are only six sample documents before us, we decline any invitation to determine the applicability of the privilege to individual documents.

7 8 Wigmore, *Evidence* § 2292 (McNaughton rev. 1961) (emphasis omitted) states:

> (1) [HN13] Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose,

> (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

[**19] **IV**

SCOPE OF *RULE 26(b)(2)*

The district court's second certified question concerns whether *Fed. R. Civ. P. 26(b)(2)* limits discovery of the corporate risk management documents. *Rule 26(b)(2)* provides:

> [HN14] A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Searle argues that *Rule 26(b)(2)* contains an implicit limitation on the discovery of insurance information beyond the insurance agreement itself. Searle has produced its insurance policies. It now argues that all other insurance information, which it defines to include its reserve information, is nondiscoverable. Appellees respond that *Rule 26(b)(2)* was not intended to limit discovery but to end the conflict over the relevancy of insurance policies for discovery purposes. Thus we are presented with the question whether the reserve information of a self-insured defendant is discoverable.

The advisory committee's notes to *Rule 26(b)(2)* reveal that the rule, which was included in the 1970 [**20] amendments to the Federal Rules, was not intended to change existing law on discovery concerning self-insured businesses that maintain a reserve fund. *Fed. R. Civ. P. 26(b)(2)* advisory committee notes; *see Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 352* & n.16, *57 L. Ed. 2d 253, 98 S. Ct. 2380 (1978)*. Therefore, the controlling law on this question is that which would have applied to insurance agreements before the 1970 amendments, together with any recent developments concerning insurance documents other than agreements. Prior to the 1970 amendments, [HN15] "the discovery of matters pertaining to insurance depend[ed] on whether such information was 'relevant to the subject matter' or 'reasonably calculated to lead to admissible evidence.'" 4 J. Moore, *Moore's Federal Practice* para. 26.62[1] (2d ed. 1986). This standard, which comes from *Fed. R. Civ. P. 26(b)(1)*, remains applicable to insurance documents other than agreements. We cannot agree with Searle that *Rule 26(b)(2)* forecloses discovery of any insurance document beyond the agreement. First, the language of the rule itself plainly is not preclusive. Second, the advisory committee expressed concern, at least as to indemnity agreements, that *Rule 26(b)(2)* not be [**21] interpreted to protect insurance information from discovery when that information is relevant under *Rule 26(b)(1)*. *See id.* para. 26.62[2]. We hold, therefore, that insurance documents that are not discoverable under *Rule 26(b)(2)* remain discoverable in accordance with the provisions of *Rule 26(b)(1)*. [8] *Id.*

> 8 The district court reached the same conclusion, and decided that the risk management documents were discoverable under *Rule 26(b)(1)* because they relate to issues of notice, defect, and punitive damages. We find no reason to disturb this application of the relevant legal standard. Moreover, we also agree with the district court that even if *Rule 26(b)(2)* were to prevent discovery of insurance documents, we are doubtful that the risk management documents correctly can be termed insurance documents.

V

CONCLUSION

Although we have no disagreements with the law as stated by the special master, we [*405] recognize that our analysis may have resolved sub-issues not anticipated by the district court. We therefore instruct the district court to review its determinations with respect to the individual documents in the light of the views set forth in this opinion. [9] Moreover, our review [**22] of the sample documents leaves us with the definite impression that if they are truly representative of those that will ultimately be held to be discoverable, appellees will acquire nothing in the way of admissible evidence on the issue of liability or on the issue of damages, either compensatory or punitive. The sample documents reveal nothing more than the prudent business decisions that any corporation must necessarily make if it hopes to survive in this litigious age.

> 9 We are concerned about the reference to loss reserves for a specific case mentioned in the sample *in camera* documents submitted to us. Those references presumably should be redacted.

With the foregoing qualifications, the order of the district court is affirmed.

DISSENT BY: GIBSON

DISSENT

JOHN R. GIBSON, Circuit Judge, dissenting.

The court today correctly concludes that individual case reserves set by Searle's attorneys are protected as mental impressions, thoughts, and conclusions under the opinion work product doctrine. It then concludes that averages and aggregates derived from these reserves are not protected. There is a deep inconsistency in protecting the parts but determining that the sum of the parts and calculations [**23] based upon the protected figures are not protected.

The court properly reasons that because the Searle attorneys' specific case reserve figures "embody the attorney's [sic] estimate of anticipated legal expenses, settlement value, length of time to resolve the litigation, geographic considerations, and other factors," they reveal the attorneys' mental impressions concerning Searle's pending litigation and are therefore protected opinion work product. *Ante* slip op. at 8. The court then denies protection to the risk management documents, which were derived from the nondiscoverable mental impressions of Searle's attorneys and, as the special master found, "arguably [give the] plaintiffs some insight into Searle's attorneys' thought processes of setting reserves." Report I of Special Master, *Simon v. G.D. Searle & Co.*, No. 4-80-160, at 5-6 (D. Minn. Aug. 22, 1984). In allowing discovery of the risk management documents, the court fails to consider the full import of the mental impression/opinion work product doctrine, which gives virtually absolute protection to both the mental impressions of Searle's attorneys -- as contained in the specific case reserve figures and necessarily reflected [**24] in the risk management documents -- and the mental impressions of Searle's representatives, as contained in the risk management reports.

Since the Supreme Court's decision in *Hickman v. Taylor, 329 U.S. 495, 91 L. Ed. 451, 67 S. Ct. 385 (1947)*, the courts have recognized that particular solicitude is given mental impression/opinion work product as contrasted to the ordinary work product protection accorded other documents and materials prepared in anticipation of litigation. In *Upjohn Co. v. United States, 449 U.S. 383, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981)*, the Supreme Court recognized mental impression/opinion work product as "deserving special protection" under *Rule 26*. *Id. at 400*. The Court considered, but found unnecessary to decide, whether any showing of necessity could ever overcome the protection afforded such work product. It recognized, however, that simply showing "substantial need and inability to obtain the equivalent without undue hardship" is not sufficient. *Id. at 401*. In *Shelton v. American Motors Corp., 805 F.2d 1323 (8th Cir. 1986)*, we observed that the work product doctrine protects not only materials obtained or prepared in anticipation of litigation, "but also the attorney's mental impressions, including [**25] thought processes, opinions, conclusions, and legal theories." *Id. at 1328*; *see also Sporck v. Peil, 759 F.2d 312, 316 (3d Cir.)* ("*Rule 26(b)(3)* recognizes the distinction between 'ordinary' and 'opinion' work product first articulated by [*406] the Supreme Court in *Hickman v. Taylor*"), *cert. denied, 474 U.S. 903, 106 S. Ct. 232, 88 L. Ed. 2d 230 (1985)*; *In re Murphy, 560 F.2d 326, 336 (8th Cir. 1977)* ("opinion work product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances"). The court today fails to give full weight to the special protection accorded mental impression/opinion work product.

In the present case, we are asked to protect mental processes that go to the essence of the lawyer's expertise -- establishing the value of a legal claim and the fees and expenses that may be incurred in its defense. The litigation's ultimate cost to the client has great significance in determining whether a lawsuit will be tried or settled and, if settled, for what amount. Establishing the value of a claim is analytically complex, requiring an assessment of the body of evidence and the particular legal issues involved in each case, as well as an evaluation [**26] of the case's strengths and weaknesses. It is one of the more challenging and difficult tasks a lawyer confronts. In *Work Product of the Rulesmakers*, 53 Minn. L. Rev. 1269 (1969), Professor Edward H. Cooper discusses the importance of an attorney's private evaluation of a claim in facilitating the bargaining process inherent in our system of justice:

> Some of the areas in which the work product doctrine forecloses discovery are easily comprehended * * * as well. One obvious example is the need for protection against forced revelation of a party's evaluation of his case; as long as voluntary settlement is encouraged, it would be an intolerable intrusion on the bargaining process to allow one party to take advantage of the other's assessment of his prospects for victory and an acceptable settlement figure.

Id. at 1283.

The special master's report states that the aggregate reserve figures may give some insight into the mental processes of the lawyers in setting specific case reserves. This is inevitable, considering that these aggregates and

averages are based upon the attorneys' evaluations of the value of specific claims. Notably, this is not a situation where mental impressions [**27] are merely contained within and comprise a part of another document and can easily be redacted. Instead, the aggregate and average figures are derived from and necessarily embody the protected material. They could not be formulated without the attorneys' initial evaluations of specific legal claims. Thus, it is impossible to protect the mental impressions underlying the specific case reserves without also protecting the aggregate figures.

Apparently, the court reasons that if an attorney's mental impressions are revealed only indirectly and in a diluted manner, they are not protected as opinion work product. *See ante* slip op. at 8-9 & n.3. This, however, has never been used as a criteria for applying the opinion work product doctrine. In *Shelton v. American Motors Corp., supra*, we held that an attorney could not be compelled to acknowledge whether specific corporate documents existed because such acknowledgments would reveal her mental processes, which are protected under the opinion work product doctrine. *Id. at 1329*. The selection of documents involves a substantially less complex mental process than does arriving at a case reserve figure. In selecting documents, an attorney [**28] assesses a document's relevance and materiality to the legal issues in the case, and considers its admissibility. This analysis stops short of the weighing and evaluating necessary to determine case reserves. Yet, in *Shelton* we protected this information, for the opinion work product doctrine does not merely protect materials that, as the majority suggests, directly reveal an attorney's undiluted mental impressions. Instead, the doctrine is premised on values fundamental to the American scheme of justice and protects information that even "tends to reveal the attorney's mental processes." *Upjohn Co., 449 U.S. at 399*. The risk management documents certainly fall within this protected ambit. The relationship between the attorneys' mental impressions and these documents is no less tenuous than the relationship between the attorney's mental impressions and the information [*407] we held nondiscoverable in *Shelton*. *See also Sporck, 759 F.2d at 315-17* (selection of documents is in the "highly protected category of opinion work product").

The court is equally in error in focusing solely on the mental impressions of Searle's lawyers. While the court protects the mental impression/opinion [**29] work product concerning the attorneys' evaluation of the reserve necessary for each lawsuit, it fails to grant similar protection to the risk management department's opinion work product concerning the aggregate reserve necessary for the Cu-7 litigation. I find no basis in *Rule 26(b)(3)* for this distinction. *Rule 26(b)(3)* requires a court to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney *or other representative* of a party concerning the litigation." *Fed. R. Civ. P. 26(b)(3)* (emphasis added). Thus, protected work product is not confined to information or materials gathered or assembled by a lawyer. *Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 603, rev'd in part on other grounds, 572 F.2d 596, 606 (8th Cir. 1977)*. Instead, it includes materials gathered by any consultant, surety, indemnitor, insurer, agent or even the party itself. *Fed. R. Civ. P. 26(b)(3)*. The only question is whether the mental impressions were documented, by either a lawyer or nonlawyer, in anticipation of litigation. Here, in the face of pending litigation, the risk management group monitored, controlled, and anticipated the costs of the [**30] litigation. The group compiled the individual reserve figures established by Searle's attorneys and analyzed them in light of a number of variables to arrive at aggregate reserve figures. This is no less a mental impression concerning Searle's litigation than were the attorneys' thoughts in arriving at individual reserve figures.

The court concludes that the risk management documents cannot qualify for work product protection because they were not prepared in anticipation of litigation. It reasons that "Searle's business involves litigation," and, therefore, the risk management documents are for business planning purposes. *Ante* at 401. The court thus concludes that the risk management documents fall into the "ordinary course of business" exception to the work product doctrine. *See Fed. R. Civ. P. 26(b)(3)* advisory committee note. This analysis, however, causes the exception to swallow the rule and makes the anticipation-of-litigation test meaningless as it concerns materials prepared by a defendant's employees.

First, we cannot authorize discovery of documents containing representatives' mental impressions concerning pending litigation simply because the documents also serve [**31] a business purpose. It is difficult to imagine a document that is generated by a party's nonlawyer representatives in anticipation of litigation that does not also have some business purpose; the purposes are not mutually exclusive. Under the court's analysis, almost every document prepared by a nonlawyer is subject to discovery despite *Rule 26(b)(3)*'s concern with protecting opinion work product of both the lawyer and nonlawyer. *See id.* ("Subdivision (b)(3) reflects the trend of the cases by requiring a special showing, not merely as to materials prepared by an attorney, but also as to materials prepared in anticipation of litigation or preparation for trial by or for a party or any representative acting on his behalf.") If all such records were discoverable, a business would be seriously impaired in calculating and recording the financial aspects of litigation or in taking other necessary corporate action regarding the litigation. Of

course, just as not every document an attorney prepares concerning pending litigation is protected opinion work product, neither is every business document prepared by a nonlawyer. The determination, however, should not hinge on whether the material [**32] has an ancillary business purpose.

Second, in the present case, the business purposes of the documents were to keep track of, control, and plan for the costs of Searle's pending products liability litigation. Only by concluding that Searle is in the business of litigation can the court convert these litigation-oriented documents into business planning documents. The court reaches just this conclusion, however, [*408] when it reasons that "Searle's business involves litigation, just as it involves accounting, marketing, advertising, sales, and many other things." *Ante* at 401. In eroding the protection *Rule 26(b)(3)* affords, the court confronts Searle with a dilemma of Catch-22 proportions: if Searle were not involved in litigation, *Rule 26(b)(3)* would have no application, but because Searle is involved in litigation, the ordinary course of business business exception applies. Thus, litigation, the event that triggers application of the rule, also triggers application of the exception.

Moreover, when considered within the increasingly common context of mass products liability litigation, the aggregate and average figures may take on even greater significance. Today's products liability litigation [**33] often involves hundreds of lawsuits against one or more corporate defendants based upon a single or related products. The plaintiffs in these cases usually join forces and are represented by organized counsel. The defense, if not unified, is usually coordinated. Settlements can be negotiated so as to dispose of the claims of all or several plaintiffs at once. *See, e.g.*, 3A *L. Frumer & M. Friedman, Products Liability § 46A.07[1]* (1986); Rubin, *Mass Torts and Litigation Disasters, 20 Ga. L. Rev. 429, 431 (1986)* (Agent Orange class estimated to include between 600,000 and 2.4 million plaintiffs; 4,500 plaintiffs' lawyers settled claims for $180,000,000); Vairo, *Multi-Tort Cases: Cause for More Darkness on the Subject, or a New Role for Federal Common Law, 54 Fordham L. Rev. 167, 170 n.6 (1985)* (settlement fund established to dispose of 680 asbestos claims). Just as a specific reserve figure gives an opponent an unfair advantage in settlement negotiations, an aggregate reserve figure would give attorneys representing a group of opponents an equally unfair advantage. In this instance, the cases of forty plaintiffs with claims based on the Cu-7 have been consolidated [**34] for discovery in the Minnesota district court. Material that may be of questionable value in one case becomes more meaningful when considered in the context of a number of cases. We would be naive not to recognize the sophisticated analysis that is possible in this day of the computer. Comparison between different groups of cases and periods of time conceivably could give one party substantial insight into the thought processes of the other. Therefore, when the aggregate and average figures are produced for attorneys representing a large group of opposing litigants and are examined with reference to the entire group, the opposition obtains information containing the Searle attorneys' mental processes that is much less diluted and indirect than the court acknowledges. When we deal with so sensitive a mental process as the calculation of individual case reserves, the foundation for all of the aggregates and averages, *Rule 26(b)(3)*, *Upjohn*, *Shelton*, and *Murphy* mandate that we accord this material special protection. We fail to do so when we make the aggregate and average figures available to the opponent.

Significantly, Searle is defending not one but rather hundreds of Cu-7 [**35] lawsuits. *See* Thornton, *Intrauterine Devices*, Trial, Nov. 1986, at 44, 46 (Searle defending more than 600 Cu-7 lawsuits). Searle is undoubtedly concerned with each lawsuit, and the court properly recognizes that the Searle attorneys' mental impressions concerning each lawsuit are protected. Searle's greater concern, however, is its liability exposure and the costs related to defending this aggregate of lawsuits. When subjected to mass tort litigation, a defendant should be allowed to confidentially analyze the litigation as a whole, plan for its defense, and compare the costs of settlement with the costs of proceeding through trial. The aggregate and average reserves play an essential and unique role in these activities. By requiring Searle to share its assessments with its adversaries, the court unfairly hinders Searle's ability to organize its defense.

A party, in managing its litigation, should not be forced to provide materials to its opponent that necessarily reflect its lawyers' mental impressions regarding the litigation and contain its agents' mental impressions concerning the cost of the litigation. By concluding that the risk management [*409] documents are discoverable [**36] because they only indirectly reflect the attorneys' impressions and because they were created for business planning purposes, the court makes it extremely hazardous for a business to finance and plan for its defense. The incidental effect of this decision could be the failure of litigants to properly document and consider all the factors that bear upon the decision to try or settle lawsuits. *Cf. Hickman v. Taylor, 329 U.S. at 511* ("Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten.").

This is not a case where there has been limited discovery. Searle has produced over 500,000 documents. Those documents based on the mental impressions of its lawyers and representatives concerning litigation strategy

and costs, which the court today admits may be of limited value, should not be the subject of discovery.

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MSF HOLDING, LTD., Plaintiff, - against - FIDUCIARY TRUST COMPANY INTERNATIONAL, Defendant.

03 Civ. 1818 (PKL) (JCF)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2005 U.S. Dist. LEXIS 34171

December 7, 2005, Decided

PRIOR HISTORY: *MSF Holding Ltd. v. Fiduciary Trust Co. Int'l, 2005 U.S. Dist. LEXIS 27811 (S.D.N.Y., Nov. 10, 2005)*

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant company moved for reconsideration of the court's denial of its motion for a protective order seeking the return of documents that were inadvertently produced during discovery.

OVERVIEW: In the course of producing documents, defendant inadvertently produced two documents from its in-house counsel. The trial court denied defendant's motion for a protective order on the grounds that the e-mails were immune from discovery under the work product doctrine. The court acknowledged that it did not previously address whether the documents were immune from discovery under the attorney client privilege, so the motion for reconsideration was granted to consider that issue. Ultimately, the trial court denied the motion for protective order in total because defendant failed to establish that it took reasonable steps to prevent the disclosure of the documents as only 202 documents were produced. Further, the e-mails at issue reflected the exercise of a predominantly commercial function as they never alluded to a legal principle or engaged in legal analysis.

OUTCOME: The motion for reconsideration was granted for the sole purpose of reviewing the motion for a protective order in terms of the attorney-client privilege; otherwise, the trial court affirmed its denial of the motion for a protective order.

LexisNexis(R) Headnotes

Evidence > Privileges > Attorney-Client Privilege
[HN1] In-house counsel often fulfill the dual role of legal advisor and business consultant. Accordingly, to determine whether counsel's advice is privileged, a court looks to whether the attorney's performance depends principally on the attorney's knowledge of or application of legal requirements or principles, rather than the attorney's expertise in matters of commercial practice.

Civil Procedure > Discovery > Privileged Matters > General Overview
[HN2] In determining whether the release of documents during litigation was a knowing waiver or simply a mistake, immediately recognized and rectified, courts in this district consider four factors: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure, (2) the time taken to rectify the error, (3) the scope of the

discovery in proportion to the extent of the particular disclosure at issue, and (4) overarching issues of fairness.

COUNSEL: [*1] For MSF Holding, Ltd., Plaintiff: Spencer Lee Schneider, New York, NY; John F. Neupert, Miller Nash LLP, Portland, OR.

For Fiduciary Trust Company International, Defendant: Alan M. Gelb, Jones Hirsch Connors and Bull, P.C, New York, NY.

JUDGES: JAMES C. FRANCIS IV, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: JAMES C. FRANCIS IV

OPINION

MEMORANDUM AND ORDER

JAMES C. FRANCIS IV

UNITED STATES MAGISTRATE JUDGE

The defendant in this action, Fiduciary Trust Company International ("FTCI"), previously moved for a protective order seeking the return of two documents inadvertently produced during the course of discovery. In a Memorandum and Order dated November 10, 2005, I denied that motion, finding that FTCI had not met the threshold requirement of demonstrating that the documents were immune from discovery. FTCI has now moved for reconsideration on the ground that I addressed only its claim of work product protection and not its assertion of the attorney-client privilege. The application for reconsideration is granted, but, for the reasons set forth below, I adhere to my prior determination and deny FTCI's motion for a protective order.

Attorney-Client Privilege

The relevant facts [*2] are set forth in the November 10 Order. FTCI is correct that I did not explicitly address its claim of privilege. However, just as FTCI did not carry its burden of demonstrating that the two e-mails at issue were created in anticipation of litigation, so did it fail to show that those documents were authored by an attorney acting in her legal, as opposed to business, capacity. [HN1] In-house counsel often fulfill the dual role of legal advisor and business consultant. *See Bank Brussels Lambert v. Credit Lyonnais (Suisse), 220 F. Supp. 2d 283, 286 (S.D.N.Y. 2002)*. Accordingly, to determine whether counsel's advice is privileged, "we look to whether the attorney's performance depends principally on [her] knowledge of or application of legal requirements or principles, rather than [her] expertise in matters of commercial practice." *Note Funding Corp. v. Bobian Inv. Co., N.V., 1995 U.S. Dist. LEXIS 16605, No. 93 Civ. 7427, 1995 WL 662402, at *3 (S.D.N.Y. Nov. 9, 1995)*. In this case, the analysis is complicated slightly by the fact that the business decision of whether to honor the letter of credit necessarily occurs against the background of any legal obligation to do so.

Nevertheless, [*3] the e-mails at issue here reflect the exercise of a predominantly commercial function. Susan Garcia, the author of the communications and FTCI's Senior Vice President and Deputy Corporate Counsel, never alluded to a legal principle in the documents nor engaged in legal analysis. Instead, she collected facts just as any business executive would do in determining whether to pay an obligation. In doing so, she evidently relied on her knowledge of commercial practice rather than her expertise in the law. The documents are therefore not privileged.

Inadvertent Disclosure

Even if the e-mails were subject to the attorney-client privilege, that privilege would have been waived by their production in discovery. [HN2] In determining whether the release of documents during litigation was a "knowing waiver" or "simply a mistake, immediately recognized and rectified," courts in this district consider four factors: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure, (2) the time taken to rectify the error, (3) the scope of the discovery in proportion to the extent of the particular disclosure at issue, and (4) overarching issues of fairness. *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 104 F.R.D. 103, 105 (S.D.N.Y. 1985)*; [*4] *see also Denney v. Jenkins & Gilchrist, 362 F. Supp. 2d 407, 416-17 (S.D.N.Y. 2004)*; *United States v. Rigas, 281 F. Supp. 2d 733, 737-38 (S.D.N.Y. 2003)*; *Securities and Exchange Commission v. Cassano, 189 F.R.D. 83, 85 (S.D.N.Y. 1999)*.

Here, FTCI has failed to demonstrate that it took reasonable steps to prevent disclosure. Neither of the e-mails in question bears any legend identifying it as an attorney-client communication or as a document prepared in anticipation of litigation. Had FTCI intended to preserve the confidentiality of these documents, it should have taken such an elementary precaution. Furthermore, although the two documents produced were initially reviewed by counsel and identified for redaction, FTCI has offered no explanation of how they then came to be released in unredacted form.

FTCI did act promptly upon learning of the disclosure. When the plaintiff relied upon the e-mails in its summary judgment motion, FTCI immediately sought their return.

The scope of disclosure, however, is an important factor that weighs against FTCI's claim of inadvertence. These two e-mails were contained in a production of only 154 [*5] documents totaling 202 pages. This was not a disclosure of numerous electronic documents where privilege review might legitimately be based on an imperfect computerized search rather than individual document review. Nor was it a massive production of paper, such that some degree of human error was inevitable.

Finally, there is no overarching principle of fairness favoring either side. If deprived of the ability to rely on the e-mails, the plaintiff would simply be relegated to the position it would have been in had FTCI properly preserved any privilege. Conversely, if a privilege is breached, that is a price FTCI pays for its own negligence.

Considering all of the *Lois Sportswear* factors, the balance tips in favor of the plaintiff. FTCI was simply too cavalier in protecting any privilege, and it has failed to adequately explain the circumstances of the disclosure in the context of a very modest document production. These considerations outweigh FTCI's promptness in seeking to rectify its error and the absence of any serious prejudice to the plaintiff.

Conclusion

Upon reconsideration, I find that FTCI has failed to demonstrate that the two documents in question are either [*6] attorney-client communications or work product and, even if they were, their disclosure has waived any immunity. FTCI's motion for a protective order is therefore denied.

SO ORDERED.

JAMES C. FRANCIS IV

UNITED STATES MAGISTRATE JUDGE

Dated: New York, New York

December 7, 2005

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Cooper-Rutter Associates, Inc., respondent, v. Anchor National Life Insurance Co., et al., appellants

No. 90-00417

Supreme Court of New York, Appellate Division, Second Department

168 A.D.2d 663*; *563 N.Y.S.2d 491*; *1990 N.Y. App. Div. LEXIS 15984

December 3, 1990, Submitted
December 31, 1990

PRIOR HISTORY: [**1] In an action, *inter alia*, to recover damages for breach of contract, the defendants appeal from so much of an order of the Supreme Court, Dutchess County (Jiudice, J.), entered February 27, 1990, as denied those branches of their motion which were for a protective order with respect to two items sought by the plaintiff during pretrial disclosure, identified by the defendants as times numbered 57 and 65 on a schedule of purportedly privileged documents.

DISPOSITION: ORDERED that the order is affirmed insofar as appealed from, with costs.

COUNSEL: O'Connell and Aronowitz, Albany, New York (Neil H. Rivchin and David M. Cherubin of counsel), for appellants.

Berger & Steingut, New York, New York (Theodore S. Steingut and Lawrence A. Mandelker of counsel), for respondent.

JUDGES: William C. Thompson, J.P., Charles B. Lawrence, Joseph J. Kunzeman, Albert M. Rosenblatt, JJ., concur.

OPINION

DECISION & ORDER

[*492] This appeal concerns so much of an order of the Supreme Court as denied the defendants' motion for a protective order with respect to two documents sought by the plaintiff during pretrial disclosure. Based upon our in camera review of the disputed documents, two [**2] handwritten memoranda prepared by an individual who was both in-house counsel and corporate secretary to one of the defendants, we conclude that the defendants did not sustain their burden of establishing that the documents were shielded by the attorney-client privilege (*see, Matter of Priest v Hennessy, 51 NY2d 62, 68-69)*. The documents, prepared more than six months prior to the commencement of the instant action, concern both the business and legal aspects of the defendants' ongoing negotiations with the plaintiff with respect to the business transaction out of which the underlying lawsuit ultimately arose. As such, the documents were not primarily of a legal character, but expressed substantial nonlegal concerns (*see, Rossi v Blue Cross & Blue Shield of Greater N.Y., 73 NY2d 588*; *Bekins Record Stor. Co.* [*In re Grand Jury Subpoena*], *62 NY2d 324*; 5 Weinstein-Korn-Miller, *NY Civ Prac § 4503.05*). Under these circumstances, the Supreme Court properly determined that the documents were not shielded by the attorney-client privilege and therefore were discoverable.

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In re: THE COUNTY OF ERIE, ADAM PRITCHARD, EDWARD ROBINSON, and JULENNE TUCKER, both individually and on behalf of a class of others similarly situated, Plaintiffs-Respondents, v. THE COUNTY OF ERIE, PATRICK GALLIVAN, both individually and in his official capacity as Sheriff of the County of Erie, TIMOTHY HOWARD, both individually and as Undersheriff of the County of Erie, DONALD LIVINGSTON, both individually and as Acting Superintendent of the Erie County Correctional Facility, and ROBERT HUGGINS, both individually and as Deputy Superintendent of the Erie County Correctional Facility, Defendants-Petitioners, H. MCCARTHY GIBSON, both individually and as Superintendent of the Erie County Holding Center, Defendant.

Docket No. 06-2459-op

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

473 F.3d 413*; *2007 U.S. App. LEXIS 26

September 12, 2006, Submitted
January 3, 2007, Decided

SUBSEQUENT HISTORY: On remand at, Motion denied by *Pritchard v. County of Erie, 2007 U.S. Dist. LEXIS 42528 (W.D.N.Y., June 11, 2007)*

PRIOR HISTORY: [**1] Motion for a writ of mandamus ordering the United States District Court for the Western District of New York (Curtin, J.) to vacate an order compelling production of communications asserted to be protected by the attorney-client privilege. For the reasons that follow, we issue the writ ordering the district court to vacate its order; to determine whether the privilege was otherwise waived; and to enter an appropriate order in the interim, protecting the confidentiality of the disputed communications.
Pritchard v. County of Erie, 2006 U.S. Dist. LEXIS 94775 (W.D.N.Y., Apr. 7, 2006)

DISPOSITION: The court issued a writ of mandamus ordering the district order to vacate its order, to determine whether the distribution of some of the disputed e-mails to others within the county sheriff's department constituted a waiver of the attorney-client privilege, and to enter an interim order to protect the confidentiality of the disputed communications.

CASE SUMMARY:

PROCEDURAL POSTURE: In a *42 U.S.C.S. § 1983* action, plaintiff detainees alleged that they were subjected to strip searches that violated the *Fourth Amendment*. Defendants, a county and its officials, filed a petition for a writ of mandamus directing the United States District Court for the Western District of New York to vacate an order requiring production of certain e-mails between a county attorney and county officials.

OVERVIEW: The e-mails at issue discussed the compliance of the county's existing search policy with the *Fourth Amendment*, any liability of the county and its officials stemming from the existing policy, alternative search policies, guidance for implementing alternative policies, and evaluations of the county's progress in implementing an alternative search policy. Finding that the e-mails went beyond rendering legal analysis, the district

court concluded that the e-mails were not privileged. In granting the writ of mandamus, the court held that the e-mails were privileged because they were sent for the predominant purpose of soliciting or rendering legal advice. The court found that the e-mails conveyed a lawyer's assessment of *Fourth Amendment* requirements to the public officials responsible for formulating, implementing, and monitoring the county's corrections policies and provided guidance in crafting and implementing alternative policies for compliance. Such advice, particularly when viewed in the context in which it was solicited and rendered, did not constitute general policy or political advice unprotected by the attorney-client privilege.

OUTCOME: The court issued a writ of mandamus ordering the district order to vacate its order, to determine whether the distribution of some of the disputed e-mails to others within the county sheriff's department constituted a waiver of the attorney-client privilege, and to enter an interim order to protect the confidentiality of the disputed communications.

LexisNexis(R) Headnotes

Civil Procedure > Remedies > Writs > Common Law Writs > Mandamus
Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders
Evidence > Privileges > General Overview
[HN1] Ordinarily, pretrial discovery orders involving a claim of privilege are unreviewable on interlocutory appeal, and the United States Court of Appeals for the Second Circuit has expressed reluctance to circumvent this salutary rule by use of mandamus. At the same time, the writ is appropriate to review discovery orders that potentially invade a privilege, where: (A) the petition raises an important issue of first impression; (B) the privilege will be lost if review must await final judgment; and (C) immediate resolution will avoid the development of discovery practices or doctrine that undermine the privilege.

Evidence > Privileges > Attorney-Client Privilege > Scope
Governments > Local Governments > Employees & Officials
[HN2] The attorney-client privilege protects communications that pass between a government lawyer having no policymaking authority and a public official, where those communications assess the legality of a policy and propose alternative policies in that light.

Evidence > Privileges > Attorney-Client Privilege > General Overview
[HN3] To encourage full and frank communication between attorneys and their clients, lawyers and clients need to know which of their communications are protected. An uncertain privilege is little better than no privilege.

Evidence > Privileges > Attorney-Client Privilege > Scope
[HN4] The attorney-client privilege protects confidential communications between client and counsel made for the purpose of obtaining or providing legal assistance. Its purpose is to encourage attorneys and their clients to communicate fully and frankly and thereby to promote broader public interests in the observance of law and administration of justice. The availability of sound legal advice inures to the benefit not only of the client who wishes to know his options and responsibilities in given circumstances, but also of the public which is entitled to compliance with the ever growing and increasingly complex body of public law.

Evidence > Privileges > Attorney-Client Privilege > Scope
[HN5] The court construes the attorney-privilege narrowly because it renders relevant information undiscoverable; the court applies it only where necessary to achieve its purpose.

Evidence > Privileges > Attorney-Client Privilege > General Overview
Evidence > Procedural Considerations > Burdens of Proof > Allocation
[HN6] The burden of establishing the applicability of the attorney-client privilege rests with the party invoking it.

Evidence > Privileges > Attorney-Client Privilege > General Overview
Governments > Local Governments > Claims By & Against
[HN7] In civil suits between private litigants and government agencies, the attorney-client privilege protects most confidential communications between government counsel and their clients that are made for the purpose of obtaining or providing legal assistance.

Evidence > Privileges > Attorney-Client Privilege > General Overview

Governments > Local Governments > Employees & Officials

[HN8] The attorney-client privilege accommodates competing values; the competition is sharpened when the privilege is asserted by a government. On the one hand, nondisclosure impinges on open and accessible government. On the other hand, public officials are duty-bound to understand and respect constitutional, judicial and statutory limitations on their authority; thus, their access to candid legal advice directly and significantly serves the public interest. The traditional rationale for the attorney-client privilege applies with special force in the government context. It is crucial that government officials, who are expected to uphold and execute the law and who may face criminal prosecution for failing to do so, be encouraged to seek out and receive fully informed legal advice. Upholding the privilege furthers a culture in which consultation with government lawyers is accepted as a normal, desirable, and even indispensable part of conducting public business. Abrogating the privilege undermines that culture and thereby impairs the public interest.

Evidence > Privileges > Attorney-Client Privilege > General Overview

Governments > Local Governments > Claims By & Against

[HN9] Access to legal advice by officials responsible for formulating, implementing and monitoring governmental policy is fundamental to promoting broader public interests in the observance of law and administration of justice. At least in civil litigation between a government agency and private litigants, the government's claim to the protections of the attorney-client privilege is on a par with the claim of an individual or a corporate entity.

Evidence > Privileges > Attorney-Client Privilege > Elements

[HN10] 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.

Evidence > Privileges > Attorney-Client Privilege > General Overview

[HN11] Fundamentally, legal advice involves the interpretation and application of legal principles to guide future conduct or to assess past conduct. It requires a lawyer to rely on legal education and experience to inform judgment. But it is broader, and is not demarcated by a bright line. The modern lawyer almost invariably advises his client upon not only what is permissible but also what is desirable. And it is in the public interest that the lawyer should regard himself as more than a predictor of legal consequences. His duty to society as well as to his client involves many relevant social, economic, political and philosophical considerations. And the privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice. The United States Court of Appeals for the Second Circuit considers whether the predominant purpose of a communication is to render or solicit legal advice.

Evidence > Privileges > Attorney-Client Privilege > General Overview

[HN12] The complete lawyer may well promote and reinforce legal advice given, weigh it, and lay out its ramifications by explaining: how the advice is feasible and can be implemented; the legal downsides, risks and costs of taking the advice or doing otherwise; what alternatives exist to present measures or the measures advised; what other persons are doing or thinking about the matter; or the collateral benefits, risks or costs in terms of expense, politics, insurance, commerce, morals, and appearances. So long as the predominant purpose of the communication is legal advice, these considerations and caveats are not other than legal advice or severable from it. The predominant purpose of a communication cannot be ascertained by quantification or classification of one passage or another; it should be assessed dynamically and in light of the advice being sought or rendered, as well as the relationship between advice that can be rendered only by consulting the legal authorities and advice that can be given by a non-lawyer.

Evidence > Privileges > Attorney-Client Privilege > General Overview

[HN13] A lawyer's lack of formal authority to formulate, approve or enact policy does not actually prevent the rendering of policy advice to officials who do possess that authority. When an attorney is consulted in a capacity other than as a lawyer, as, for example, a policy advisor, media expert, business consultant, banker, referee or friend, that consultation is not privileged.

Evidence > Privileges > Attorney-Client Privilege > General Overview

Governments > Local Governments > Employees & Officials

[HN14] When a lawyer has been asked to assess compliance with a legal obligation, the lawyer's recommendation of a policy that complies (or better complies) with

the legal obligation--or that advocates and promotes compliance, or oversees implementation of compliance measures--is legal advice. Public officials who craft policies that may directly implicate the legal rights or responsibilities of the public should be encouraged to seek out and receive fully informed legal advice in the course of formulating such policies. The availability of sound legal advice inures to the benefit not only of the client but also of the public which is entitled to compliance with the ever growing and increasingly complex body of public law.

COUNSEL: FRANK T. GAGLIONE, Hiscock & Barclay LLP, Buffalo, NY, for Defendants-Petitioners.

ELMER ROBERT KEACH, III, Law Offices of Elmer Robert Keach, III, PC, Amsterdam, NY; Jonathan W. Cuneo, Charles J. LaDuca, Alexandra Coler, Cuneo, Gilbert & Laduca, LLP, Washington, DC; Gary E. Mason, Nicholas A. Migliaccio, The Mason Law Firm, PC, Washington, DC; Alexander E. Barnett, The Mason Law Firm, P.C., New York, NY; David Gerald Jay, Buffalo, NY; Bruce E. Menken, Jason J. Rozger, Beranbaum Menken Ben-Asher & Biermam LLP, New York, NY, for Plaintiffs-Respondents.

JUDGES: Before: JACOBS, Chief Judge, CARDAMONE and MINER, Circuit Judges.

OPINION BY: DENNIS JACOBS

OPINION

[*415] DENNIS JACOBS, *Chief Judge*:

[**2] In the course of a lawsuit by a class of arrested persons against Erie County (and certain of its officials) alleging that they were subjected to unconstitutional strip searches, the United States District Court for the Western District of New York (Curtin, *J.*) ordered the discovery of e-mails (and other documents) between an Assistant Erie County Attorney and County officials that solicit, contain and discuss advice from attorney to client. The County defendants petition for a writ of mandamus directing the district court to vacate that order. The writ is available because: important issues of first impression are raised; the privilege will be irreversibly lost if review awaits final judgment; and immediate resolution of this dispute will promote sound discovery practices and doctrine. Upon consideration of the circumstances, we issue the writ ordering the district court: to vacate its order, to determine whether the privilege was otherwise waived, and to enter an interim order to protect the confidentiality of the disputed communications.

I

On July 21, 2004, plaintiffs-respondents Adam Pritchard, Edward Robinson and [*416] Julenne Tucker commenced suit under *42 U.S.C. § 1983* [**3] , individually and on behalf of a class of others similarly situated, alleging that, pursuant to a written policy of the Erie County Sheriff's Office and promulgated by County officials, every detainee who entered the Erie County Holding Center or Erie County Correctional Facility (including plaintiffs) was subjected to an invasive strip search, without regard to individualized suspicion or the offense alleged, and that this policy violates the *Fourth Amendment*. [1] They sued the County of Erie, New York, as well as Erie County Sheriff Patrick Gallivan; Undersheriff Timothy Howard; the acting Superintendent of the Erie County Correctional Facility, Donald Livingston; the Deputy Superintendent, Robert Huggins; and the Superintendent of the Erie County Holding Center, H. McCarthy Gibson (collectively, the "County").

1 We intimate no view as to the underlying merits.

During the course of discovery, the County withheld production of certain documents as privileged attorney-client communications; a privilege log [**4] was produced instead, pursuant to the Federal Rules of Civil Procedure and Local Civil Rules for the Western District of New York. In August 2005, plaintiffs moved to compel production of the logged documents, almost all of which were e-mails. The County submitted the documents to Magistrate Judge Hugh B. Scott for inspection *in camera*. In January 2006, Judge Scott ordered production of ten of the withheld e-mails, [2] which (variously) reviewed the law concerning strip searches of detainees, assessed the County's current search policy, recommended alternative policies, and monitored the implementation of these policy changes.

2 Certain of these e-mails are better characterized as e-mail chains, because they contain the initial e-mail as well as subsequent responses. Because the chains concern the subject of the original e-mail, for simplicity's sake, we use the term "e-mail" to encompass the entire e-mail "conversation."

Judge Scott reasoned that:

. These communications "go beyond rendering 'legal [**5] analysis' [by] propos[ing] changes to existing policy to make it constitutional, including drafting of policy regulations";

. The "drafting and subsequent oversight of implementation of the new strip search policy ventured beyond merely rendering legal advice and analysis into the realm of policy making and administration"; and

. "[N]o legal advice is rendered apart from policy recommendations."

Judge Scott ordered the County to deliver these ten e-mails to the plaintiffs.

After considering the County's objections to this order, the district court independently reviewed the disputed e-mails *in camera* and, applying a "clearly erroneous" standard, overruled the objections, and directed production. This petition for a writ of mandamus followed.

II

[HN1] Ordinarily, pretrial discovery orders involving a claim of privilege are unreviewable on interlocutory appeal, "and we have expressed reluctance to circumvent this salutary rule by use of mandamus." *In re W.R. Grace & Co., 984 F.2d 587, 589 (2d Cir. 1993)*. At the same time, the writ is appropriate to review discovery orders that potentially invade a privilege, where: (A) the petition raises [**6] an important issue of first impression; (B) the privilege will be lost if review must await final judgment; and (C) immediate resolution [*417] will avoid the development of discovery practices or doctrine that undermine the privilege. *Chase Manhattan Bank, N.A. v. Turner & Newall PLC, 964 F.2d 159, 163 (2d Cir. 1992)*; *In re Long Island Lighting Co., 129 F.3d 268, 270 (2d Cir. 1997)*. (Although the County argues that any single showing is enough, the test sprouts three prongs; in any event, the County prevails on all three.)

(A) This petition raises an issue of first impression: whether [HN2] the attorney-client privilege protects communications that pass between a government lawyer having no policymaking authority and a public official, where those communications assess the legality of a policy and propose alternative policies in that light. [3] The issue is not unimportant.

> 3 The parties have not raised the applicability of the deliberative process privilege. *See Nat'l Council of La Raza v. Dep't of Justice, 411 F.3d 350, 356 (2d Cir. 2005)* ("[T]he deliberative process privilege [is] a sub-species of work-product privilege that covers documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." (internal quotation marks omitted)).

[**7] "[T]here is little case law addressing the application of the attorney-client privilege" in the government context. *In re Grand Jury Investigation, 399 F.3d 527, 530 (2d Cir. 2005)*; *see also Ross v. City of Memphis, 423 F.3d 596, 601 (6th Cir. 2005)* (same). The issue of first impression here concerns policy advice rendered by a government lawyer, and the distinction between (on the one hand) attorney-client privileged recommendations designed to achieve compliance with the law or reduce legal risk, and (on the other) recommendations made for other reasons, which advice may not be privileged. [4]

> 4 Respondents assert that this issue is not novel and that it was raised in *Mobil Oil Corp. v. Dep't of Energy, 102 F.R.D. 1 (N.D.N.Y. 1983)*. *Mobil Oil* is useful; but it applies the familiar requirement that a factual communication sent to an attorney is protected by the attorney-client privilege only if the communication was generated for the purpose of securing legal assistance. *Id. at 9-10*. Because in that case it was "impossible to determine" whether certain factual memoranda were sent to government lawyers primarily for the purpose of securing legal assistance, the government did not discharge its burden to prove that the privilege applied. *Id.*

[**8] (B) Post-judgment relief would be inadequate to protect the privilege, if it exists; this consideration "justifies the more liberal use of mandamus in the context of privilege issues." *In re Long Island Lighting Co., 129 F.3d at 271*; *see also In re von Bulow, 828 F.2d 94, 99 (2d Cir. 1987)*.

A motions panel of this Court denied the County's motion for a stay pending appeal, so the communications at issue are already in plaintiffs' hands. Plaintiffs argue that the dispute is now moot because "the risks associated with the development of discovery practices . . . undermining the privilege . . . have already been realized. "Issuing the writ "cannot unsay the confidential information that has been revealed." *In re von Bulow, 828 F.2d at 99*. In the circumstances presented, the privilege can nevertheless be vindicated by preventing the use of the documents during further discovery (including, for example, in depositions, interrogatories, document requests and pretrial motions) and at trial.

(C) To await resolution of this issue pending final judgment risks the development of discovery practices and doctrine that unsettle and undermine [**9] the governmental attorney-client privilege. *See Chase Manhattan, 964 F.2d at 164*. [HN3] To "encourage full and frank communication [*418] between attorneys and their clients," *Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)*, lawyers and clients need to know which of their communications are protected. "An uncertain privilege . . . is little better than no privilege." *In re von Bulow, 828 F.2d at 100*. The "potentially broad applicability and influence of the privilege ruling" weighs heavily in favor of adjudicating the dispute now. *In re Long Island Lighting Co., 129 F.3d at 271*.

III

[HN4] The attorney-client privilege protects confidential communications between client and counsel made for the purpose of obtaining or providing legal assistance. *United States v. Construction Prods. Research, 73 F.3d 464, 473 (2d Cir. 1996)*. Its purpose is to encourage attorneys and their clients to communicate fully and frankly and thereby to promote "broader public interests in the observance of law and administration of justice." *Upjohn, 449 U.S. at 389*; *see also In re John Doe, Inc., 13 F.3d 633, 635-36 (2d Cir. 1994)*. [**10] "The availability of sound legal advice inures to the benefit not only of the client who wishes to know his options and responsibilities in given circumstances, but also of the public which is entitled to compliance with the ever growing and increasingly complex body of public law." , *In re Grand Jury Subpoena Duces Tecum 731 F.2d 1032, 1036-37 (2d Cir. 1984)*.

At the same time, [HN5] we construe the privilege narrowly because it renders relevant information undiscoverable; we apply it "only where necessary to achieve its purpose." *Fisher v. United States, 425 U.S. 391, 403, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976)*; *see In re Grand Jury Investigation, 399 F.3d at 531*. [HN6] The burden of establishing the applicability of the privilege rests with the party invoking it. *In re Grand Jury Proceedings, 219 F.3d 175, 182 (2d Cir. 2000)*; *United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am., AFL-CIO, 119 F.3d 210, 214 (2d. Cir 1997)*.

[HN7] In civil suits between private litigants and government agencies, the attorney-client privilege protects most confidential communications between government [**11] counsel and their clients that are made for the purpose of obtaining or providing legal assistance. [5] *In re Grand Jury Investigation, 399 F.3d at 532*; *see, e.g., Ross v. City of Memphis, 423 F.3d 596, 601 (6th Cir. 2005)* ("[A] government entity can assert attorney-client privilege in the civil context."); *In re Lindsey, 331 U.S. App. D.C. 246, 148 F.3d 1100, 1107 (D.C. Cir. 1998)* (*per curiam*) (noting the existence of "a government attorney-client privilege that is rather absolute in civil litigation"); *cf.* Proposed Fed. R. Evid. 503(a)(1), *reprinted in 56 F.R.D. 183, 235 (1972)* (describing a client, for the purpose of defining the attorney-client privilege, as a "person, *public officer*, or corporation, association, or other organization or entity, *either public or private*") (emphasis added).

> 5 Certain limitations to the government attorney-client privilege, not implicated here, may render an otherwise- protectable communication unprotected. *See Nat'l Council of La Raza, 411 F.3d at 360-61* (holding that the government could not invoke the attorney-client privilege to bar disclosure of a legal memorandum where the government had incorporated it into its policy by repeatedly, publicly and expressly relying upon its reasoning and had adopted its reasoning as authoritative within the agency); *see also Niemeier v. Watergate Special Prosecution Force, 565 F.2d 967, 974 (7th Cir. 1977)*; *Falcone v. IRS, 479 F. Supp. 985, 989-90 (E.D. Mich. 1979)*.

[**12] [HN8] The attorney-client privilege accommodates competing values; the competition is [*419] sharpened when the privilege is asserted by a government. On the one hand, non-disclosure impinges on open and accessible government. *See Reed v. Baxter, 134 F.3d 351, 356-57 (6th Cir. 1998)*. On the other hand, public officials are duty-bound to understand and respect constitutional, judicial and statutory limitations on their authority; thus, their access to candid legal advice directly and significantly serves the public interest:

> We believe that, if anything, the traditional rationale for the [attorney-client] privilege applies with special force in the government context. It is crucial that government officials, who are expected to uphold and execute the law and who may face criminal prosecution for failing to do so, be encouraged to seek out and receive fully informed legal advice. Upholding the privilege furthers a culture in which consultation with government lawyers is accepted as a normal, desirable, and even indispensable part of conducting public business. Abrogating the privilege undermines that culture and thereby impairs the public interest.

In re Grand Jury Investigation, 399 F.3d at 534. [**13] [HN9] Access to legal advice by officials responsible for formulating, implementing and monitoring governmental policy is fundamental to "promot[ing] broader public interests in the observance of law and administration of justice," *Upjohn, 449 U.S. at 389*. At least in civil litigation between a government agency and private litigants, the government's claim to the protections of the attorney-client privilege is on a par with the claim of an individual or a corporate entity.

IV

[HN10] 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. *Construction Prods. Research, 73 F.3d at 473*. At issue here is the third consideration: whether the communications were made for the purpose of obtaining or providing legal advice, as opposed to advice on policy. [6]

> 6 As discussed *infra* in Part VI, we remand to the district court to consider whether petitioners waived the privilege through distribution of certain e-mails. However, that is not the focus of this opinion, and we intimate no view of its resolution on remand.

[**14] The rule that a confidential communication between client and counsel is privileged only if it is generated for the purpose of obtaining or providing legal assistance is often recited. The issue usually arises in the context of communications to and from corporate in-house lawyers who also serve as business executives. *See, e.g., MSF Holding, Ltd. v. Fiduciary Trust Co. Int'l, No. 03 Civ. 1818, 2005 U.S. Dist. LEXIS 34171, 2005 WL 3338510, at *1 (S.D.N.Y. Dec. 27, 2005)*; *Bank Brussels Lambert v. Credit Lyonnais (Suisse), 220 F. Supp. 2d 283, 286 (S.D.N.Y. 2002)*; *U.S. Postal Serv. v. Phelps Dodge Refining Corp., 852 F. Supp. 156, 160 (E.D.N.Y. 1994)*. So the question usually is whether the communication was generated for the purpose of obtaining or providing legal advice as opposed to business advice. *See , In re Grand Jury Subpoena Duces Tecum,731 F.2d at 1036-37*.

[HN11] Fundamentally, legal advice involves the interpretation and application of legal principles to guide future conduct or to assess past conduct. *See generally* 1 Paul R. Rice, *Attorney Client Privilege in the United States* § 7:9 (2d ed. 1999). It requires [**15] a lawyer to rely on legal education and experience to inform judgment. *Ball v. United States Fidelity & Guaranty Co., No. M8-85, 1989 U.S. Dist. LEXIS 13363, 1989* [*420] *WL 135903, at *1 (S.D.N.Y. Nov. 8, 1989)* (reasoning that legal advice "involve[s] the judgment of a lawyer in his capacity as a lawyer"). But it is broader, and is not demarcated by a bright line. What Judge Wyzanski observed long ago applies with equal force today:

> The modern lawyer almost invariably advises his client upon not only what is permissible but also what is desirable. And it is in the . . . public interest that the lawyer should regard himself as more than [a] predicter of legal consequences. His duty to society as well as to his client involves many relevant social, economic, political and philosophical considerations. And the privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice.

United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 359 (D. Mass. 1950). We consider whether the predominant purpose of the communication is to render or solicit legal advice. *United States v. International Business Machines Corp., 66 F.R.D. 206, 212 (S.D.N.Y. 1974)*; [**16] *see also In re Buspirone Antitrust Litig., 211 F.R.D. 249, 252-53 (S.D.N.Y. 2002)* (employing the "primary purpose" standard in assessing whether the attorney-client privilege protects certain documents); *In re Grand Jury Proceedings, No. M-11-198, 2001 U.S. Dist. LEXIS 15646, 2001 WL 1167497, at *25 (S.D.N.Y. Oct. 3, 2001)* (same); *Armstrong v. Brookdale Hosp.*, No. 98 Civ. 2416, 1999 WL 690149, at *2 (E.D.N.Y. Aug. 28, 1999) (same); *U.S. Postal Serv., 852 F. Supp. at 163* (applying a "dominant purpose" standard). [7]

> 7 In *dicta*, this Court has observed that "[t]he [corporate attorney-client] privilege is clearly limited to communications made to attorneys *solely* for the purpose of the corporation seeking legal advice and its counsel rendering it." *In re John Doe Corp., 675 F.2d 482, 488 (2d Cir. 1982)* (emphasis added). However, because the Court held that the corporation had waived the privilege (and because there was cause to believe that the crime-fraud exception applied), the issue was not further considered. *Id. at 488-89*. As discussed in the accompanying text, however, we think the predominant-purpose rule is the correct one. *Accord In re Lindsey, 158 F.3d at 1106*; *In re Grand Jury Subpoena, 204 F.3d 516, 520 n.1 (4th Cir. 2000)* (requiring that the confidential communication must be made "for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding"); *Montgomery County v. MicroVote Corp., 175 F.3d 296, 301 (3d Cir. 1999)* (same); *United States v. Robinson, 121 F.3d 971, 974 (5th Cir. 1997)* (same); *see also* Rice, *Attorney Client Privilege in the United States* § 7:5 ("[T]here is general agreement that the protection of the privilege applies only if the *primary or*

predominate purpose of the attorney-client consultation is to seek legal advice or assistance." (emphasis in original)); 24 Charles Alan Wright & Kenneth W. Graham, *Federal Practice and Procedure* § 5490 (1986) (observing that while this issue is "seldom discussed by the courts and writers," the majority rule is the "dominant purpose doctrine").

[**17] [HN12] The complete lawyer may well promote and reinforce the legal advice given, weigh it, and lay out its ramifications by explaining: how the advice is feasible and can be implemented; the legal downsides, risks and costs of taking the advice or doing otherwise; what alternatives exist to present measures or the measures advised; what other persons are doing or thinking about the matter; or the collateral benefits, risks or costs in terms of expense, politics, insurance, commerce, morals, and appearances. So long as the predominant purpose of the communication is legal advice, these considerations and caveats are not other than legal advice or severable from it. The predominant purpose of a communication cannot be ascertained by quantification or classification of one passage or another; it should be assessed dynamically and in light of the advice being sought or rendered, as well as the [*421] relationship between advice that can be rendered only by consulting the legal authorities and advice that can be given by a non-lawyer. [8] The more careful the lawyer, the more likely it is that the legal advice will entail follow-through by facilitation, encouragement and monitoring.

8 Importantly, redaction is available for documents which contain legal advice that is incidental to the non-legal advice that is the predominant purpose of the communication. *See, e.g., United States v. Weissman, No. 94 Cr. 760, 1995 U.S. Dist. LEXIS 5476, 1995 WL 244522, at *4 (S.D.N.Y. Apr. 26, 1995)* (recognizing the availability of redaction to protect legal advice in hybrid documents); *Detection Sys., Inc. v. Pittway Corp., 96 F.R.D. 152, 155 (W.D.N.Y. 1982)* ("In those instances where both privileged and non-privileged material exist, the privileged material has been deleted.").

[**18] **V**

The County asserts that the Assistant County Attorney whose advice was solicited could not have been conveying non-legal policy advice because the Erie County Charter (§ 602) confines her authority to that of a "legal advisor," and because "only the County Sheriff and his direct appointees ha[ve] policy-making authority for the [Sheriff's] department." This argument does not assist the analysis much. [HN13] A lawyer's lack of formal authority to formulate, approve or enact policy does not actually prevent the rendering of policy advice to officials who do possess that authority. A similar consideration may be useful in different circumstances. When an attorney is consulted in a capacity other than as a lawyer, as (for example) a policy advisor, media expert, business consultant, banker, referee or friend, that consultation is not privileged. *In re Lindsey, 148 F.3d at 1106* (citing 1 *McCormick on Evidence* § 88, at 322-24 (4th ed. 1992); Restatement (Third) of the Law Governing Lawyers § 122 (Proposed Final Draft No. 1, 1996)). [9] In the government context, one court considered relevant the fact that the [**19] attorney seeking to invoke the privilege held two formal positions: Assistant to the President (ostensibly non-legal) and Deputy White House Counsel (ostensibly legal). *In re Lindsey, 148 F.3d at 1103, 1106-07*. The same is true in the private sector where "in-house attorneys are more likely to mix legal and business functions." *Bank Brussels Lambert, 220 F. Supp. 2d at 286*; *accord Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136, 147 (D. Del. 1977)*. In short, an attorney's dual legal and non-legal responsibilities may bear on whether a particular communication was generated for the purpose of soliciting or rendering legal advice; but here, the Assistant County Attorney's lack of formal policymaking authority is not a compelling circumstance.

9 Normally, the capacity in which a lawyer receives or generates a communication is related to determining whether the communication actually involves a lawyer; in other words, a lawyer not acting in her capacity as a lawyer is not a lawyer for the purpose of the attorney-client privilege.

[**20] The predominant purpose of a particular document--legal advice, or not--may also be informed by the overall needs and objectives that animate the client's request for advice. For example, Erie County's objective was to ascertain its obligations under the *Fourth Amendment* and how those requirements may be fulfilled, rather than to save money or please the electorate (even though these latter objectives would not be beyond the lawyer's consideration).

VI

After reviewing *in camera* the documents listed on the County's privilege log, Judge Scott determined that the ten e-mails at issue here are not privileged. These e-mails, dated between December [*422] 23, 2002 and December 11, 2003, passed between the Assistant County Attorney and various officials in the Sheriff's Office (primarily petitioners). The ten e-mails are an amalgam of the following six broad issues:

(i) The compliance of the County's search policy with the *Fourth Amendment*

(EC-C-0014, EC-C-0060, EC-C-00119, EC-C-00126 and EC-C-00161);

(ii) Any possible liability of the County and its officials stemming from the existing policy (EC-C-0014, EC-C-0060, EC-C-00119 and EC-C-00126);

(iii) Alternative [**21] search policies, including the availability of equipment to assist in conducting searches that comply with constitutional requirements (EC-C-14, EC-C-0060, EC-C-00108, EC-C-00119, EC-C-00126, EC-C-00161- 79, EC-C-00180 and EC-C-00227);

(iv) Guidance for implementing and funding these alternative policies (EC-C-14, EC-C-0060, EC-C- 00119, EC-C-00126, EC-C-00161, EC-C-00180, EC-C-204-20 and EC-C-00227);

(v) Maintenance of records concerning the original search policy (EC-C-00225); and

(vi) Evaluations of the County's progress implementing the alternative search policy (EC-C-00204-20 and EC-C-00223-25). [10]

10 Because these documents have been and will be under seal, we limit our description, to the extent possible, to that which the rules require be disclosed: "the general subject matter of the document." *W.D.N.Y. Civ. R. 26(f)(1)(B)(i)(II)*. No description by this Court or by the trial court should be taken to prejudge any issue relevant to the underlying claim.

The judge reasoned ([**22] *inter alia*) that because these e-mails "propose[d] changes to existing policy to make it constitutional" and provided guidance "to executive officials within the Sheriff's Department to take steps to implement the new policy . . . no legal advice is rendered or rendered apart from policy recommendations." Because the e-mails "go beyond rendering legal analysis," the judge concluded that they were not privileged. We disagree.

It is to be hoped that legal considerations will play a role in governmental policymaking. [HN14] When a lawyer has been asked to assess compliance with a legal obligation, the lawyer's recommendation of a policy that complies (or better complies) with the legal obligation--or that advocates and promotes compliance, or oversees implementation of compliance measures--is legal advice. Public officials who craft policies that may directly implicate the legal rights or responsibilities of the public should be "encouraged to seek out and receive fully informed legal advice" in the course of formulating such policies. *In re Grand Jury Investigation, 399 F.3d at 534*. To repeat: "The availability of sound legal advice inures to the benefit not only [**23] of the client . . . but also of the public which is entitled to compliance with the ever growing and increasingly complex body of public law." *In re Grand Jury Subpoena Duces Tecum, 731 F.2d at 1036-37*. This observation has added force when the legal advice is sought by officials responsible for law enforcement and corrections policies.

We conclude that each of the ten disputed e-mails was sent for the predominant purpose of soliciting or rendering legal advice. They convey to the public officials responsible for formulating, implementing and monitoring Erie County's corrections policies, a lawyer's assessment of *Fourth Amendment* requirements, and provide guidance in crafting and implementing alternative [*423] policies for compliance. This advice--particularly when viewed in the context in which it was solicited and rendered--does not constitute "general policy or political advice" unprotected by the privilege. *In re Lindsey, 148 F.3d at 1120* (Tatel, *J.*, dissenting).

Although the e-mails at issue were generated for the predominant purpose of legal advice, we remand for the district court to determine whether the distribution [**24] of some of the disputed e-mail communications to others within the Erie County Sheriff's Department constituted a waiver of the attorney-client privilege. *Cf. In re Horowitz, 482 F.2d 72, 81-82 (2d. Cir 1973)*; *see also United States v. DeFonte, 441 F.3d 92, 94-95 (2d Cir. 2006)* (*per curiam*).

Conclusion

The writ of mandamus is granted; the district court's April 17, 2006 order is vacated; the district court is instructed to determine whether the attorney-client privilege was nonetheless waived; pending adjudication, the district court is directed to enter an order protecting the confidentiality of the disputed e-mails.

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NXIVM CORPORATION, EXECUTIVE SUCCESS PROGRAMS, INC., ALEX BETANCOURT, BARBARA BOUCHEY, CLARE W. BRONFMAN, EDGAR BOONE, ELLEN GIBSON, SARA R. BRONFMAN, PAMELA CAFRITZ, SUZANNE KEMP, WAYNE BATES, LUIS MONTES, and FRANCA DICREENSENZO, Plaintiffs, - v - JOSEPH J. O'HARA, DOUGLAS RUTNIK, [1] and DENISE F. POLIT, Defendants.

1 On July 17, 2006, the parties filed a Stipulation of Dismissal with Prejudice in reference to Defendant Douglas Rutnik. Dkt. No. 45. On July 18, 2006, the Honorable Gary L. Sharpe, United States District Judge, endorsed this Stipulation of Dismissal. Dkt. No. 46.

Civ. No. 1:05-CV-1546 (GLS/RFT)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

241 F.R.D. 109*; *2007 U.S. Dist. LEXIS 13660*; *67 Fed. R. Serv. 3d (Callaghan) 696

February 9, 2007, Decided

SUBSEQUENT HISTORY: Motion granted by, Partial summary judgment granted by *NXIVM Corp. v. O'Hara, 2012 U.S. Dist. LEXIS 86811 (N.D.N.Y, June 22, 2012)*

PRIOR HISTORY: *NXIVM Corp. v. Ross Inst., 364 F.3d 471, 2004 U.S. App. LEXIS 7608 (2d Cir. N.Y., 2004)*

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff corporation filed legal malpractice, racketeering, fraud, breach of contract, breach of fiduciary duty, and unjust enrichment claims against defendant former consultant. Before the court was the corporation's motion (1) for a protective order prohibiting the consultant from disclosing privileged information, (2) to quash a subpoena that intervenor deprogrammer served upon the consultant, and (3) to compel the return of client files.

OVERVIEW: After receiving negative publicity due to its litigation against the deprogrammer, the corporation engaged the consultant to provide various professional services. An investigative firm hired by the corporation prepared a report on the deprogrammer and conducted a sting operation during which the deprogrammer was questioned about his knowledge of the corporation. After terminating his relationship with the corporation, the consultant gave copies of the investigation report to the deprogrammer and reporters and told them about the sting operation. The court held (1) that documents providing business and non-legal advice were not protected by the attorney-client privilege; (2) that the investigation report on the deprogrammer constituted work product; (3) that the report, even if it contained information that was illegally obtained, was not used to facilitate fraud; (4) that conversations concerning the sting operation were not privileged because the sting operation violated the rule forbidding unauthorized contact with an adversarial litigant; and (5) the corporation waived the

work product protection when it disclosed the investigation report to a public relations firm.

OUTCOME: The motion for a protective order was granted in part. The deprogrammer's application to waive privileges as to the investigative firm's report and the sting operation was granted. The consultant's application to waive privileges as to certain documents was granted. The motion to quash the deprogrammer's subpoena was denied. The corporation's motion to compel production of communications the consultant initiated with third parties was granted.

LexisNexis(R) Headnotes

Civil Procedure > Discovery > Privileged Matters > Attorney-Client Privilege
Evidence > Privileges > Attorney-Client Privilege > Scope
[HN1] The distinction between New York and federal law on attorney-client privilege is quite indistinguishable, as the law intersects in all of its facets, and are viewed interchangeably. As such, the attorney-client privilege is a long-standing, common law privilege recognized in New York and by the federal courts under *Fed. R. Evid. 501*. This privilege encourages full engagement between a party and her attorney so that full and frank communication exists to impart all the information an attorney may need in order to give sage and cogent advice on the matter. Stated another way, its essential purpose is to encourage clients to be fully forthcoming with their attorney and to receive, in return, advice which will protect the clients' legal rights. The free-flow of information and the twin tributary of advice are the hallmarks of the privilege. For all of this to occur, there must be a zone of safety for each to participate without apprehension that such sensitive information and advice would be shared with others without their consent.

Civil Procedure > Discovery > Privileged Matters > Attorney-Client Privilege
Evidence > Privileges > Attorney-Client Privilege > Elements
Evidence > Procedural Considerations > Burdens of Proof > Allocation
[HN2] When determining if there is in fact an attorney-client privilege present to cloak both a client's communication and the corresponding legal advice, a court needs to ascertain that this safety net attaches to only those communications (1) where legal advice of any kind is sought, (2) from a professional legal advisor in his or her capacity as such, (3) the communication relates to that purpose, (4) made in confidence, (5) by the client, and (6) are at his or her insistence permanently protected, (7) from disclosure by the client or the legal advisor, (8) except if the protection is waived. This privilege further attaches to the advice rendered by the attorney. The burden of proving each element of the privilege rests on the party claiming the protection.

Civil Procedure > Discovery > Privileged Matters > Attorney-Client Privilege
Evidence > Privileges > Attorney-Client Privilege > Scope
[HN3] Contrary to modern yet ill-informed perceptions, the attorney-client privilege is often narrowly defined, riddled with exceptions, and subject to continuing criticism. Grand as the privilege stands in the nation's legal lexicon, it is nonetheless narrowly defined by both scholars and the courts. The attorney-client privilege is not given broad, unfettered latitude to every communication with a lawyer, but is to be narrowly construed to meet this narrowest of missions.

Civil Procedure > Discovery > Privileged Matters > Attorney-Client Privilege
Evidence > Privileges > Attorney-Client Privilege > Scope
[HN4] There is a general maxim that the public, particularly within the judicial forum, is entitled to be exposed to everyman's evidence. The quest is for the truth of the matter to flow forward before the court, and the suppression of truth is a grievous necessity at best only justified when the opposed private interest is supreme. But since the attorney-client privilege stands in derogation of the public's right to everyman's evidence, it ought to be strictly confined within the narrowest possible limits consistent with the logic of the principle.

Civil Procedure > Discovery > Privileged Matters > Attorney-Client Privilege
Evidence > Privileges > Attorney-Client Privilege > Scope
[HN5] Attorneys frequently give to their clients business or other advice which, at least insofar as it can be separated from essentially professional legal services, gives rise to no privilege whatsoever. When an attorney is consulted in a capacity other than as a lawyer, as (for example) a policy advisor, media expert, business consultant, banker, referee or friend, that consultation is not privileged. The privilege is triggered only by a request for legal advice, not business advice. If the communication between client and lawyer is not designed to meet prob-

lems which can fairly be characterized as predominately legal, the privilege does not apply. In this framework, if a business decision can be viewed as both business and legal evaluations, the business aspects of the decision are not protected simply because legal considerations are also involved.

Civil Procedure > Discovery > Privileged Matters > Attorney-Client Privilege
Civil Procedure > Discovery > Privileged Matters > Work Product > Scope
Evidence > Privileges > Attorney-Client Privilege > Scope
[HN6] Whenever the attorney-client privilege is raised in ongoing litigation, concomitantly the work product doctrine is virtually omnipresent. They are inseparable twin issues, and when one is advanced, surely the other will follow. The work product privilege is more broad than the attorney-client privilege.

Civil Procedure > Discovery > Privileged Matters > Work Product > Scope
[HN7] The work product privilege exists to protect attorneys' mental impressions, opinions, and/or legal theories concerning litigation. The work product privilege is designed to protect an adversarial system of justice. This doctrine establishes a "zone of privacy" in which a lawyer can prepare and develop theories and strategies with an eye towards litigation free from unnecessary intrusion by his or her adversaries.

Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview
Evidence > Procedural Considerations > Burdens of Proof > Allocation
[HN8] The burden, albeit not a heavy one, of establishing that the work product doctrine applies rests with that party's attorney who is claiming the protection.

Civil Procedure > Discovery > Privileged Matters > Work Product > Scope
Evidence > Privileges > Attorney-Client Privilege > Scope
[HN9] The work product doctrine, as well as the attorney-client privilege, does not extend to every document generated by the attorney; it does not shield from disclosure everything a lawyer does.

Civil Procedure > Discovery > Privileged Matters > Work Product > Waivers
[HN10] The work product doctrine is generally invoked as soon as an attorney, in responding to a request for production of documents, serves upon the requesting party a privilege log asserting this and any other relevant privilege or provides notification that it will not be disclosed for this reason. *Fed. R. Civ. P. 26(b)(5)* and *34(b)*. Failure to timely provide the privilege log or objection constitutes a waiver of any of the asserted privileges. Even if a party follows these steps, the security of the work product doctrine is not assured. There must be the omnipresent concern that revealing the attorney's mental processes is real and not just speculative.

Civil Procedure > Discovery > Privileged Matters > Work Product > Scope
[HN11] See *Fed. R. Civ. P. 26(b)(3)*.

Civil Procedure > Discovery > Privileged Matters > Work Product > Fact Work Product
Civil Procedure > Discovery > Privileged Matters > Work Product > Opinion Work Product
[HN12] The work product doctrine classifies documents into two categories: "non-opinion" work product and "opinion" work product. The distinction between these two categories turns on the effort employed in obtaining disclosure pursuant to *Fed. R. Civ. P. 26(b)(3)*. For "non-opinion" work product, the party seeking this information must show a substantial need for the document and undue hardship to acquire the document or its substantial equivalent by other means. On the other hand, "opinion" work product requires a higher protection to the extent that the requesting party has to demonstrate extraordinary justification before the court will permit its release. At a minimum, such "opinion" work product should remain protected until and unless a highly persuasive showing is made. In a similar vein, in most instances, the work product doctrine does not extend to facts. Generally, non-privileged facts should be freely discoverable.

Civil Procedure > Discovery > Privileged Matters > Work Product > Scope
[HN13] Where a party faces the choice of whether to engage in a particular course of conduct virtually certain to result in litigation and prepares documents analyzing whether to engage in the conduct based on its assessment of the likely result of the anticipated litigation, it should be concluded that the preparatory documents should receive protection under *Fed. R. Civ. P. 26(b)(3)*. The crux being that a document which has been prepared because of the prospect of litigation will not lose its protection under the work product doctrine, even though it may

assist in business decisions. But this protection will not be extended, under any circumstances, to records that are prepared in the ordinary course of business.

Civil Procedure > Discovery > Privileged Matters > Work Product > Scope
Civil Procedure > Discovery > Privileged Matters > Work Product > Waivers
[HN14] Even though the work product doctrine protects the impressions, opinions, theories, and strategies of an attorney, *Fed. R. Civ. P. 26(b)(3)* makes clear that the document at issue, either obtained or prepared by or for a party, or by or for his representative, may be cloaked by this doctrine as well. This maxim makes sound sense considering how complex litigation can be and the undeniable need for others to assist in developing all that is necessary to prosecute or defend a lawsuit. Obviously, impressions and strategies are not always created in a vacuum, but, rather are generated in cogent discourse with others, including the clients and agents. Further, the exchange of such documents and ideas with those whose expertise and knowledge of certain facts can help the attorney in the assessment of any aspect of the litigation does not invoke a waiver of the doctrine.

Legal Ethics > Client Relations > Confidentiality of Information
[HN15] See N.Y. Code Prof. Resp. DR 4-101(B)(1), N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.19(b)(1).

Civil Procedure > Discovery > Privileged Matters > Attorney-Client Privilege
Evidence > Privileges > Attorney-Client Privilege > Scope
[HN16] In determining whether there was an attorney-client relationship, the court looks to see whether the primary or predominate purpose of the communication at issue was to procure legal advice, which suffices to say that the court also looks at the primary or predominate purpose for retaining the lawyer/professional.

Civil Procedure > Discovery > Privileged Matters > General Overview
[HN17] A proponent of a privilege log must make a claim of privilege expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection. *Fed. R. Civ. P. 26(b)(5)*. In this respect, and in order to evaluate and facilitate the determination of whether a privilege exists, courts generally require compliance with the statutory mandate that an adequately detailed privilege log be provided. Without an adequately detailed privilege log, the courts are hamstrung in attempting to decipher the presence and extent of the claimed privilege. To constitute an acceptable privilege log, at a minimum, it should provide facts that would establish each element of the claimed privilege as to each document and identify each document and the individuals who were parties to the communications, providing sufficient detail to permit a judgment as to whether the document is at least potentially protected from disclosure. Other required information, such as the relationship between individuals not normally within the privileged relationship, is then typically supplied by affidavit or deposition testimony.

Civil Procedure > Discovery > Privileged Matters > General Overview
[HN18] Where a party fails to comply with the requirements of *Fed. R. Civ. P. 26(b)(5)* when submitting a privilege log, which is inadequate as a matter of law in that the log does not provide sufficient information to support the privilege, the claim of privilege may be denied.

Civil Procedure > Discovery > Privileged Matters > Attorney-Client Privilege
Civil Procedure > Discovery > Privileged Matters > Work Product > Scope
Evidence > Privileges > Attorney-Client Privilege > Exceptions
[HN19] The courts have recognized an exception to the attorney-client privilege and work product doctrine for communications between lawyers and clients that are designed to facilitate or even conceal the commission of a crime or fraud. The United States Court of Appeals for the Second Circuit, realizing the attorney-client privilege and work product immunity substantially overlap, has ruled that there is no need for a different piercing standard for attorney work product. To assert this exception, the discovering party must demonstrate reasonable cause to believe that a crime or fraud has been committed or was intended and that the attorney-client communication was intended to facilitate or conceal the misconduct. That is, the particular communication or document in issue itself must be in furtherance of a contemplated or ongoing criminal or fraudulent conduct. Somehow or some way, the advice sought must be used or contemplated to be used to complete an illegal activity or perpetrate a fraudulent scheme. In assessing whether the discovering party has demonstrated probable cause, the court may review, in camera, the privileged document

and ascertain if it supports the view that it was being used at the time of its drafting to commit or conceal a fraud or a crime.

Banking Law > Consumer Protection > Right to Financial Privacy > General Overview
[HN20] Federal law provides privacy protection for customer information of a financial institution and prohibits an otherwise unauthorized person or institution to obtain this information by false pretenses. *15 U.S.C.S. § 6821(a)* and *(b)*.

Banking Law > Consumer Protection > Right to Financial Privacy > General Overview
[HN21] See *15 U.S.C.S. § 6821(a)* and *(b)*.

Civil Procedure > Discovery > Privileged Matters > Attorney-Client Privilege
Civil Procedure > Discovery > Privileged Matters > Work Product > Scope
Evidence > Privileges > Attorney-Client Privilege > Exceptions
[HN22] The crime/fraud exception does not apply simply because a privileged communication would provide an adversary with evidence of a crime or fraud, and, if it did the attorney-client privilege would be virtually worthless. Rather, the exception applies when the particular communication or document in issue itself is used in furtherance of a contemplated or ongoing criminal or fraudulent conduct. Stated another way, the exception concerns not prior wrong doing but future wrong doing.

Legal Ethics > Professional Conduct > Opposing Counsel & Parties
[HN23] An attorney cannot have any ex parte contact with an adversary who is represented by counsel. N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.35.

Civil Procedure > Discovery > Privileged Matters > Attorney-Client Privilege
Evidence > Privileges > Attorney-Client Privilege > Exceptions
[HN24] A fraud is defined as a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. However, the crime/fraud exception is not relegated solely to crimes, criminal fraud, or common law fraud. At a minimum, the attorney-client privilege does not protect communications in furtherance of an intentional tort that undermines the adversary system itself. Advice in furtherance of a fraudulent or unlawful goal cannot be considered sound. Rather advice in furtherance of such goals is socially perverse, and a client's communications seeking such advice are not worthy of protection.

Legal Ethics > Professional Conduct > Opposing Counsel & Parties
[HN25] It is a seminal rule of law that an attorney should not have any contact with a litigant who is represented by counsel. N.Y. Code Prof. Resp. DR 7-104(A)(1) emphatically states that during the course of the representation of a client a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has prior consent of the lawyer representing such other party or is authorized by law to do so. N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.35(a)(1). N.Y. Code Prof. Resp. DR 7-104(A)(1) explicitly forbids any and all unauthorized contact with an adversarial litigant, whether directly or indirectly. That means a party cannot hire an investigator to do what a lawyer cannot.

Legal Ethics > Professional Conduct > Illegal Conduct
[HN26] See N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.32(b)(2).

Legal Ethics > Professional Conduct > Illegal Conduct
[HN27] See N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.33(a)(7) and (8).

Legal Ethics > Client Relations > Confidentiality of Information
[HN28] An attorney's duty of confidentiality does not extend to a client's announcement of a plan to engage in criminal conduct or breaching an inviolate discipline rule.

Legal Ethics > Client Relations > Confidentiality of Information
Legal Ethics > Professional Conduct > Tribunals
[HN29] N.Y. Code Prof. Resp. DR 7-102(B)(1), N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.33(b)(1), states that a lawyer who receives information clearly establishing that a client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal, except

when the information is protected as a confidence or secret.

Legal Ethics > Client Relations > Confidentiality of Information

[HN30] N.Y. Code Prof. Resp. DR 4-101(C)(3), N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.19(c)(3), provides that an attorney can reveal confidences if the intention of a client is to commit a crime.

Civil Procedure > Discovery > Privileged Matters > Attorney-Client Privilege
Civil Procedure > Discovery > Privileged Matters > Work Product > Waivers
Evidence > Privileges > Attorney-Client Privilege > Waiver

[HN31] Both the attorney-client privilege and the work product doctrine may be waived in various ways including sharing such documents with a third party.

Civil Procedure > Discovery > Privileged Matters > Attorney-Client Privilege
Evidence > Privileges > Attorney-Client Privilege > Waiver

[HN32] A waiver resulting from sharing a client's communication or legal advice with a third party may be done explicitly or implicitly, or rather, intentionally or inadvertently. When communications between a party and her attorney occur in the presence of a third party, the privilege may be waived. Yet, a disclosure to a third party does not waive the privilege unless such disclosure is inconsistent with the maintenance of secrecy and if the disclosure substantially increases the possibility of an opposing party obtaining the information. For example, an exemption from the waiver accrues if such communications are shared with an agent of the attorney, which may include investigators and accountants retained to assist the attorney in rendering legal advice and instruction.

Civil Procedure > Discovery > Privileged Matters > Work Product > Waivers
Evidence > Privileges > Attorney-Client Privilege > Waiver

[HN33] The work product doctrine protection, like any other privilege, can be waived and the determination of such a waiver depends on the circumstances. In most respects, the discussion of a third party waiver is virtually the same for both the attorney-client privilege and the work product doctrine. A voluntary disclosure of work product, for some or any inexplicable benefit, to a third party, especially if the party is an adversary, may waive the immunity. Once a party allows an adversary to share in an otherwise privileged document, the need for the privilege disappears, and may disappear forever, even as to different and subsequent litigators. As an illustration, when a party makes a strategic decision, no matter how broad and sweeping or limited, to disclose privileged information, a court can find an implied waiver. Moreover, a party cannot partially disclose a privileged document nor selectively waive the privilege and then expect it to remain a shield. However, there is no per se rule that all voluntary disclosures constitute a waiver of the work product doctrine because there is no way the court can anticipate all of the situations when and how such disclosure is required. There are times when a waiver can be broad and other times when it has to be narrowly construed. Each case must be judged on its own circumstances and merits.

Civil Procedure > Discovery > Privileged Matters > Attorney-Client Privilege
Evidence > Privileges > Attorney-Client Privilege > Scope

[HN34] The extension of the attorney-client privilege to a non-lawyer's communication is to be narrowly construed. If the purpose of the third party's participation is to improve the comprehension of the communication between an attorney and a client, then the privilege will prevail. The communication between an attorney and a third party does not become shielded by the attorney-client privilege solely because the communication proves important to the attorney's ability to represent the client.

Civil Procedure > Discovery > Privileged Matters > Work Product > Scope

[HN35] As a general matter public relation advice, even if it bears on anticipated litigation, falls outside the ambit of protection of the so-called work product because the purpose of the work product rule is to provide a zone of privacy for strategizing about the conduct of litigation itself, not for strategizing about the effects of the litigation on a client's customers, the media, or on the public generally.

Civil Procedure > Discovery > Privileged Matters > Attorney-Client Privilege
Civil Procedure > Discovery > Privileged Matters > Work Product > Scope
Civil Procedure > Discovery > Privileged Matters > Work Product > Waivers
Evidence > Privileges > Attorney-Client Privilege > Waiver

[HN36] A party cannot selectively share a work product and then expect it to remain as a shield. Just as the attorney-client privilege cannot be used as a shield and sword, neither can a work product document, especially one that does not include an attorney's impression, opinions, or strategies.

Civil Procedure > Discovery > Protective Orders
[HN37] Courts retain inherent supervisory authority over discovery and can extend a protective order to squelch any abuses. *Fed. R. Civ. P. 26(c).*

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PETER L. SKOLNIK, ESQ., LOWENSTEIN SANDLER PC, Attorney for Intervenor Rick Ross, Roseland, New Jersey.

JUDGES: RANDOLPH F. TREECE, United States Magistrate Judge.

OPINION BY: RANDOLPH F. TREECE

OPINION
[*112]

MEMORANDUM DECISION and ORDER

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[**2] [*113] It is a rare occasion indeed when a non-dispositive motion unravels a tale as eccentric as this. The axiom that facts are sometimes stranger than fiction has never been more applicable. As in most stories, the Motion and Opposition that now confronts this Court has a prologue. As early as March 26, 2006, Plaintiffs (hereinafter collectively referred to as "NXIVM" [2] informally requested a protective order against Defendant O'Hara. [3] Dkt. No. 36. Pursuant to this Court's directions, the parties entered into negotiations, which extended over several months, to resolve those underlying issues. All seemed resolved when the parties filed a confidentiality stipulation, which was subscribed to by this Court. Dkt. Nos. 47 & 48. However, some unexpected and highly public events occurred during the summer of 2006, which altered the consonant complexion of the litigation, and, NXIVM, once again, sought permission to file a motion for a protective order. Dkt. No. 49, Pls.' Lt.-Mot., dated Sept. 27, 2006; *see also* Dkt. No. 50, Defs.' Lt.-Br., dated Sept. 28, 2006. NXIVM's application for a protective order spawned a request from Rick Ross, a defendant in a related case, to intervene. [**3] *See* Dkt. Nos. 53, Peter Skolnik, Esq., Lt.-Br., dated Oct. 5, 2006 & 51, Mem. of Law (filed under seal). In July 2006, Ross served a subpoena upon Defendant O'Hara on matters having a nexus to those unexpected events alluded to above. If granted, NXIVM's application for a protective order would have profound effect upon Ross' subpoena. After conferring with the parties, this Court granted NXIVM permission to file a Motion for a Protective Order and Ross the right to intervene in NXIVM's request.

2 NXIVM Corporation is the successor to Executive Success Program, which is referred to in the parties' papers as ESP. Further, notwithstanding we have twelve Plaintiffs, it appears that NXIVM is the heart and soul of Plaintiffs' case against the Defendants. Therefore, for the sake for brevity, since all of the Plaintiffs appear to be united in interest, we will refer to the Plaintiffs collectively as NXIVM.

3 As mentioned in note 1, Defendant Rutnik has been dismissed from this case. The only remaining Defendants are O'Hara and his former wife Denise F. Polit. The crux of NXIVM's complaints are directed exclusively toward O'Hara. For the sake of clarity in addressing this Motion, Defendants will be referred to collectively as "O'Hara."

[**4] On October 20, 2006, NXIVM filed a Motion (1) for a Protective Order prohibiting Defendant O'Hara from disclosing privileged and confidential information to third parties, (2) to quash the third-party (Ross) subpoena served upon O'Hara, and (3) to compel the return of client files and related discovery. Dkt. No. 57, Not. of Mot., Nancy Salzman Decl., dated Oct. 19, 2006, Exs. A-AT. O'Hara filed an Opposition to the Motion. Dkt. Nos. 58, Defs.' Lt., dated Nov. 20, 2006 (seeking that their pleading be filed under seal, [4] which was granted) & 68, Defs.' Mem. of Law, James Peluso, Esq., Aff., dated Nov. 20, 2006, with Exs. A-H, Joseph J. O'Hara Aff., dated Nov. 20, 2006, with Exs. A-Y. As permitted, Intervenor Ross filed a Memorandum of Law and Declarations from Peter L. Skolnik, Esq., dated Oct. 1, 2006, with Exs. A-G, and Rick Ross, dated Oct. 1, 2006, with Exs. A-D, all filed under seal. Dkt. No. 67. NXIVM filed a Reply to both O'Hara's and Ross' Opposition to its Omnibus Motion. Dkt. Nos. 61, Nancy Salzman Decl., dated Dec. 1, 2006, Douglas Rennie, Esq., Decl., dated Dec. 1, 2006, with Exs. A-J, & 63, Pls.' Reply Mem. of Law.

4 Because this Motion pertains to matters that may be cloaked by the attorney-client privilege, the work product doctrine, or possibly provide the basis for other confidentiality claims, all of the papers, except the initial Motion, have been filed under seal.

[**5] After all of the pleadings and papers were filed, O'Hara sought permission to submit yet another exhibit and an explanation as to its relevance to the Motion. Dkt. No. 64, Lt.-Mot., dated Dec. 4, 2006. The Court granted O'Hara permission to file a Letter-Brief with Exhibits. Dkt. Nos. 65, Defs.' Supp. Lt.-Br., dated Dec. 7, 2006, with Exs., & 68, Sealing Order, dated Dec. 7, 2006. Likewise, NXIVM was granted permission to file under seal a Reply to O'Hara's Supplemental Letter-Brief. Dkt. No. 69, Pls.' Supp. Reply Lt.-Br., dated Dec. 7, 2006. Nonetheless, this matter was not fully briefed, so each party was granted permission to file a very brief Memorandum of Law and more Exhibits. [*114] Dkt. No. 71, Pls.' Mem. of Law, dated Jan 8, 2007, Kristin Keefe Decl., dated Jan 8, 2007, with Exs. A & B; Dkt. No. 72, Defs.' Lt.-Mem. of Law, dated Jan. 8, 2007, Joseph J. O'Hara Decl., dated Jan. 8, 2007, with Exs. A-D.

I. BACKGROUND

This is a rather prodigious, fact intensive litigation. More precisely, the litigation is actually plural. In addition to this litigation, there is related litigation in the District of New Jersey. The facts in these cases could not be any more convoluted and are [**6] rendered more complicated by the tri-party litigious bloodletting that obfuscates any transparency or lucidity. Weighing the vitriolic verbiage dispensed from geometric angles of this issue, it is a wonder if any court could pierce the "perceptual pall" of these legal combatants to discern the true par-

ticulars of these Motions and an agreeable set of facts. [5] The divergence of relevant facts are overcast by the matter of credibility. Perspective, credibility and the multifaceted array of arguments and exhibits notwithstanding, after considerable study of the submissions, we submit that we are able to assemble some semblance of the facts. Because there are so many permutations of the facts and issues, we are regrettably obligated to discuss the fractious history of these litigants and their related cases.

5 Periodically percolating throughout the pleadings, motion papers and the oppositions thereto, and the corresponding affidavits and exhibits in this and the New Jersey case are *ad hominem* attacks, scurrilous and specious name calling, and provocative charges of ill-motives on the part of all litigants and even the litigators that have not served any party well. Cumulatively, all parties have cluttered the discussion with clever and passionate prattle rather than precise pronouncement of the facts and the issues. The Honorable Mark Falk, United States Magistrate Judge for the District of New Jersey, listed some of the more opprobrious statements that confront both courts. New Jersey Tr., at pp. 30-34. These virulent commentaries have distracted and even sullied what are, generally speaking, well written memoranda.

[**7] A. Relationship Between NXIVM and Joseph O'Hara

NXIVM Corporation appears to be the successor corporation to Executive Success Program, Inc. ("ESP"). If not the successor, then they are one and the same. The President of NXIVM is Nancy Salzman and other key and relevant officials and personalities, particularly with regards to these Motions, are Kristin Keefe, an employee who may have acted as the "Corporate Legal Liaison," and Kenneth Raniere. Dkt. No. 57, Ex. R, Kristin Keefe, Decl., dated Aug. 7, 2006, Ex. AD, Nancy Salzman Decl., dated Sept. 12, 2005, at P 3; Dkt. No. 68, Ex. O, O'Hara Lt., dated. Nov. 19, 2004 at p. 1; Dkt. No. 71, Kristin Keefe Decl., dated Jan. 8, 2007. Although he has no official title, and has been identified as a "volunteer consultant," the founder or "defacto leader" of NXIVM is Kenneth Raniere. NXIVM provides an exclusive seminar training program primarily for executives, though extended to others as well, known as Executive Success. Executive Success employs a methodology called Rational Inquiry TM, which is purported to improve communication skills, memory, and decision-making. NXIVM claims that Rational Inquiry TM is proprietary and thus protected.

[**8] Joseph O'Hara has worn many professional hats over his thirty-year career. Although he is an attorney admitted to practice law in Washington D.C., but not in the State of New York, for most of his career he has been a business man and a lobbyist. In reference to his many business ventures in New York, he is the President and Chief Executive Officer (CEO) of Strategic Government Solutions, Inc., and The O'Hara Group & Associates, LLC ("TOGA LLC"). As reported on his resume, TOGA LLC is a New York based limited liability company that provides lobbying and marketing services to both private and public sector clients. Dkt. No. 68, Ex. A. Early in his career, O'Hara practiced law in Washington D.C., however, that practice became relatively dormant until July 2004. O'Hara re-established his practice of law as TOGA PLLC that now serves government and municipal agencies, school districts, and clients of Strategic Governmental Solutions, Inc. ("SGSI"). Dkt. No. 68, Ex. G, O'Hara Decl., dated Sept. 8, 2005, at P 6; O'Hara [*115] Decl., dated Nov. 20, 2006, at P 4, Ex. A (resume).

In September 2003, Dee Dee Mitzen, a representative of NXIVM, contacted O'Hara to assist them because NXIVM's business [**9] was affected by negative publicity generated by its litigation against Rick Ross and the Ross Insitute. O'Hara avers that he told Mitzen that he did not practice law in New York but was in a position to recommend attorneys. On September 17, 2004, O'Hara met with Mitzen and Nancy Salzman and he reiterated to both that he did not practice law in New York. Nonetheless, after this meeting, on or about September 22, 2003, O'Hara drafted and forwarded a Strategic Plan that would cover various consultation services, including public relations, lobbying, and marketing needs. In fact there were three drafts before the Plan was reduced to its final form. Dkt. No. 68, Ex. F. [6] Within the Strategic Plan and its cover letter, other entities, such as law, lobbying, and public relations firms are mentioned, and O'Hara identifies himself as the Strategic Plan Coordinator. Apparently based upon this proposal, the parties agreed to enter into a Professional Service Agreement on or about September 29, 2003. This Agreement was limited for the term of October 1, 2003 through December 31, 2004, and O'Hara is identified as Consultant throughout. Ostensibly, the parties were operating under this Agreement [**10] even though it was not signed by Salzman. Dkt. No. 65, O'Hara's Decl., dated Nov 20, 2006, at PP 1-10; *see also* Dkt. No. 61, Nancy Salzman's Reply Decl., dated Dec. 1, 2006, at PP 3 & 4.

6 There was a cover letter addressed to Keith Raniere in which O'Hara wrote,

> if you are interested in having me serve as NXIVM's "Strategic

> Plan Coordinator," I will draft a "Letter-of Agreement" . . . . I will structure my proposed compensation in a manner which recognizes the fact that the responsibility and time commitment of the "Strategic Plan Coordinator" will be directly tied to the scope-of-work that will be undertaken by the various entities that will be providing services to NXIVM in conjunction with the "Strategic Plan[.]"

Dkt. No. 68, Ex. F.

In terms of the scope of any legal representation, and to understand the issues in this Omnibus Motion, there are two critical passages within the Professional Service Agreement:

> The Consultant will provide - and/or help the Company the Company/Executive [**11] Success Programs to obtain -- appropriate technical assistance and/or consultative services that will help . . . to resolve various issues . . . . In this regard, those issues, include but are not limited to . . . the legal status of Company/Executive Success Programs in New York State . . . [.]

Dkt. No. 68, Ex. G, at p. 1.

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> The Consultant will help to coordinate the work of various attorneys who are currently providing legal services to the Company/Executive Success Programs - and/or help to identify other appropriate attorneys who can provide needed legal services to the company if/as the need arises for same (Note: the Company/Executive Success Programs will enter into separate written agreements with respect to all of the attorneys that it hires to provide legal services on its behalf - and it is mutually understood and agreed that the Consultant will not provide any direct legal services to the Company/Executive Success Programs.

Id. at p. 3.

In the context of this Omnibus Motion, O'Hara contends that the latter paragraph is a disclaimer of any notion that he was providing legal services. Dkt. No. 68, O'Hara Decl., dated Nov. 20, 2006, at P 1. NXIVM [**12] asserts that the former paragraph establishes that indeed O'Hara was providing legal advice to them. *See generally* Dkt. No. 57, Pls.' Mot.

In support of O'Hara's contention that he was not serving as an attorney, he refers to a matter that had significant legal and tax implications for Raniere and Salzman to which he wrote a memorandum, dated May 13, 2004, suggesting "that you hire an attorney who specializes in this area of the law . . . and you [should] not have any discussions with me and/or Jim Loperfido [NXIVM's accountant] with respect to this [*116] matter since we would most likely have to disclose such discussions if we were ever subpoenaed with respect to same." *Id.*, Ex. I. On the other hand, Plaintiffs identify other transactions where O'Hara may have acted as an attorney or at least presented himself as a legal representative. *See generally* Dkt. No. 57, Exs. AE-AJ. [7]

> 7 Plaintiffs present a number of Declarations stating, in unison, that they considered O'Hara NXIVM's attorney and may have observed him performing legal services. *See* Dkt. No. 57, Nancy Salzman Decl., dated Oct. 19, 2006, with Exs. A-F, Ex. R, Kristin Keefe Decl., dated Aug. 7, 2006, Ex. AD, Nancy Salzman's Aff., dated Sept. 12, 2005, & Exs. AE-AJ, Declarations of Michael Sutton, James Loperfido (accountant), John Casey, Sara Bronfman, and Clare Bronfman; Dkt. No. 63, Ex. C, Juval Aviv Decl., dated Dec. 1, 2006. Several of NXIVM's Exhibits are paychecks made out to O'Hara noting in the memo section, "legal/professional services." *See* Dkt. No. 57, Exs. A-E.

[**13] In the Spring of 2004, the parties had a discussion that O'Hara should re-establish his law practice in Washington D.C. solely for the purpose of establishing or possibly solidifying an attorney-client relationship and preserving confidentiality in their communications. The parties disagree as to who was the progenitor of this idea, however. [8] As early as July 2004 but confirmed in October 2004, TOGA PLLC was re-constituted. Also at the same time, the law firm of Nolan and Heller was representing NXIVM in the lawsuit against Rick Ross, Ross Institute, and others for copyright and trademark infringement. *See infra* section I.B. It further appears that Richard H. Weiner, Esq., of Nolan and Heller had recommended to NXIVM to hire the international investigative firm of Interfor Inc. ("Interfor") to investigate the demise of Kristen Snyder of Anchorage, Alaska, a former NXIVM student who may have committed suicide.

Dkt. No. 68, Ex. M. Initially Interfor forwarded the "Terms of Engagement" to Nolan and Heller, however, on November 9, 2004, Interfor mailed the "Terms of Engagement" to TOGA PPLC, which was signed by O'Hara on November 17, 2004. Dkt. No. 68, Ex. N. Within the Terms of [**14] Engagements are two key statements: (1) "Interfor agrees to conduct factual inquires as may be mutually agreed upon and to consult with and assist The O'Hara Group in formulating strategy and preparing for legal proceedings, if applicable;" and (2) "It is further understood and agreed that [certain generated work papers and reports] will be deemed confidential work product prepared in connection with the case [9] and that all communications between The O'Hara Group and Interfor shall be for the purpose of assisting The O'Hara Group and are, therefore, privileged." *Id.* at pp. 1 & 2; *see also* Dkt. No. 68, O'Hara Decl.; *see generally* Dkt. No. 57, Pls.' Mot.

8 O'Hara claims that Raniere asked him to reestablish his law practice in Washington, D.C. and to take the New York Bar Exam and become admitted in New York. Dkt. No. 68, O'Hara's Decl., dated Nov. 20, 2006, at PP 15 & 16. Conversely, Salzman claims that the idea to reactivate the Washington, D.C. law firm was solely O'Hara's. Dkt. No. 57, Ex. AD, Salzman's Decl., at P 7.

9 The Terms of Engagement only make reference to Kristen Snyder. Dkt. No. 68, Exs. M & N, at p. 1. Ostensibly, the Terms of Engagement expanded to include an investigation into Rick Ross. *See* Dkt. No. 68, Ex. Q, O'Hara's Mem., dated Nov. 24, 2004, at p. 1 ("I was aware that INTERFOR, Inc. [] was going to be undertaking a "Confidential Investigation" of Mr. Ross[.]"); Dkt No. 62, Ex. C, Juval Aviv Decl., dated Oct. 31, 2006, at P 3.

[**15] On November 23, 2004, Interfor faxed a confidential status report on Rick Ross to O'Hara. Dkt. No. 68, Ex. P. This Status Report is a thorough expose on Rick Ross and includes some controversial and unflattering information about him. The most controversial information, which is now the focal point of this and the New Jersey lawsuits, is the revelation of discrete banking activity within Ross' and his personal friend's respective checking accounts and Ross' private telephone conversations. *Id.* [10] Upon receiving [*117] this Status Report on Ross, O'Hara wrote and hand-delivered a memorandum, dated November 24, 2004, to Raniere and Salzman noting, *inter alia*, that:

> In this regard, my initial review of this document indicates that at least some of the information that is contained therein could not have been obtained legally without the approval of a court of competent jurisdiction (e.g., information from Rick Ross' medical records; detailed information concerning recent activity in his checking account; detailed information concerning his recent telephone calls; etc.). . . Although I was aware that INTEFOR, Inc. (INTERFOR) was going to be undertaking a "Confidential Investigation [**16] of Mr. Ross - and the activities of The Ross Institute - I was not aware that this review would involve any illegal (and potentially criminal activities (Note: Since, per your direction, Kristin Keeffe was designated as the sole representative of The O'Hara Group & Associates, PLLC (TOGA) with respect to INTERFOR, I do not have any personal knowledge as to what activities the company has authorized to undertake on behalf o NXIVM Corporation "doing business as" Executive success programs (NXIVM/ESP) and / or either of you). In this regard it is imperative that you -- or Kristin -- immediately direct INTERFOR to cease and desist any such activities. . . At this point, I am not willing to have INTERFOR continue undertaking activities on behalf of NXIVM/ESP through TOGA unless I have your pesonal assurance that all of those activities will be completely legal (Note: This specifically includes, but is not limited to, the "Sting Operation" that Keith has proposed having INTERFOR undertake with respect to Mr. Ross.

Dkt. No. 68, Ex. Q at p. 1 (emphasis in original).

10 In their Reply Papers, Plaintiffs note that most of the facts set forth in this Status Report can be found on the website www.religiousfreedomwatch. org. Dkt. No. 69, Ex. B. While it may be accurate that this website reveals significant sensitive information about Ross, there is no information about his individual banking transactions nor private telephone calls. The issue that we may have to address is whether this investigation breached federal banking laws.

[**17] O'Hara disclaims that he gave Interfor any directions or guidance on the Ross Status Report. Dkt. 68, O'Hara Decl. at P 24.

O'Hara contends that shortly thereafter, on January 2, 2005, he sent an email to Raniere informing him that their professional relationship was severed for sundry reasons. Dkt. No. 68, O'Hara Decl. at P 29. A written termination of the relationship was forwarded on March 11, 2005. Dkt. No. 68, Ex. T; Dkt. No. 57, Nancy Salzman's Decl., dated Oct. 19, 2005, at P 9, Ex. B. This termination letter acknowledges that TOGA PLLC may have provided legal services, but O'Hara inserts this rather curious paragraph:

> I submit to you, I believe that all of TOGA's work to date is entitled to all of the protections that are associated with "Attorney/Client Privilege". In this regard, however, please be advised that this privilege only applies to work that was undertaken -- and/or related discussions that occurred -- during the period from July 1, 2004 [the date TOGA PLLC was re-established] through this date.

Dkt. No. 68, Ex. T at p. 2 (emphasis in original).

B. NXIVM and Rick Ross

Rick Ross is generally known as a deprogrammer and operates a website [**18] at www.rickross.com. A visitor to this website will find information about organizations Ross and others consider to be controversial groups, movements or cults and other related information. Additionally, he is the founder of the Ross Institute where Ross serves as a consultant, lecturer and an intervention specialist. Dkt. No. 67, Rick Ross Decl., dated Oct. 1, 2006, at PP 2 & 3. NXIVM is one of those groups criticized on the website.

In August 2003, NXIVM filed a lawsuit in this District Court against Ross and the Ross Institute, among others, presumably arising out his relationship and involvement with Stephanie Franco and Morris and Michelle Sutton. [11] Civil Case No. 03-CV-976. The [*118] complaint in this action against Ross alleges that Ms. Franco attended an Executive Success Program and was provided "protected" material of which she signed an agreement not to disclose to the public. Apparently Franco shared this information with Ross who posted the material on his and others' websites and may have shared the hard copies with others, all allegedly violating trademark and copyright laws. *Id.*, Dkt. No. 1, Compl., at PP 22-41. This case was consolidated with another and transferred [**19] to the District of New Jersey. *Id.;* Dkt. No. 222, Summary Order on Mot. to Change Venue, dated Feb. 21, 2006; Dkt. No. 57, Ex. L, Am. Consolidated Compl. [12]

11 Morris and Michelle Sutton and Stephanie Franco are defendants in the *NXIVM v. Ross, et al.,* 03-CV-976. While this case was pending in the Northern District of New York and before it was transferred to the District of New Jersey pursuant to *28 U.S.C. § 1404(a),* the Honorable Thomas J. McAvoy, now Senior District Court Judge and the Honorable Gary L. Sharpe, United States District Court Judge, were the presiding judges. Additionally, and highly relevant to the issues before this and the New Jersey case, in October 2003, Forbes Magazine issued an unflattering expose on NXIVM, Raniere, and Salzman, and discussed this lawsuit. Dkt. No. 68, O'Hara Ex. F.

12 Now, the matter is referred to as *NXIVM Corp. v. Sutton, et al.,* 06-CV-1051, and the Honorable Mark Falk, United States Magistrate Judge is the assigned judge.

[**20] During the pendency of *NXIVM v. Ross et al.,* sometime in November 2004, while all the parties were represented by counsel, Ross was contacted by Interfor's President, Juval Aviv, and a meeting was set up. Ross was unaware that Interfor was working for NXIVM. Later that month Ross met with Aviv, Anna Moody, Aviv's assistant, and a "concerned and distraught" mother by the name of Susan L. Zuckerman, who represented to Ross that she had a daughter by the name of Judy who was involved with NXIVM. Approximately five months later, on or about April 7, 2005, Moody contacted Ross to set up another meeting, and they met on April 20, 2005. The November meeting with Aviv, Moody, and Zuckerman occurred in Interfor's office supposedly for the purpose of interviewing Ross under the guise that he may be retained to assist Zuckerman and her daughter. Ross avers that during this meeting he was interviewed extensively about his knowledge of NXIVM. Consequently, a plan was concocted to have Ross intervene with Zuckerman's daughter on a cruise ship outside NXIVM's orbit. Shortly after this meeting, Zuckerman, through her agent Interfor, entered into an agreement with Ross and gave him a $ 2,500 retainer. [**21] Dkt. No. 67, Ross Decl., dated Oct. 1, 2006, Ex. C (Retainer Agreement). Eventually after the April meeting, the plan was called off, Ross was advised that the intervention would not go forward, and that his services were no longer necessary. Dkt. No. 67, Ross Decl., at PP 3-9.

As we now know, Susan Zuckerman was an actress hired for these meetings and her purported daughter was going to be portrayed by Kristin Keefe, who hoped to "convert" Ross. The nature of that conversion has not been specified in this record. Dkt. No. 67, Ex. B, Ross

Decl., at P 10; Dkt. No. 68, O'Hara, Ex. R, Pls.' Ex. R. Now, in retrospect, Ross accuses Aviv, Moody, and Zuckerman, of questioning him about his knowledge of NXIVM and his pending lawsuit outside the presence of his attorney. *See generally* Dkt. 67, Ross Mem. of Law. [13]

13 Ross recalls being asked a series of questions that include but are not limited to:

> (a) Everything I knew about NXIVM;
>
> (b) What was my experience with the organization
>
> (c) Why I considered NXIVM destructive;
>
> (d) The number of complaints I had received about NXIVM;
>
> (e) How does NXIVM brain-wash people;
>
> (f) My work history with NXIVM clients;
>
> (g) How I would handle Zuckerman's case.

Dkt. No. 67, Ross Decl. at P 10.

[**22] On or about July 4, 2006, Chet Hardin, a reporter for the Albany based weekly newspaper, *Metroland*, contacted Ross to discuss the story about NXIVM's efforts to investigate him and to lure him onto a cruise ship. Seemingly, Hardin had a copy of the Interfor Report on Ross, which was provided to him by O'Hara. It appears that O'Hara was also the source of the news story. Dkt. No. 68, O'Hara Ex. V. During Hardin's and Ross' conversation, Hardin read excerpts of the Interfor Report, particularly passages that unveiled the investigation into Ross' banking transactions. On or about August 10, 2006, this story was published in *Metroland.* [14] Dkt. No. 67, Ross Decl., at P 10, Ex. D; Dkt. [*119] No. 68, Ex. W (the article). Ironically, on or about July 12, 2006, O'Hara called Ross and explained the plot against him, discussed some of the intimate machinations of NXIVM's staff and consultants, revealed personal transactions, and further stated that Ross' meetings with Interfor and others, the "sting operation," occurred after O'Hara's November 24, 2004 Memorandum to Salzman and after he tendered his written resignation on March 11, 2005. Dkt. No. 68, O'Hara Decl., at P 28; Dkt. No. 67, Ross [**23] Decl., dated Oct. 1, 2006. After this O'Hara/Ross conversation, O'Hara faxed a copy of the Interfor Report to Ross. [15] Dkt. No. 67, Ross Decl., at PP 13-16, Ex. B, (another) Ross Decl., dated Oct. 1, 2006 (detailing the O'Hara/Ross conversation). Said revelations by O'Hara probably triggered Ross' Subpoena to compel the deposition testimony of O'Hara and representatives of Interfor. Dkt. No. 57, Rennie Decl., at PP 16-19, Exs. N-P. Based upon these events, Ross has filed a Motion to Amend his Answer in the New Jersey case to add counterclaims against NXIVM, for these purportedly improper *ex parte* contacts. Dkt. No. 57, Rennie Decl., at P 23.

14 Other stories were published about NXIVM on or about the same time as the *Metroland* story. Dkt. No. 68, O'Hara, Ex. U (Michael Freedman, *Cult of Personality*, FORBES MAGAZINE, dated July 24, 2006) & W (Dennis Yusko, *"Fears and Tears After NXIVM Class,"* ALBANY TIMES UNION, dated Aug. 6, 2006).

15 O'Hara asseverates that he actually mailed the Interfor Report to Ross in August 2005. Dkt. No. 68, O'Hara Decl., at P 28, Ex. S, O'Hara Lt., dated Aug 30, 2005. However, there is no proof that Ross received the Report on or about that time. Ross explains that the July 12, 2006 conversation with O'Hara was the first time that they spoke. Dkt. No. 67, Ross Decl. at P 13. Further, in August 2005, O'Hara reached out to the Suttons seeking their assistance in establishing a defense fund on his behalf. Dkt. No. 57, Rennie Decl., at P 15, Ex. M.

[**24] C. NXIVM v. O'Hara

On August 18, 2005, Plaintiffs commenced an action against O'Hara and others in this District Court. Civil Case No. 05-CV-1045. Numerous causes of action were alleged by all of the Plaintiffs against O'Hara and others, however, just in terms of NXIVM and O'Hara, it appears that NXIVM alleged causes of action sounding in legal malpractice, rackeetering, fraud, breach of fiduciary duty, breach of contract, and unjust enrichment. *Id.*, Dkt. No. 1, Compl. Immediately after filing the Complaint, Plaintiffs sought a temporary restraining order and a preliminary injunction. *Id.*, Dkt. Nos. 7-9. These applications were denied. *Id.*, Oral Order, dated Sept. 12, 2005. Then, creating a novel turn of events, pursuant to *FED. R. CIV. P. 41(a)(1)*, Plaintiffs voluntarily dismissed this action without prejudice. *Id.*, Dkt. No. 27, Stip. and Order, dated Sept. 14, 2005. However, this litigation was far from over.

Before the ink could dry on the Stipulation and Order of Voluntary Discontinuance, and as a glaringly transparent end run around the District Court's ruling on the preliminary injunction, Plaintiffs filed, on September 12, 2005, the [**25] very same action in New York Supreme Court, County of New York, alleging virtually verbatim the same causes of actions and seeking the very

same relief as sought in the previous District Court case. Civil Case No. 05-CV-1546, Dkt. No. 1, Notice of Removal, with State Compl. The matter was removed to the Southern District of New York posthaste and on December 1, 2005, this case was transferred back to the Northern District of New York. *See* Dkt. No. 26.

O'Hara served his initial mandatory disclosures pursuant to *FED. R. CIV. P. 26(a)* in February 2006, and included in that packet of documents was the Interfor Report. Dkt. No. 57, Douglas Rennie, Esq., Decl., dated Oct. 20, 2006, at P 3, Exs. A & B. Wasting little time to assert privileges, by a Letter-Motion, NXIVM sought a protective order. Dkt. No. 36. Pending the briefing on NXIVM's request, the Court issued a Text Order establishing a briefing schedule, but more important, ruled "[i]n the interim, Defendant O'Hara shall not publicly disclosed the documents claimed to be privileged until the Court has conferred with the parties and, to the extent necessary, decided the issued." Text Order, [**26] dated Mar. 27, 2006. Because of the complexity of the legal issues, the Court issued another Text Order, establishing, *inter alia*, another briefing schedule. Dkt. No. 40, Text Order, dated Apr. 3, 2006. Rather than pursue the Motion, NXIVM asked the Court to adjourn the briefing so that the parties may enter into an agreement on these issues. Dkt. No. 46, Pls.' Lt.-Mot., dated Apr. 21, 2006; Dkt. No. 57, Rennie Decl., at PP 6-10.

[*120] The records indicate that O'Hara submitted a Confidentiality Stipulation to NXIVM on or about April 20, 2006, which would cover several documents including the Interfor Report. Dkt. No. 57, Rennie Decl., at PP 6-12, Exs. A, B, & G. Rather than sign expeditiously the Confidentiality Stipulation, NXIVM delayed its execution of the Stipulation until July 19, 2006, at which time it was forwarded to this Court to be so ordered. Dkt. No. 47. This Confidentiality Stipulation became an Order on July 20, 2006. Dkt. No. 48. The Confidentiality Stipulation/Order in many respects is a typical confidentiality agreement but there are several salient provisions that need to be mentioned:

> P8 The parties agree that the materials appearing as exhibits G through [**27] U [includes Interfor Report] to Defendant O'Hara *Rule 26(a)* disclosure will be treated as "Confidential - Attorney Client Privilege" without prejudice to Defendant O'Hara's position that the materials are not privileged.
>
> P11 Any party at any time while the action is ongoing may challenge the "Confidential -- Attorney Client Privilege" designation of any Discovery Material.
>
> P13 The foregoing is without prejudice to the right of any party hereto to apply to the Court for a further protective order relating to any documents and/or information produced in this litigation.
>
> P14 The provisions and terms of this Stipulation will not terminate at the conclusion of this action. However, this Stipulation shall only govern disclosure and release of documents occurring or intended to occur after the date of this agreement. Thus, this Stipulation shall not constitute evidence of an alleged prior disclosure of materials claimed to be protected by the attorney-client privilege or work product doctrines. Similarly, to the extent that there have been any such prior disclosures, this Stipulation shall not constitute evidence or ratification of any such disclosures by the holder of any such privilege. [**28]

Dkt. Nos. 47 & 48; Dkt. No. 57, Exs. E & F, (lawyers' emails on the confidentiality stipulation). The parties concur that this Confidentiality Stipulation/Order did not go into effect until July 20, 2006. Dkt. No. 63, Pls.' Reply Mem. of Law at p. 5. These dates and provisions are critical for the very reason that O'Hara did disclose the Interfor Report subsequent to this Court's March 27, 2006 Order. Dkt. No. 36.

Equally critical dates are the dates when *Metroland* reporter Chet Hardin contacted Ross on or before July 12, 2006, about the contents of the Interfor Report, in which O'Hara is the likely source of the eventual story, and, July 13, 2006, when O'Hara spoke with Ross and then faxed him a copy of the Interfor Report. *See supra* Section I.B. [16]

> 16 Furthermore, O'Hara communicated with Morris Sutton about the *Ross* lawsuits. Contents of that contact have not been fully disclosed. There is an intimation that O'Hara may have disclosed the Interfor Report and other information about NXIVM to Sutton. Dkt. No. 57, Douglas Rennie Decl., dated Oct. 20, 2006, at P 15, Ex. M. NXIVM also suspects that O'Hara is the source for another *Forbes Magazine* article, dated July 24, 2006, and the *Albany Times Union* article about them. Dkt. No. 57, Rennie Decl., at P 26, Exs. U-Y.

[**29] D. Sitrick Company

Sitrick Company is a strategic communications firm based in Los Angles, which provides, *inter alia,* litigation supported public relation services. Dkt. No. 71, Kristin Keefe Decl., dated Jan. 8, 2007. at P 1. [17] Interfor introduced Sitrick to NXIVM and the public relations firm began working with NXIVM in October 2004, when an appeal was pending with the Second Circuit Court of Appeals in the matter of *NXIVM v. Ross et. al.,* which appeal ultimately ended in the United States Supreme Court. Dkt. No. 71, Keefe Decl., at PP 3 & 4. Because of unfavorable publicity, such as a scathing article in *Forbes Magazine,* Sitrick was "retained primarily to assist NXIVM in combating negative press and publicity resulting from *NXIVM v. Ross." Id.* at P 3; *see* Dkt. No. 72, Ex. A, Keefe Email, dated Nov. 5, 2004. Keefe was the primary liaison between NXIVM and Sitrick and, to some degree, O'Hara and Salzman had some limited involvement with them. *Id.* at P 5.

17 *See also* www.sitrick.com.

[**30] [*121] After providing services to NXIVM for approximately three months, on or about December 13 2004, NXIVM, through TOGA PLLC, and Sitrick entered into a written retainer agreement, "effective as of October 20, 2004." Dkt. No. 72, Joseph O'Hara Decl., dated Jan. 8, 2007, at P 5, Ex. B, Retainer Agreement, at P 1. The records indicate that prior to December 13, 2004, Sitrick conferred with NXIVM many times about many matters but only with Nolan and Heller and O'Hara on November 3, 2004. Dkt. No. 72, Ex. C, Sitrick Detailed Billing Records. [18] At such meeting, it appears that the parties discussed the *Ross* litigation. *Id.* On or about November 24, 2004, presumably Interfor provided Sitrick with a copy of the Ross Report. *Id.* at p. 8. O'Hara was not aware of such interchange until he had received and observed on Sitrick's December 10, 2004 Remittance a notation for November 24, 2004, indicating a receipt and a review of the Interfor Report. Dkt. No. 67, O'Hara Decl., at P 5.

18 Kristin Keefe avers that Sitrick had many strategic meetings that include telephone calls with NXIVM, Nolan and Heller, and TOGA PLLC staff about the *Ross* litigation. Dkt. No. 71, Keefe Decl., at P 11. However, Sitrick's uncanningly detailed bills do not reflect that at all. Yes, there are many meetings listed with her and Salzman, and other unknown persons, but there is only one meeting in which Nolan and Heller and O'Hara are noted as being present. Dkt. No. 72, Ex. C. Of course, O'Hara denies having such intimate and frequent involvement with Sitrick. Dkt. No. 72, O'Hara Decl., at PP 6-8.

[**31] Apparently, NXIVM was anxious to have the retainer agreement signed because they believed they "need[ed] [it] ASAP for [the] attorney client privileges it afford us." Dkt. No. 72, Ex. A, Keefe's Email, dated Nov. 5, 2004. Sitrick was retained to act as "corporate communication advisor, specialist, and non-designated consultant" to "provide advice and public relations services in connection with various legal issues concerning [NXIVM]," and several of the provisions of the Sitrick retainer agreement were consistent with the belief that attorney client privilege protection would be available: "All communications, correspondence, instruments and writings between Sitrick and Attorney shall be deemed to constitute attorney work-product and otherwise protected by the attorney-client privilege." Dkt. No. 72, Ex. B, at p. 2; Dkt. No. 71, Keefe Decl. at PP 7-10, Ex. A. However, Sitrick was involved in many services on NXIVM's behalf such as composing press kits, monitoring news coverage, drafting and pitching news stories about Ross, among other things." Dkt. No. 72, O'Hara Decl., at P 6, n. 1, Ex. C, Sitrick's Bill. Sitrick also reviewed legal pleadings, transcripts, legal opinions [**32] and other legal documents, participated in strategy meetings on the appeal to the United States Supreme Court, and contacted members of the media about the pending appeal. Dkt. No. 71, Keefe Decl., at P 12 & 13. [19] O'Hara disclaims any active involvement with Sitrick except receiving Sitrick's billings which he faxed to NXIVM. Dkt. No. 72, O'Hara Decl., at PP 6-8. O'Hara swears that he "never used any information from Sitrick to provide legal advice or services to NXIVM . . . [n]or did [he] ever use any information from Sitrick as part of any work performed on behalf of NXIVM." Dkt No. 72, O'Hara Decl., at PP 17 & 18.

19 In an email, Keefe outlines the "overall" and "short term" role of Sitrick: "(1) Develop long term and short term PR strategy and implement"; (2) create positive press to support our Supreme Court Cert petition; (3) help figure out and implement strategy for Fritjof; (4) find friendly report to attend Scientist Training; and (5) create positive press for upcoming events. Dkt No. 73, Ex. A, Email.

[**33] E. *NXIVM v. Sutton, et al.,* Civil Case No. 06-CV-1051, District of New Jersey

In the New Jersey litigation, NXIVM moved to quash Defendants' subpoena on Interfor, for a protective order preventing the discovery of information related to Interfor, a sealing order of the entire records, and the disclosure of all information and documents received from O'Hara. Dkt. No. 57, Pls.' Mem. of Law, dated Aug. 7, 2006; Dkt. No. 67 Intervenor's Mem. of Law, dated Nov. 17, 2006. Heard concurrently was Ross' Motion to

Amend his Answer in order to assert counterclaims. Oral arguments were heard [*122] on January 9, 2007, and the New Jersey Court issued an Order, dated January 10, 2007.

II. ISSUES

Both the parties and the Intervenor present an ambitious smattering of issues. We would be best served to list them now:

A. NXIVM

. A protective order should be granted prohibiting O'Hara from further disclosure of Plaintiffs' Protected Information and there is good cause for such protective order;

. O'Hara's conduct constituted the practice of law and he owed ethical duties to Plaintiffs;

. O'Hara's disclosure violated the Disciplinary Rules;

. O'Hara should return all of [**34] Plaintiffs' files;

. O'Hara should produce all of his communications with third parties concerning NXIVM;

. O'Hara should submit to an additional day of deposition;

. Ross' Subpoena should be quashed;

. Ross should not be allowed to depose O'Hara; and

. Communications between O'Hara and NXIVM are privileged or work product and there is no waiver of either the attorney client privilege or work product doctrine.

B. O'Hara

. No attorney-client relationship existed between O'Hara and NXIVM prior to July 1, 2004;

. No privilege exists for non-legal communications, business advice or disclosure to third-parties;

. NXIVM's investigation of Ross falls within the crime/fraud exception of the attorney-client privilege;

. Plaintiffs' Motion to Compel should be denied;

. There was a third-party waiver; and

. New York Law should provide the standard of review.

C. Intervenor Ross

. The Court should stay its decision and defer to the adjudication of the issues by the District Court of New Jersey;

. Interfor Investigation is subject to the crime/fraud exception to the attorney-client and work product privileges;

. Ross is entitled to discover what other criminal [**35] mischief NXIVM and Interfor conspired to commit;

. NXIVM has waived any attorney-client privilege either by sharing it with a third-party or an at-issue waiver; and

. NXIVM's work product -- Interfor Report -- is necessary to prosecute Ross' counterclaims.

One could argue that there is no need for a further protective order since there exists a Confidentiality Stipulation/Order. *See* Dkt. Nos. 47 & 48; *see also supra* Section I.B. at p. 15. Yet, this Confidentiality Stipulation/Order permits any party to apply to the court for a further protective order relating to any document. Dkt. No. 48 at P 13. The genesis for seeking a protective order, pursuant to *FED. R. CIV. P. 26(c)* and the Court's inherent discretion, is to stop O'Hara from "exacerbating Plaintiffs' damages by setting out on a campaign to reveal the Plaintiffs' Protected Information." Dkt. No. 57, Pls.' Mem. of Law at p. 15. Similarly, notwithstanding O'Hara's previous disclosure of the Interfor Report, it can be construed that his opposition to NXIVM's Omnibus Motion in seeking full disclosure of this Report also complies with the terms of the Confidentiality Order. [**36] *Id.* at PP 8 & 11. Therefore, these issues are properly before this Court.

III. DISCUSSION

A. Intervenor's Motion for this Court to Stay and Defer to the District of New Jersey

This Court finds itself in an atypical dilemma having to grapple with a number of issues that are being concurrently decided by another District Court. As we noted above, *NXIVM v. O'Hara et al.*, and *NXIVM v.* [*123]

Ross, et al., are on nearly parallel tracks and timetables. These two cases overlap in several materials respects - facts, issues, and key players. Moreover, NXIVM has filed Motions for a Protective Order and to Quash Ross' Subpoenas, primarily directed at the Interfor Report and O'Hara's role in all of these matters, in both this Court and the District Court for the District of New Jersey. Coincidentally, all of the motion papers, oppositions, and corresponding exhibits before both courts are virtually identical, and the motion calendar for both Courts are almost contemporaneous. To reiterate, Ross served a subpoena upon O'Hara to depose him about the Interfor Report, sting operations, and probably other related issues. By moving to quash that subpoena and seeking a protective order, [**37] NXIVM wishes to prevent O'Hara from discussing with any third-party purportedly confidential information. Since O'Hara works and resides in this District, Ross' subpoena upon him is properly before this Court. *FED. R. CIV. P. 45(b)(2).*

Intervenor Ross argues that the District Court in New Jersey is in a better position to determine the "nature of the NXIVM-Interfor plot and the applicability of the crime-fraud exception" to the attorney client privilege, and thus we should defer our decision until the New Jersey Motions are decided. Dkt. No. 67, Intervenor's Mem. of Law at p. 16. Further, Ross contends that at the time he submitted his opposition to NXIVM's Motions in this Court, presumably New Jersey already had a "fully-briefed" set of motions, and thus was ahead in terms of a court's review. *Id.* We concur with Ross that there is a possibility of inconsistent rulings and duplication, which should be avoided, and certainly the District Court of New Jersey is keenly aware of what is relevant to its case and hence capable of deciding those issues accordingly. However, we respectfully decline Ross' invitation to defer to the District Court [**38] in New Jersey.

First, New Jersey does not have jurisdiction to assess the issues germane to this New York litigation, even though there are some factual similarities between the two litigations. The claims of attorney-client privilege and possible breach of a lawyer's ethical obligation are soundly grounded in this jurisdiction and the examination of those matters based upon New York law by this Court are inescapable, as much as the District Court of New Jersey has to wrestle with the New Jersey based facts and issues. Furthermore, if the District Court of New Jersey were to make rulings that may be pertinent to our set of Motions, such rulings would only be persuasive and not controlling, and inversely. This Court is obligated to rule on the pending Omnibus Motion nonetheless.

But, the request to defer may be moot. On January 9, 2007, NXIVM's Motion for a Protective Order, NXIVM's and Interfor's Motion to Quash Ross' Subpoena, and Ross' Motion to Amend were heard before the Honorable Mark Falk, United States Magistrate Judge. NJ Tr., dated Jan. 9, 2007. Magistrate Judge Falk made rulings on the records, which were eventually reduced to a written Order. The Court (1) denied NXIVM's [**39] Motion to Seal the Record, (2) granted NXIVM's Motion for a discovery confidentiality order, (3) denied NXIVM's and Interfor's Motion to Quash, and (4) granted in part and denied in part Ross' Motion to Amend. New Jersey Order, dated Jan. 10, 2007. As Plaintiffs so incisively note, Magistrate Judge Falk did not decide whether O'Hara was NXIVM's attorney nor decide whether "O'Hara's legal obligation of confidentiality were somehow obviated by his accusation" of a crime or fraud. Dkt. No. 78, Defs." Lt.-Br., dated Jan. 26, 2007; *see also* NJ Tr.

Therefore, Ross' Motion to Stay our decision is **denied.**

B. Previous Court Order

In support of its Motion for a Protective Order, NXIVM alerts the Court that O'Hara violated this Court's March 27, 2006 Order, which directed that he not disclose the Interfor Report, among others, until the Court resolved the matters. Text Order, dated March 27, 2006 ("In the interim, Defendant O'Hara shall not publicly disclose the documents claimed to be privileged until the Court has conferred with the parties and, to the extent necessary, decided the issued."); *see supra* Section I.B. at pp. 15-16. The [*124] repercussion for violating this Order [**40] has not been clearly suggested to the Court. However, and pertinent to these Motions, we know that O'Hara disclosed the Interfor Report to Ross and discussed with him its contents and maybe more on July 12, 2006. We can safely presume that O'Hara discussed and disclosed the same Report with Chet Hardin of *Metroland* Newspaper. Other information, much in the same vein as the Interfor Report, was shared with the Suttons, and there could have been others.

On its face, it would appear that O'Hara blatantly ignored our March 27, 2006 Order by speaking with Ross, the reporter and others, and approximate sanctions or consequences should ensue. But the ability to enforce that Order upon O'Hara has been seriously dissipated by the subsequent Confidentiality Stipulation/Order, dated July 20, 2006, and NXIVM's strategic tactic not to submit the Confidentiality Stipulation for nearly three months. The enforceability of the Stipulation was deferred to the detriment of NXIVM. NXIVM received this Stipulation on April 20, 2006, and yet, for whatever reason, delayed signing the agreement until July 19, 2006, and then submitted it to the Court the following day. Until NXIVM signed the Stipulation, [**41] there was

no enforceable confidentiality agreement or order, with the exception of our March 27<th> Order.

Cleverly, O'Hara inserted a provision within the Confidentiality/Stipulation that has retroactive ramifications: "However, this Stipulation shall only govern disclosure and release of documents occurring or intended to occur after the date of this agreement [July 19, 2006]. Thus, this Stipulation shall not constitute evidence of an alleged prior disclosure of materials claimed to be protected by the attorney-client privilege or work product doctrines. Similarly, to the extent that there have been any such prior disclosures, this Stipulation shall not constitute evidence of ratification of any such disclosures by the holder of any such privilege." Dkt. Nos. 47 & 48 at P 14. NXIVM decries surprise arguing that it never anticipated that this provision would be retroactive though, contrary to that declaration, the record indicates that the parties haggled over this provision through emails, with O'Hara insisting that it remain in the Stipulation and consequently NXIVM acquiescing, however with a modification of its own. *Id.;* Dkt. No. 57, Ex. E. Moreover, the clear meaning of [**42] this provision strikes a discordance with NXIVM's current posture and interpretation. Now to NXIVM's chagrin, had it signed the Stipulation upon receipt and delivered it to the Court promptly rather than tactically withholding it, there might be some aftermath to O'Hara's disclosure and revelations. In terms of this Omnibus Motion, because of this Stipulation and the belated executed, O'Hara gets a reprieve for his discussion with third parties prior to July 20, 2006. Thus, O'Hara's failure to abide by the March 27<th> Order has no further bearing on NXIVM's Application for a Protective Order. [20]

20 We intimate no view as to its implication on the underlying merits of this litigation.

C. Attorney-Client Privilege and Work Product Doctrine

1. Attorney-Client Privilege

One manner in which to seek a protective order is to assert that the documents and the information to be protected is shielded by the attorney-client privilege and/or the work product doctrine. NXIVM has made both of those claims.

We [**43] acknowledge that the causes of actions filed against Defendants are common law claims that should be governed by New York law. The same should hold true when the attorney-client privilege is invoked. Nevertheless, [HN1] the distinction between New York and federal law on attorney-client privilege is quite indistinguishable, as the law intersects in all of its facets, and are viewed interchangeably. *Bank of Am., N.A. v. Terra Nova Ins. Co. Ltd., 211 F. Supp. 2d 493 (S.D.N.Y. 2002)* ("New York law governing attorney-client privilege is generally similar to accepted federal doctrine.") (citations omitted). As such, the attorney-client privilege is a longstanding, common law privilege recognized in New York and by the federal courts under *FED. R. EVID. 501*. This privilege encourages full engagement between a [*125] party and her attorney so that full and frank communication exists to impart all the information an attorney may need in order to give sage and cogent advice on the matter. *Swidler Berlin v. United States, 524 U.S. 399, 403, 118 S. Ct. 2081, 141 L. Ed. 2d 379 (1998)*; *United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989)* ("[The] communications [**44] between attorney and client endure as the oldest rule of privilege known to the common law."). Stated another way, its essential purpose is to encourage clients to be fully forthcoming with their attorney and to receive, in return, advice which will protect the clients' legal rights. *Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)*; *United States v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir. 1991)*; *Asian Vegetable Research & Dev. Ctr. v. Inst. of Int'l Educ., 1996 U.S. Dist. LEXIS 307, 1996 WL 14448, at *4 (S.D.N.Y. Jan. 16, 1996)* (citing, *inter alia, In re Horowitz, 482 F.2d 72, 81 (2d Cir.), cert. denied, 414 U.S. 867, 94 S. Ct. 64, 38 L. Ed. 2d 86 (1973)*; *People v. Mitchell, 58 N.Y.2d 368, 373, 448 N.E.2d 121, 461 N.Y.S.2d 267 (1983)*. The free-flow of information and the twin tributary of advice are the hallmarks of the privilege. For all of this to occur, there must be a zone of safety for each to participate without apprehension that such sensitive information and advice would be shared with others without their consent. *In re Grand Jury Subpoena Duces Tecum Dated November 16, 1974, 406 F. Supp. 381, 386 (S.D.N.Y. 1975)* ("The *sine qua non* of the [**45] attorney-client-privilege is . . . a confidence reposed . . . .").

[HN2] When determining if there is in fact an attorney-client privilege present to cloak both the client's communication and the corresponding legal advice, a court needs to ascertain that this safety net attaches to only those communications (1) where legal advice of any kind is sought, (2) from a professional legal advisor in his or her capacity as such, (3) the communication relates to that purpose, (4) made in confidence, (5) by the client, and (6) are at his or her insistence permanently protected, (7) from disclosure by the client or the legal advisor, (8) except if the protection is waived. *United States v. Int'l Bhd. of Teamsters, 119 F.3d 210, 214 (2d Cir. 1997)* (citing *In Re Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1036 (2d Cir. 1984)*); *Madanes v. Madanes, 199 F.R.D. 135, 143 (S.D.N.Y. 2001)* (citing, *inter alia, In re Richard Roe, Inc., 68 F.3d 38, 39-40 (2d Cir.1995)* & quoting *United States v. Kovel, 296 F.2d 918, 921 (2d Cir.1961)*); *see also* 8 WIGMORE, EVIDENCE § 2292 (McNaughton rev. ed. 1961). This privilege, as [**46]

previously stated, further attaches to the advice rendered by the attorney. *In re County of Erie, 473 F.3d 413, 2007 WL 12024, at *3 & 4 (2d Cir. Jan. 3, 2007)* (citing *United States v. Constr. Prod. Research, Inc., 73 F.3d 464, 473 (2d Cir. 1996)* (listing the elements that include that the communication is made "for the purpose of obtaining or providing legal advice")); *In re Six Grand Jury Witnesses, 979 F.2d 939, 943-44 (2d Cir. 1992)*. The burden of proving each element of the privilege rests on the party claiming the protection. *In re Horowitz, 482 F.2d at 82*; *United States v. Stern, 511 F.2d 1364, 1367 (2d Cir. 1975)* (cited in *Von Bulow v. Von Bulow, 652 F. Supp. 823, 1986 WL 11783, at *3 (S.D.N.Y. Oct. 15, 1986)* for the proposition that "it is axiomatic that the burden is on a party claiming the essential elements of the privileged relationship").

[HN3] Contrary to modern yet ill-informed perceptions, the attorney-client privilege is often "[n]arrowly defined, riddled with exceptions, and subject to continuing criticism." *United States v. Schwimmer, 892 F.2d at 243*. [**47] Grand as the privilege stands in our legal lexicon, it is nonetheless narrowly defined by both scholars and the courts. *Univ. of Pa. v. E.E.O.C., 493 U.S. 182, 189, 110 S. Ct. 577, 107 L. Ed. 2d 571 (1990)*; *In re County of Erie, 473 F.3d 413, 2007 WL 12024, at *3* (finding that the privilege is narrowly construed and "appl[ies] only where necessary to achieve its purpose) (citing, *inter alia, Fisher v. United States, 425 U.S. 391, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976))*. [21] The attorney-client privilege is not [*126] given broad, unfettered latitude to every communication with a lawyer, but is to be narrowly construed to meet this narrowest of missions. *Fisher v. United States, 425 U.S. 391, 403, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976)* ("However, since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose."); *see also In re Horowitz, 482 F.2d at 81* (privilege ought to be "strictly confined within the narrowest possible limits consistent with the logic of its principle") (quoting 8 WIGMORE § 2292 at 70); *United States v. Int'l Bhd. of Teamsters, 119 F.3d at 214*.

> 21 [HN4] There is the general maxim that the public, particularly within the judicial forum, is entitled to be exposed to "everyman's evidence." 8 WIGMORE, EVIDENCE § 2317 (McNaughton rev. ed. 1961). The quest is for the truth of the matter to flow forward before the court, and "[t]he suppression of truth is a grievous necessity at best . . . [only justified] when the opposed private interest is supreme." *In re Megan-Racine Assocs., Inc., 189 B.R. 562, 570 (Bankr. N.D.N.Y.1995)* (quoting *McMann v. Sec. and Exch. Comm'n, 87 F.2d 377, 378 (2d Cir. 1937))*. But since the attorney-client privilege "stands in derogation of the public's right to everyman's evidence, . . . it ought to be strictly confined within the narrowest possible limits consistent with the logic of the principle." *In re Grand Jury Proceedings v. John Doe, 219 F.3d 175, 182 (2d Cir. 2000)* (citing *United States v. Int'l Bhd. of Teamsters, 119 F.3d at 214*).

[**48] In today's world, an attorney's acumen is sought at every turn, even average attorneys mix legal advice with business, economic, and political. *In re County of Erie, 473 F.3d 413, 2007 WL 12024, at *5*; *MSF Holding Ltd. v. Fid. Trust Co. Intern, 2005 U.S. Dist. LEXIS 34171, 2005 WL 3338510, at *1 (S.D.N.Y. Dec. 27, 2005)* (in-house counsel often fulfill the dual role of legal advisor and business consultant); *Rattner v. Netburn, 1989 U.S. Dist. LEXIS 6876, 1989 WL 223059, at *6 (S.D.N.Y. Jun. 20, 1989)*; Many attorneys have actually established dual professional practices in order to provide a multitude of relevant advice, not necessarily confined to law advice. Some thoughtful lawyers establish professions independent of the practice of law. And oftentimes the line of demarcation as to the nature of the advice is blurred. [HN5] "Attorneys frequently give to their clients business or other advice which, at least insofar as it can be separated from essentially professional legal services, give rise to no privilege whatsoever." *Colton v. United States, 306 F.2d 633, 638 (2d Cir.), cert denied 371 U.S. 951, 83 S. Ct. 505, 9 L. Ed. 2d 499 (1963)*. "When an attorney is consulted in a capacity other than as a lawyer, [**49] as (for example) a policy advisor, media expert, business consultant, banker, referee or friend, that consultation is not privileged." *In re County of Erie, 473 F.3d 413, 2007 WL 12024, at *6* (citing *In re Lindsey, 331 U.S. App. D.C. 246, 148 F.3d 1100, 1106 (D.C. Cir. 1998))*. The privilege is "triggered only" by a request for legal advice, not business advice. *In re Grand Jury Subpena Duces Tecum Dated Sept. 15, 1983, 731 F.2d 1032, 1037 (2d Cir. 1984)*; *Elliott Assoc. L.P. v. Republic of Peru, 176 F.R.D. 93, 97 (S.D.N.Y. 1997)* (finding that the communication is not cloaked if the lawyer is hired for business or personal advice); *Fine v. Facet Aerospace Products Co., 133 F.R.D. 439, 444 (S.D.N.Y. 1990)* (privilege not extended to management advice). If the communication between client and lawyer "is not designed to meet problems which can fairly be characterized as predominately legal, the privilege does not apply." *Rattner v. Netburn, 1989 U.S. Dist. LEXIS 6876, 1989 WL 223059, at *6*; *In re County Erie, 473 F.3d 413, 2007 WL 12024, at *5 & 6* (ruling that the predominant purpose of the advice is to solicit or gain legal advice); *United States Postal Serv. v. Phelps Dodge Refining Corp., 852 F. Supp. 156, 160 (E.D.N.Y. 1994)* [**50] ("The Communication must be made to the attorney acting in her capacity as counsel."). In this

framework, if a business decision can be viewed as both business and legal evaluations, "the business aspects of the decision are not protected simply because legal considerations are also involved." *Hardy v. New York News, Inc., 114 F.R.D. 633, 643-44 (S.D.N.Y. 1987).*

2. Work Product Doctrine

[HN6] Whenever the attorney-client privilege is raised in on-going litigation, concomitantly the work product doctrine is virtually omnipresent. They are inseparable twin issues, and when one is advanced, surely the other will follow. The work product privilege is more broad than the attorney-client privilege. *In re Grand Jury Proceedings, 219 F.3d 175, 190 (2d Cir. 2000).* [HN7] This privilege exists to protect attorneys' mental impressions, opinions, and/or legal theories concerning litigation. *Horn & Hardart Co. v. Pillsbury Co., 888 F.2d 8, 12 (2d Cir. 1989).* Indeed, the work product privilege is designed [*127] to protect an adversarial system of justice and has been analyzed in that context by the Supreme Court in *Hickman v. Taylor, 329 U.S. 495, 510-11, 67 S. Ct. 385, 91 L. Ed. 451 (1947).* [**51] This doctrine establishes a "zone of privacy" in which a lawyer can prepare and develop theories and strategies with an eye towards litigation free from unnecessary intrusion by his or her adversaries. *United States v. Adlman ("Adlman I"), 68 F.3d 1495, 1500-01 (2d Cir. 1995)* (citing *United States v. Nobles, 422 U.S. 225, 238, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975)* & *Hickman v. Taylor, 329 U.S. at 516*); *see also In re Minebea Co., Ltd., 143 F.R.D. 494, 499 (S.D.N.Y. 1992).* Of course [HN8] the burden, albeit not a heavy one, of establishing that the work product doctrine applies rests with that party's attorney who is claiming the protection. [HN9] The work product doctrine, as well as the attorney-client privilege, "does not extend to every document generated by the attorney; it does not shield from disclosure everything a lawyer does." *Rattner v. Netburn, 1989 U.S. Dist. LEXIS 6876, 1989 WL 223059, at *6.* [HN10] The doctrine is generally invoked as soon as the attorney, in responding to a request for production of documents, serves upon the requesting party a privilege log asserting this and any other relevant privilege or provides notification that it will not be disclosed for [**52] this reason. *FED. R. CIV. P. 26(b)(5)* & *34(b).* Failure to timely provide the privilege log, as discussed above, or objection constitutes a waiver of any of the asserted privileges. Even if a party follows these steps, the security of the work product doctrine is not assured. There must be the omnipresent concern that revealing the attorney's mental processes is real and not just speculative. *Gould Inc. v. Mitsui Mining & Smelting Co., Ltd., 825 F.2d 676, 680 (2d Cir. 1987).*

[HN11] *FED. R. CIV. P. 26(b)(3)* provides a relevant rule on the discovery of work product material. It reads in part:

> [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 the other party's 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 the party's [**53] case and that the party 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 the disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

It is important to note that [HN12] the work product doctrine classifies documents into two categories: "non-opinion" work product and "opinion" work product. The distinction between these two categories turns on the effort employed in obtaining disclosure pursuant to *Rule 26(b)(3).* For "non-opinion" work product, the party seeking this information must show a substantial need for the document and undue hardship to acquire the document or its substantial equivalent by other means. On the other hand, "opinion" work product requires a higher protection to the extent that the requesting party has to demonstrate extraordinary justification before the court will permit its release. *Strougo v. BEA Assocs., 199 F.R.D. 515, 521 (S.D.N.Y. 2001)* (citing *In re Sealed Case, 219 U.S. App. D.C. 195, 676 F.2d 793, 809-10 (D.C. Cir. 1982)*); [**54] *see also Upjohn Co. v. United States, 449 U.S. at 401.* At a minimum, such "opinion" work product should remain protected until and unless a highly persuasive showing is made. *In re Grand Jury Proceedings, 219 F.3d at 191*; *United States v. Adlman ("Adlman II"), 134 F.3d 1194, 1204 (2d Cir. 1998).* In a similar vein, in most instances, the work product doctrine does not extend to facts. Generally, non-privileged facts should be freely discoverable. *Compare In re Savitt/Adler Litig., 176 F.R.D. 44, 48 (N.D.N.Y. 1997) with In re Grand Jury Subpoena dated Oct. 22, 2001, 282 F.3d 156, 161 (2d Cir. 2002).*

"[W]here [HN13] a party faces the choice of whether to engage in a particular course of conduct virtually

certain to result in litigation and prepares documents analyzing whether to engage in the conduct based on its assessment of the likely result of the [*128] anticipated litigation, [it should be] conclude[d] that the preparatory documents should receive protection under *Rule 26(b)(3)*." *Adlman II, 134 F.3d at 1196*. The crux being that a document which has been prepared because of the prospect [**55] of litigation will not lose its protection under the work product doctrine, even though it may assist in business decisions. *Strougo v. BEA Assocs., 199 F.R.D. at 521* ("Where a document is created because of the prospect of litigation, analyzing the likely outcome of that litigation, it does not lose protection under this formulation merely because it is created to assist with a business decision." (citing *Adlman II, 134 F.3d at 1202*)); *Adlman I, 68 F.3d at 1502*. But this protection will not be extended, under any circumstances, to records that are prepared in the ordinary course of business. *Adlman II, 134 F.3d at 1202*; *Adlman I, 68 F.3d 1502*. [HN14] Even though the work product doctrine protects the impressions, opinions, theories, and strategies of an attorney, *Rule 26(b)(3)* makes clear that the document at issue, either obtained or prepared by or for a party, or by or for his representative, may be cloaked by this doctrine as well. *Id.* This maxim makes sound sense considering how complex litigation can be and the undeniable need for others to assist in developing all that is necessary to prosecute [**56] or defend a lawsuit. Obviously, impressions and strategies are not always created in a vacuum, but, rather are generated in cogent discourse with others, including the clients and agents. Further, the exchange of such documents and ideas with those whose expertise and knowledge of certain facts can help the attorney in the assessment of any aspect of the litigation does not invoke a waiver of the doctrine. *United States v. Nobles, 422 U.S. at 239*; *Adlman I, 68 F.3d at 1502*.

3. Analysis of the NXIVM/O'Hara Relationship

Notwithstanding the current Confidentiality Stipulation/Order, NXIVM seeks an additional protective order to prevent O'Hara, who has been prone to sharing sensitive information with third parties, from continuing to dispense purportedly protected information. NXIVM's request seems to cover "any information that [O'Hara] learned in the course of his work with NXIVM, including any documents that he received or documents that he created in connection with his work for Plaintiffs." Dkt. No. 57, Proposed Order. Herein, NXIVM emphatically asserts that O'Hara has been its attorney since October 2003 and all of its communications are [**57] protected by either the attorney-client privilege or work product doctrine, and because there is an attorney-client privilege, O'Hara does not have authority, implicit or otherwise, to disclose the content of those communications and documents without NXIVM's consent. *Maloney v. Sisters of Charity Hosp. of Buffalo, New York, 165 F.R.D. 26, 29 (W.D.N.Y. 1995)* (citing, *inter alia, In re von Bulow, 828 F.2d 94, 100 (2d. Cir. 1987)* ("An attorney may not waive the privilege without his client's consent.")); *Connecticut Mut. Life Ins. Co. v. Shields, 18 F.R.D. 448, 451 (S.D.N.Y. 1955)*. NXIVM's privileges are broadly rather than specifically asserted, although NXIVM has provided a Privilege Log at the Court's direction. Dkt. No. 41, Attach. 1; Dkt. No. 57, Ex. A. Because in NXIVM's view O'Hara was its attorney, he has breached an attorney Discipline Rule by disclosing Protected Information. [22] Conversely, O'Hara disagrees and states that he was not acting as an attorney during the period prior to July 2004, and curiously takes no position whether he was acting as an attorney, under the auspices of TOGA PLLC, from July 1, 2004 to January [**58] 2005. With this obvious divergence on the nature of their relationship, the burden of establishing an attorney-client relationship rests with the party invoking it, NXIVM. *In re County of Erie, 473 F.3d 413, 2007 WL 12024, at *3* (citations omitted). In meeting this burden, NXIVM "must do so by competent and specific evidence, [*129] rather than by conclusory or *ipse dixit* assertions." *In re Omnicom Group Inc. Securites Litig., 233 F.R.D. 400, 404 (S.D.N.Y. 2006)* (citing, *inter alia, United States v. Doe, 219 F.3d 175, 182 (2d Cir. 2000))*. In order to address whether there was an attorney-client relationship, we will consider the record in stages -- before July 1, 2004, the date of the reformulation of TOGA PLLC, and after July 1, 2004.

22 NXIVM submits that O'Hara breached both or either the Washington, D.C., and New York Disciplinary Rules. Dkt. No. 57, Pls.' Mem. of Law at pp. 16-24. The Discipline Rules in question are virtually synonymous. [HN15] New York Discipline Rule, *DR 4-101(B)(1)*, reads in part that "a lawyer shall not reveal a confidence or secret of a client." N.Y. COMP. CODES R. & REGS, *tit. 22 § 1200.19(b)(1)*.

[**59] NXIVM, supported by a coterie of others, contends that it hired O'Hara for legal representation. *See* Dkt. No. 57, Exs. AE-AJ. O'Hara's rejoinder is that he was hired to be a Strategic Plan Coordinator/Consultant Advisor. NXIVM refers to certain documents and transactions to support its contention, whereas, O'Hara says that none of these references lend support to meeting its burden. Dkt. No. 57, Salzman Decl., at P 5 & Exs. A-F, AD, Keefe Decl. O'Hara argues that he told NXIVM representatives that he did not practice law and could not act as their lawyer. Those representatives retort that O'Hara never made such claims and they always believed that he was their counsel based partially on either his admissions or representations. Initially, it would appear that this subject is nothing more than a grand matter of

credibility - a he said/she said folly. But the Court is able to peer behind this credibility mire and make a determination which does not necessarily have to rely totally upon any party's averments or arguments.

Even though O'Hara was not licensed to practice law in New York and TOGA LLC promoted itself as a lobbying and marketing firm, NXIVM argues that O'Hara always [**60] acted as its attorney, relying upon the reasoning that if the client entertains a reasonable good faith belief that the person is a lawyer, then such person is acting in that capacity. *United States v. Ostrer, 422 F. Supp. 93, 97 (S.D.N.Y. 1976)*. If that were true that we rely solely upon subjective beliefs of the client, then why would the courts labor so strenuously and consistently to create objective elements to help others determine whether an attorney-client relationship truly exists. *See United States v. Int'l Bhd. of Teamsters, 119 F.3d 210, 214 (2d Cir. 1997)*. [23] This Court is not prepared to accept one party's personal view to determine the facts, especially in a disputed case such as this, and even if we did, it is not relevant. As we know, an attorney can act as a legal advisor one day and the next day provide other advice which does not deserve the broad protection afforded by the attorney-client privilege. The issue is not the client's belief that a professional may be acting as an attorney but rather the issue is for what purpose was the lawyer retained. More keenly, it is the nature of the communication that controls. As the Second [**61] Circuit has consistently stated, [HN16] we look to see whether the primary or predominate purpose of the communication was to procure legal advice, which suffices to say that we also look at the primary or predominate purpose for retaining the lawyer/professional. *In re County of Erie, 473 F.3d 413, 2007 WL 12024, at *8, n. 7* ("The predominate-purpose rule is the correct one."). In order to determine what was the primary or predominate purpose of the relationship and thus nature of most of the communications, [*130] we turn to the Professional Service Agreement as our guide. Dkt. No. 68, Exs. F & G.

> 23 The law in New York is not settled on the notion of the putative attorney. Some courts in and out of the state have attempted to carve out rules to help determine the reasonableness of a client's belief that a person has held herself out as attorney. *Fin. Tech. Int'l, Inc., v. Smith, 2000 U.S. Dist. LEXIS 18220, 2000 WL 1855131, at *4-6 (S.D.N.Y. Dec. 19, 2000)* (citing *United States v. Boffa, 513 F. Supp. 517, 523 (D. Del. 1981))*. But any attempt to adopt such a rule still remains in flux, with some courts rejecting or modifying it. For example, the Honorable Raymond Ellis, United States Magistrate Judge, grappled with this issue and came to the conclusion that "even if New York would apply the reasonable belief exception to individuals, corporations would have to make sure their attorneys are in fact attorneys." *2000 U.S. Dist. LEXIS 18220, [WL] at *7*; *see also A.I.A. Holdings, S.A. v. Lehman Bros., Inc., 2002 U.S. Dist. LEXIS 20107, 2002 WL 31385824, at *4 (S.D.N.Y. Oct. 21, 2002)* ("Thus, in the absence of an excusable mistake of fact, even if all the other requirements of the privilege are met, communications between 'client' and an unadmitted law school graduate are not privileged even where the putative 'attorney' has passed the bar examination."). Plaintiff's plaintive argument that we should follow this rule will be rejected, and if we were to follow Magistrate Judge Ellis's analysis, since NXIVM is a corporation it should have made sure O'Hara was properly licensed. Considering New York's ambiguity on this principle of law, we will rely upon the content, context and form of the communication.

[**62] The Professional Service Agreement clearly denotes that O'Hara, as Strategic Plan Coordinator, was providing much more than legal services, if that. He was coordinating media, public relations, lobbying, and other non-legal services, and throughout the Agreement he is referred to as a consultant, not as counselor or attorney. Thus, O'Hara was wearing multiple hats and if he was advising NXIVM on anything and everything other than legal services, whether business, media, public relations, or lobbying, there is no attorney-client privilege. The *sine qua non* that inextricably supports the notion that the parties meant to limit his role as legal counselor to only one of coordinator of legal service, whatever that might entail, is the disclaimer that "it is mutually understood and agreed that the Consultant [O'Hara] will not provide any direct legal services to the Company." Dkt. No. 68, Ex. G at p. 1. Moreover, the Professional Service Agreement specifically mentions that O'Hara would help identify law firms to represent NXIVM on various matters. As coordinator of legal services, however, O'Hara may have participated in communications providing legal advice or had become privy to [**63] documents prepared in anticipation of litigation, but the burden of proving such participation remains with NXIVM.

Rather than provide specificity, NXIVM relies upon a broad extrapolation of its attorney-client relationship. We were not provided with specific communications in order to determine the primary purpose for those communications. NXIVM presents several exhibits but they are of little value and lend *de minimis* support, if any, to the impression that there was an attorney-client relationship. *See* Dkt. No. 57, Exs. A-F. Also, we have a privilege log listing fifteen items, the same items O'Hara shared with NXIVM during the initial mandatory disclo-

sure. [24] Dkt. No 41; Dkt. No. 57, Rennie Decl., Ex. D; Dkt No. 67, Ross Ex. A. [HN17] A proponent of a privilege log must "make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection." *FED. R. CIV. P. 26(b)(5)*. In this respect, and in order to evaluate and facilitate [**64] the determination of whether a privilege exists, courts generally require compliance with the statutory mandate that an adequately detailed privilege log be provided. *United States v. Constr. Prod. Research, Inc., 73 F.3d at 473* (citations omitted). Without an adequately detailed privilege log, the courts are hamstrung in attempting to decipher the presence and extent of the claimed privilege. To constitute an acceptable privilege log, at a minimum, it should provide facts that would establish each element of the claimed privilege as to each document, *Strougo v. BEA Assoc., 199 F.R.D. at 519*, and "identify each document and the individuals who were parties to the communications, providing sufficient detail to permit a judgment as to whether the document is at least potentially protected from disclosure. "Other required information, such as the relationship between individuals not normally within the privileged relationship, is then typically supplied by affidavit or deposition testimony." *United States v. Constr. Prod. Research, Inc., 73 F.3d at 473*. [HN18] Where a party fails to comply with the requirements of *Rule 26(b)(5)* when submitting [**65] a privilege log, which is inadequate as a matter of law in that the log does not provide sufficient information to support the privilege, the claim of privilege may be denied. *Johnson v. Bryco Arms, 2005 U.S. Dist. LEXIS 48587, 2005 WL 469612, at *3-4 (E.D.N.Y. Mar. 1, 2005)* (citing *United States v. Constr. Prod. Research, Inc., 73 F.3d at 474*).

> 24 At the time O'Hara served his initial mandatory disclosure, he had designated the documents listed on the privilege logs as G to R. When serving NXIVM with the mandatory disclosure in February 2006, O'Hara asked NXIVM to advise him whether it considered these items privileged, which NXIVM did. In March 2006, NXIVM made its initial overture to the Court to hold these documents confidential.

Here, in certain respects, NXIVM's Privilege Log is inadequate and the "dearth of information [within the Log] is so [in]complete that the listing[s] [therein are] the functional [*131] equivalent of no listing at all." *A.I.A. Holdings, S.A. v. Lehman Bros., Inc., 2000 U.S. Dist. LEXIS 15141, 2000 WL 1538003,* [**66] *at *3 (S.D.N.Y. Oct. 17, 2000)*. The Court could declare all of the purported privileges waived. And, yet, adjudging all of these documents as waived would be too austere a remedy when the deficiencies can be readily rectified at this juncture of the litigation. *Export-Import Bank of United States v. Asia Pulp & Paper Co., Ltd., 232 F.R.D. 103, 111 (S.D.N.Y. 2005)* (although finding the privilege log inadequate, the court directed that a new privilege log be promulgated). Furthermore, the Court is able to decode enough information from the Log, when supplemented by the all of the submissions, to appreciate, at least, the support or disputation of the privilege. Hence, the Court will not adopt O'Hara's importune to waive *carte blanche* the privileges due to NXIVM's failure to comply with the Federal Rules. If any waivers are applicable, it will be determined on the merits, document by document, and not completely on the failure to provide sufficient information within the Log.

Weighing the multi-purpose consultation performed by O'Hara from October 2003 to July 1, 2004, and the descriptions provided for each of the documents listed within the Privilege Log, we find [**67] that NXIVM has failed to establish that the documents designated as G, H, I, J, K, M, and O are protected by either the attorney-client privilege or the work product doctrine. Many of the documents listed appear to be for business and non-legal advice, which are not protected. *Lugosch v. Congel, 219 F.R.D. 220 (N.D.N.Y. 2003)*.

Now shifting our attention to the period July 2004 until March 11, 2005, we find that the parties professional relationship was transformative. It is undisputed that O'Hara re-constituted his Washington, D.C. law practice as TOGA PLLC, in July or October 2004, for the sole purpose of cloaking all of their communications under the attorney-client privilege. Although an attorney-client relationship is clearly established after this date, their collective belief, at that time, that all of the conversations and communications were protected is misplaced and totally erroneous. We must not forget, and the parties fail to consider, that, in order to receive protections the predominate purpose of the specific communication is to seek legal advice in order to receive protection and not some all encompassing legal blanket attempt to shield them from the [**68] chill of prying eyes and ears. We cannot ignore that O'Hara may have continued to provide other important instruction to NXIVM during this period that fell outside the legal advice purview, and yet a juxtaposition persisted. Whether initiated or confronted by NXIVM, its business and social landscape bristled with litigation. Within that litigation environment included potential litigation with Rick Ross, Toni Natalie, and others.

Even though Nolan and Heller, and then other law firms, represented NXIVM in its lawsuit against Ross, Sutton, Franco, and others, O'Hara may have been privy to protected information throughout. Even if O'Hara did

not provide legal advice, which we confidently believe that he may, he was exposed to attorney work product. The record before us establishes that O'Hara may have tangentially assisted NXIVM in its lawsuit against Ross and, in doing so, generated documents prepared in anticipation of litigation. Referring to the Privilege Log, based upon the record before us, we determine that documents designated N, Q, S, T, and U, which include the infamous Interfor Report, were prepared as work product, warranting protection.

Although Nolan and Heller referred [**69] NXIVM to Interfor, and at the insistence of Raniere, it was TOGA PLLC, on behalf of NXIVM, that signed a retainer agreement with Interfor to first investigate the Kristen Snyder matter. Dkt. No. 68, O'Hara Decl., at P 23. Subsequently, Interfor's investigation included Ross, and the record clearly indicates that O'Hara was fully aware of that development albeit unaware of the investigative methodology or tactics. At the time of the retainer agreement and the Interfor investigation, NXIVM had already sued Ross. Consequently, any report that Interfor would generate on behalf of NXIVM that pertain to Ross would be deemed work product.

[*132] Despite our finding that these documents are cloaked with some protections, O'Hara and Ross, at least in terms of the Interfor Report, repugn that the confidentiality shield should be pierced because of a third-party or at issue waiver, or the crime/fraud exception. We must now consider whether there has been a waiver.

D. Crime/Fraud Exception to the Attorney-Client Privilege and Work Product

Both O'Hara and Ross advert to the manner in which Interfor conducted the Ross sting operation and, because of Interfor's conduct in pursuing that investigation, [**70] they ask the Court to apply the crime/fraud exception to the attorney-client privilege and/or work product doctrine to pierce any confidentiality protection that might exist. In weighing whether to grant their request, we note that we are dealing with two unique sets of facts that have unfolded in stages. The first stage pertains to the Interfor Report, dated November 23, 2004. And the second stage or circumstance is the sting operation that probably commenced on or about November 22, 2004, and continue at least until April 2005.

[HN19] The courts have recognized such an exception to the attorney-client privilege and work product doctrine for communications between lawyers and clients that are designed to facilitate or even conceal the commission of a crime or fraud. *Clark v. United States, 289 U.S. 1, 15, 53 S. Ct. 465, 77 L. Ed. 993 (1933)* ("The [attorney-client] privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a crime or fraud will have no help from the law. He must let the truth be told."); *In re Richard Roe, 68 F.3d 38, 39-40 (2d Cir. 1995)* (the issue is whether the communications were made [**71] to further that crime or fraud); *In re John Doe, Inc., 13 F.3d 633, 636 (2d Cir. 1994)*; *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983, 731 F.2d 1032, 1041 (2d Cir. 1984)*; *In re John Doe Corp., 675 F.2d 482, 491 (2d Cir. 1982)*; *United States v. Bob, 106 F.2d 37, 40 (2d Cir. 1939)*. The Second Circuit, realizing the attorney-client privilege and work product immunity "substantially overlap," ruled that there was no need for a different piercing standard for attorney work product. *In re Richard Roe, 68 F.3d at 41, n.2*; *see also In re John Doe Corp, 675 F.2d at 492*.

To assert this exception, the discovering party must demonstrate reasonable cause to believe that a crime or fraud has been committed or was intended **and** that the attorney-client communication was intended to facilitate or conceal the misconduct. *United States v. Jacobs, 117 F.3d 82, 87 (2d Cir. 1997)* (emphasis added); see also, *United States v. Zolin, 491 U.S. 554, 563 n.7, 109 S. Ct. 2619, 105 L. Ed. 2d 469 (1989)* ("The quantum of proof [probable cause or prima facie] needed to establish admissibility . [**72] . . remains [] subject to question."); *In re Omnicom Group, Inc. Sec. Litig., 233 F.R.D. 400, 406-09 (S.D.N.Y. 2006)* (discussing the required showing). That is, the particular communication or document in issue "itself" must be "**in furtherance** of a contemplated or ongoing criminal or fraudulent conduct." *In re Richard Roe, 68 F.3d at 40-41* (emphasis added); *see also In re Richard Roe, 168 F.3d 69, 71 (2d Cir. 1999)* (the document was intended in some way to facilitate or to conceal the criminal activity); *In re Omnicom Group, Inc. Sec. Litig., 233 F.R.D. at 404* ("The pertinent intent is that of the client, not the attorney."). Somehow or some way, the advice sought must be used or contemplated to be used to complete an illegal activity or perpetrate a fraudulent scheme. *In re Int'l Sys. and Controls Corp. Sec. Litig., 693 F.2d 1235, 1242 (5th Cir. 1982)*. In assessing whether the Plaintiffs have demonstrated probable cause, the Court may review, *in camera*, the privileged document and ascertain if it supports the view that it was being used at the time of its drafting to commit or conceal [**73] a fraud or a crime. *United States v. Zolin, 491 U.S. at 572*; *Boss Mfg. Co. v. Hugo Boss AG, 1999 U.S. Dist. LEXIS 987, 1999 WL 47324 (S.D.N.Y. Feb. 1, 1999)*; *see also Clark v. United States, 289 U.S. at 16* ("A privilege . . . vanish[es] when abuse is shown to the *satisfaction of the judge* . . . .") (emphasis added). [*133]

1. Interfor Report

The record indicates that the investigative firm, Interfor, performed two investigative acts which are the

targets of Ross' Subpoena. O'Hara joins Ross in asking the Court to utilize the crime/fraud exception to pierce either the attorney-client privilege or work product documents.

First, we have determined that the Interfor Report is not protected by the attorney-client privilege but rather by the work product doctrine. [25] However, this may be a distinction without a difference since the applicability of the crime/fraud exception remains the same for both. *In re Richard Roe, 68 F.3d at 41, n.2*; *see also In re John Doe Corp., 675 F.2d at 492*. Since NXIVM had commenced a lawsuit against Ross in the fall of 2003, there was pending litigation at the time Interfor was hired to investigate [**74] Ross and when it issued the Status Report, dated November 23, 2004. By gathering information about Ross, which may create strategies for NXIVM in prosecuting its claims against him, the Report was prepared for litigation purposes. It appears that Interfor may have even undertaken its investigation before a written retainer was signed but, at the direction of his clients, O'Hara signed a retainer agreement with Interfor to investigate the Kristen Snyder matter and eventually Ross. Investigations of litigants are generally commonplace and often viewed as work product. What raised eyebrows for Ross and O'Hara about this Report, and is the linchpin of their argument for piercing the privileges, is the improper and probably illegal manner in which Interfor collected data on Ross' banking and telephone information. [26] Within this Report, a number of privacy breaches are divulged, including several of Ross' banking transactions. [HN20] Federal law provides privacy protection for customer information of a financial institution and prohibits an otherwise unauthorized person or institution to obtain this information by false pretenses. *15 U.S.C. § 6821(a)* & *(b)*. [27] Gathering [**75] and then listing personal banking transactions, no matter how few, would appear to a reasonably prudent person to be a violation of federal law. It would then appear that Ross and O'Hara may have met their burden under the crime/fraud exception, but, their understanding of the law is misplaced or incomplete.

25 In the context of the Interfor Report being work product, NXIVM intimates that this Report is opinion and not fact work product, which would require a higher burden to pierce the confidentiality shield. *See supra* Section III.C.2. We have reviewed the Report and conclude that this is not an opinion work product but a fact work product.

26 The collection of Ross' medical records would be included in this list since it would have violated H.I.P.A.A., *45 C.F.R. §§ 160 et seq*. However, NXIVM avers that Ross' medical records were already posted on a website www.religiousfreedomwatch.org. *See* Dkt. No. 62, Ex. B (report on Ross on the internet). Being so posted on the Internet ameliorates any complaint of violating H.I.P.A.A by NXIVM. In any event, the H.I.P.A.A. claim could only be asserted against a medical provider.

[**76]

27 This banking statute reads, in part, as follows:

> [HN21] It shall be a violation of this subchapter for any person to obtain or attempt to obtain, or cause to be disclosed or attempt to cause to be disclosed to any person, customer information of a financial institution relating to another person--
>
> (1) by making a false, fictitious, or fraudulent statement or representation to an officer, employee, or agent of a financial institution;
>
> (2) by making a false, fictitious, or fraudulent statement or representation to a customer of a financial institution; or
>
> (3) by providing any document to an officer, employee, or agent of a financial institution, knowing that the document is forged, counterfeit, lost, or stolen, was fraudulently obtained, or contains a false, fictitious, or fraudulent statement or representation.
>
> (b) Prohibition on solicitation of a person to obtain customer information from financial institution under false pretenses.
>
> It shall be a violation of this subchapter to request a person to obtain customer information of a financial institution, knowing that the person will obtain, or attempt to obtain, the information from the institution in any manner described in subsection (a) of this section.

15 U.S.C. § 6821(a) & *(b)*.

> The statutes also carves out some exceptions but none are applicable to our facts. *See 15 U.S.C § 6821(c)-(g).*

[**77] Ross and O'Hara have assiduously shown, and may have met their burden of reasonable cause to believe that a crime of fraud has been committed by Interfor and possibly its [*134] principals who may have authorized, sought, ratified or sanctioned the collection of such personal data by any means necessary in order to invoke this exception. But what is lacking in their demonstration is the second prong of the crime/fraud exception: "that the attorney-client communication was intended to facilitate or conceal the misconduct." *United States v. Jacobs, 117 F.3d at 87*; *In re Omnicom Group, Inc. Sec. Litig., 233 F.R.D. at 406-09* (discussing the required showing). The Second Circuit has pellucidly stated that [HN22] this exception does not apply "simply because the privileged communication would provide an adversary with evidence of a crime or fraud, [and], if it did the [attorney-client] privilege would be virtually worthless." *In re Richard Roe, 68 F.3d at 40-41*. Rather, the exception applies when the particular communication or document in issue "itself" is used "**in furtherance** of a contemplated or ongoing criminal or fraudulent conduct." [**78] *Id.; see also In re Richard Roe, 168 F.3d at 71* (emphasis added) (the document was intended in some way to facilitate or to conceal the criminal activity). Stated another way, the exception concerns "not prior wrong doing but future wrong doing." *United States v. Zolin, 491 U.S. at 563*; *In re Int'l Sys. and Controls Corp. Sec. Litig., 693 F.2d at 1242* (during "the course of planning future crime").

Yes, the Interfor Report may describe criminal conduct but Ross and O'Hara fail to show how this report was used or contemplated to be used to complete an illegal activity or perpetrate a fraudulent scheme. O'Hara postulates that the Interfor Report is the preliminary step toward the sting operation. Yet, even though there is a causal connection between the Report and the sting operation, yet his postulation does not rise to the level of reasonable cause to believe. These events may have occurred *seriatim*, the Interfor Report which only provides information, albeit illegally obtained, was not used to facilitate or perpetrate the sting. Ross and O'Hara fail to show how this Report was used to defraud Ross. They have thus failed to meet [**79] their burden at least as to the Interfor Report under the crime/fraud exception, and the work product protection still prevails.

2. Sting Operation

The details of the sting, from its inception to its conclusion, will suffer a different fate than the Interfor Report. Succinctly, just to reiterate, in the later part of November 2004, NXIVM and Interfor concocted a plan to get Ross to talk about his defense in *NXIVM v. Ross et al.* and his intervention investigations which may have included NXIVM. *See supra* Section I.B. Unaware of the scheme, Ross met, at Interfor's Office, with Juval Aviv, President of Interfor, Anna Moody, Aviv's assistant, and an actress who portrayed a distraught mother who believed her daughter was locked in the nefarious clutches of NXIVM and in need of an intervention specialist much like Ross. The investigative team's sole purpose was to discover Ross' investigative techniques, whether he had other NXIVM/ESP clients, and ascertain what he knew and felt about NXIVM; they asked him a lot of questions along these lines. They continued this connivance by retaining Ross to intervene on behalf of this phony Zuckerman family and extended a $ 2,500.00 retainer [**80] to him. The plan to get Ross to conduct this intervention on a cruise ship ultimately collapsed from its own design.

There are at least two reasons for granting Ross access to the underlying facts of the sting: (1) the crime/fraud exception will pierce the attorney-client privilege during the initial planning stages of the sting; and (2) after November 24, 2004, NXIVM and Interfor were not operating under any attorney-client privilege or work product protection.

After O'Hara had retained Interfor and a day prior to the release of the Ross Status Report, on November 22, 2004, Interfor and NXIVM representatives, including O'Hara, met. O'Hara made notes to himself about the various topics discussed and these notes are informative enough to illuminate the cabal's strategy to gather and collect information from Ross. On the first page of the notes are notations about the "distraught mother" scheme. But beginning on the second [*135] page, emblazoned across the top of these notes is the phrase "Rick Ross Sting" followed by the observation that "N & H [Nolan and Heller] can't participate because they represent NXIVM/ESP against Rick Ross et al -- and he's represented by counsel." Dkt. No. 68, [**81] Ex. R. Everyone should have known the parameters, and if not, at least attorney O'Hara should have known that [HN23] an attorney cannot have any *ex parte* contact with an adversary who is represented by counsel. N.Y. COMP. CODES R. & REGS. *tit. 22, § 1200.35*. [28] Any improper contact of this nature or naked disregard of a Discipline Rule may fall within the crime/fraud exception. A plan to ensnare Ross into divulging intimate litigation or business strategies by deceit may constitute a fraud. [29] [HN24] A fraud is defined as "a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment." *In re Enron Corp., 349 B.R. 115, 2006 WL 2456203, at *10 (Bkrtcy. S.D.N.Y. Aug. 25, 2006)* (citing BLACK'S LAW DICTIONARY 670 (7th ed. 1999)). However, the

crime/fraud exception is not relegated solely to crimes, criminal fraud, or common law fraud. "At a minimum, the attorney-client privilege does not protect communications in furtherance of an intentional tort that undermines the adversary system itself." *Madanes v. Madanes 199 F.R.D. 135, 149 (S.D.N.Y. 2001)*. Without providing specifics, however, the Second Circuit clearly noted [**82] that "advice in furtherance of a fraudulent or **unlawful goal** cannot be considered 'sound.' Rather advice in furtherance of such goals is socially perverse, and the client's communication seeking such advice are not worthy of protection." *In re Grand Jury Subpoena, 731 F.2d 1032, 1038 (2d Cir. 1984)* (emphasis added). [30] *In Wachtel v. Guardian Life Ins. Co., 239 F.R.D. 376, 2006 U.S. Dist. LEXIS 27117, 2006 WL 1286189 (D.N.J. 2006)*, the District Court was called upon to determine whether Guardian Life had intentionally used outdated information to calculate usual, customary and reasonable charges for out-of network medical services upon the advice of counsel to misled the New Jersey Department of Banking and Insurance, and also used counsel to delay discovery. The consequence of such conduct led to the designation of a [*136] special master to determine which documents would be subject to the crime/fraud exception since the Guardian Life's actions undermined, obstructed and subverted the adversary system. *2006 U.S. Dist. LEXIS 27117, 2006 WL 1286189, at *3 & n.1*; *see also Rambus, Inc. v. Infineon Tech. AG, 220 F.R.D. 264, 283 (E.D. Va. 2004)* (finding that communication and work product used in [**83] furtherance of the spoilation of evidence fell within the crime/fraud exception even though it is neither a crime, fraud or tort but rather was not advancing the observance of the law and counseling misconduct).

28 [HN25] It is a seminal rule of law that an attorney should not have any contact with a litigant who is represented by counsel. Discipline *Rule 7-104(A)(1)* emphatically states that

> during the course of the representation of a client a lawyer shall not: (1) [c]ommunicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has prior consent of the lawyer representing such other party or is authorized by law to do so.

N.Y.COMP. CODES R. & REGS. *tit. 22, § 1200.35(a)(1)*.

This Discipline Rule explicitly forbids any and all unauthorized contact with an adversarial litigant, whether directly or indirectly. That means you cannot hire an investigator to do what a lawyer cannot.

29 Magistrate Judge Falk arrived at the same conclusion, and not by such a dissimilar finding, that this sting operation was "improper, well beyond the rules of litigation, the rules of the game." NJ Tr. at p. 107; *see also* NJ Tr. at pp. 102-112. Judge Falk did not confront the issue of whether such conduct "vitiate[d] the attorney-client privilege and work product doctrine . . . but the court's inclination is that a *prima facie* showing . . . has been made." *Id.* at 108. The New Jersey Court continued to state in support of its *in camera* review of the documents that a "flagrant violation of the rules of professional conduct could be sufficient to pierce the attorney/client work product doctrine." *Id.* at p. 109. Lastly, Judge Falk found on their record that Ross has presented a sufficient basis to conclude that a common law fraud has occurred." *Id.* at p. 111.

[**84]

30 Although there is no long list of specific acts, the Second Circuit, nonetheless, has provided some examples as to what may be considered within a crime/fraud exception:

> For example, one may violate the antitrust laws by bringing baseless litigation intended to delay entry into a market by a competitor. *See Landmarks Holding Corp. v. Bermant, 664 F.2d 891, 895-97 (2d Cir. 1981)*. If the litigation objectively lacked a factual or legal basis, some communications or work product generated in the course of such litigation might, after a rigorous *in camera* review by a court for relevance, fall within the crime-fraud exception. Thus, a client's directing an attorney to make large numbers of motions solely for purposes of delay would be discoverable. Similarly, where a party suborns perjury by a witness to bolster a claim or defense, communications or work product relating to that witness might also be discoverable. *See In re John Doe, Inc., 13 F.3d at 635, 637-38*.

> We do not probe these issues beyond setting out these examples because the documents sought here clearly do not fall within the crime-fraud exception.

In re Richard Roe, Inc., 168 F.3d 69, 72 (2d Cir. 1999).

[**85] NXIVM and others wanted to focus on Ross' role in the Kristen Snyder case and were concerned that if he was successful on the *certiorari* petition to the United States Supreme Court he would publish everything, which presumably may include his perspective on Snyder's death. In the final analysis, it was decided that "Juval [Interfor] [would] ask RR [Ross] about: (1) how did [he] get the 2<nd>Circuit to rule in [his] favor; (2) [w]hat [he was] going to do if the Supreme Court rules in [his] favor; (3) [h]ow many other ESP members come from wealthy families; and (5) [w]ho else from ESP has RR [Ross] worked with." Dkt. No. 68, Ex. R, at p. 4. Conspicuously absent from this memo and O'Hara's affidavit is his objection to this scheme. Since he was present during this discussion and knew or should have known that such plan was at least ethically improper, his acquiescence or the paucity of prose in his note echoes loud and can be reasonably construed to be an endorsement of the scheme and upon counselor's advice. Thus his sublime concurrence can also be viewed as being used in furtherance of a fraud or misconduct and, in this case, the subversion of an adversary's [**86] attorney-client rights that undermines the integrity of the adversary system. This is the only mechanism or attorney supervision upon which NXIVM can lay claim that the facts and related conversations concerning the sting operation can even be considered privileged.. *See also* Dkt. No. 68, Ex. (March 11, 2005 Termination Memo, "during the course of providing legal services to you . . ."). Whether or not O'Hara gave any advice at this meeting, the communication should not be protected under any circumstance. Hence, the exception shall pierce all of the communications leading up to and including the November 22<nd> sting operation discussion.

After receiving the Interfor Report on November 23<rd>, an outraged O'Hara wrote to Raniere and Salzman first disclaiming any personal knowledge of Interfor tactics of peering into Ross' statutorily protected documents and then divorcing himself from the entire sting operation:

> In this regard, it is imperative that you - or Kristin [Keefe] - immediately direct INTERFOR to cease and desist any such activities . . . At this point, I am not willing to have INTERFOR continue to undertake activities on behalf of NXIVM/ESP through TOGA [**87] . . . (This specifically includes, but is not limited to, the "Sting Operation" that Keith [Raniere] has proposed having INTERFOR undertake with respect to Mr. Ross.).

Dkt. No. 68, Ex. Q.

O'Hara asserverates that he had no further contact with Interfor after his November 24<th>missive to NXIVM and did not participate any further in the scam of Ross. At most, his relatively limited contact with Interfor dealt with receiving and then forwarding Interfor's bills onto NXIVM. Within a matter of two months, in January 2005, O'Hara advised NXIVM that he was severing his professional relationship with it, which was confirmed in writing in March 2005. *See generally* Dkt. No. 68, O'Hara Decl. Without counsel's advice or direction, and, in derogation of his instruction to cease such activity, the record implicitly indicates that Interfor and NXIVM were acting on a high wire with this sting operation without the protected net afforded them by the attorney-client relationship, *a fortiori*, there were no attorney-client communications involved. Moreover, since O'Hara, Nolan and Heller, or any other attorney or litigator did not solicit this type of investigation for this pending [**88] litigation, as they should not and could not, [31] there can be [*137] no work product doctrine either. In this respect, NXIVM has failed to show, which is its burden, that this "sting operation/investigation" is guarded by the attorney-client privilege or the work product doctrine. [32]

31 The Discipline Rules are replete with instructions forbidding an attorney from participating in the nefarious machinations of her client:

> [HN26] A lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.

N.Y.COMP. CODES. R. & REGS. tit., 22, § 1200.32(B)(2) .

****

> [HN27] A lawyer shall not counsel or assist the client in conduct that the lawyers knows to be

> illegal or fraudulent [or] knowingly engage in other illegal conduct or conduct contrary to a Discipline Rule.
>
> N.Y.COMP. CODES R. & REGS. *tit. 22, § 1200.33(a)(7)* & *(8)*.

32 Equally troubling, though we do not need to dwell upon these circumstances, is the argument that O'Hara may have found out the facts of the sting from a third party. If O'Hara came into those facts from a third party, obviously there is no attorney-client privilege. And, if a NXIVM employee or agent disclosed the facts to him after his withdrawal as counsel in January and March 2005, it was not done with the intent of securing legal advice.

[**89] As we now know, O'Hara has exposed the sting operation not only to Ross but to the press. The news media notwithstanding, whether upon the benefit of hindsight, overt concern, or personal advantage, O'Hara may have had a duty to disclose the sting operation to someone. [HN28] An attorney's duty of confidentiality does not extend to a client's announcement of a plan to engage in criminal conduct, or, as in this case, breaching an inviolate Discipline Rule. *Nix v. Whiteside, 475 U.S. 157, 174, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986)* ("[T]he responsibility of an ethical lawyer . . . is essentially the same whether the client announces an intention to bribe or threaten witnesses or jurors or to commit or procure perjury. . . . No system of justice worthy of the name can tolerate a lesser standard."); *People v. Andrades, 4 N.Y.3d 355, 361-62, 828 N.E.2d 599, 795 N.Y.S.2d 497 (2005)* (ruling that an attorney "could have properly made such a disclosure [of the intent to provide perjured testimony] since a client's intent to commit a crime is not a protected confidence or secret."); *People v. DePallo, 96 N.Y.2d 437, 443, 754 N.E.2d 751, 729 N.Y.S.2d 649 (2001)* ("The intent to commit a crime is not protected confidence or secret."); *In re White, 42 B.R. 494, 499 (E.D.N.Y. 1984)* [**90] ("Communications in the aid of fraud are not protected by the attorney-client privilege."). Even though NXIVM and Interfor's fraud upon Ross may not rise to the level of a crime or a civil fraud, for strong public policy reasons, a blatant subterfuge of the adversary system should not find a safe haven within the fervent clutches of the attorney-client privilege.

In this regard, [HN29] Discipline *Rule 7-102(B)(1)* states that "a lawyer who receives information clearly establishing that

> [t]he client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyers shall reveal the fraud to the affected person or tribunal, except when the information is protected as a confidence or secret."
>
> N.Y. COMP. R.& REGS. tit. *§ 1200.33(b)(1)* [*DR 7-102(B)(1)*]; *see also* [HN30] *§ 1200.19(c)(3)* [*DR 4-101(C)(3)*] (An attorney can reveal confidences if the intention of the client is to commit a crime).

Upon the record presented, O'Hara sent a memorandum directly NXIVM to cease and desist in the further investigation, which included the sting operation. [**91] NXIVM and Interfor proceeded forward, nonetheless. No matter the construction, the sting operation discussions and acts are not protected communications nor work product. Abiding by the mandates of *DR 7-102(B)(1)*, O'Hara should have advised Ross, an affected person, much earlier than a year after the events. N.Y. COMP. CODES R & REGS. *tit. 22, § 1200.33(b)(1)*.

For all of these reasons, the sting operation is not protected and hence subject to disclosure. The crime/fraud exception has not been established in regards to the Interfor Report however. We now must address the issues of waivers.

E. Waiver of Attorney-Client Privilege and Work Product Doctrine

There are circumstances, and permutations thereof, that cause waivers upon waivers [*138] to these less than sacrosanct rules. Cynthia B. Feagan, Comment, *Issues of Waiver In Multiple-Party Litigation: The Attorney-Client Privilege and the Work Product Doctrine, 61 UMKC L. REV. 757 (1993)*; Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine*, (4th ed. 2001). Considering that the attorney-client privilege protects communications and the work product doctrine protects tangible items which [**92] may contain strategies, impressions, and attorney's opinions, [HN31] both the privilege and the doctrine may be waived in various ways including sharing such documents with a third party. *In re Pfohl Bros. Landfill Litig., 175 F.R.D. 13, 22-28 (W.D.N.Y. 1997)* (survey of the various types of implicit and explicit waivers); *see also* Feagan, Comment, *Issues of Waiver in Multiple-Party Litigation, 61 UMKC L. REV. at 775-77*. We need not now address all of the potential waivers and exceptions to the attorney-client privilege and the work product doctrine, but it is necessary in the context of this case to first draw upon those waivers which invariably cause lawyers

the greatest angst, and may be problematic in this case. *See In re Pfohl Bros. Landfill Litig., 175 F.R.D. at 22-26*.

1. Third Party Waiver

The waiver to which we speak is whether the client's communication(s) or the legal advice given was shared, in some form or fashion, with a third party. [HN32] A waiver such as this may be done explicitly or implicitly, or rather, intentionally or inadvertently. 6 JAMES WM. MOORE ET AL, *MOORE'S FEDERAL PRACTICE § 26.49* [**93] [5] (3d ed. 2005); *In re Pfohl Bros. Landfull Litig, 175 F.R.D. at 24-26*. Obviously, when communications between a party and her attorney occur in the presence of a third party, the privilege may be waived. *United States v. Am. Tel. and Tel. Co., 206 U.S. App. D.C. 317, 642 F.2d 1285, 1298-99 (D.C. Cir. 1980)*. Yet, a disclosure to a third party does not waive the privilege unless such disclosure is inconsistent with the "maintenance of secrecy" and if the disclosure "substantially increases the possibility of an opposing party obtaining the information." *GAF Corp. v. Eastman Kodak Co., 85 F.R.D. 46, 51-52 (S.D.N.Y. 1979), abrogated on other grounds by In re Steinhardt Partners, L.P., 9 F.3d 230, 233 (2d Cir. 1993)*. For example, an exemption from the waiver accrues if such communications are shared with an agent of the attorney, which may include investigators and accountants retained to assist the attorney in rendering legal advice and instruction. *United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989)* (accountant); *United States v. McPartlin, 595 F.2d 1321, 1336-37 (7th Cir. 1979)* (investigator); [**94] *United States v. Kovel, 296 F.2d 918, 921-24 (2d Cir. 1961)* (disclosures to an accountant does not waive attorney-client privilege).

As noted above, the work product doctrine is not absolute either. [HN33] Such protection, like any other privilege, can be waived and the determination of such a waiver depends on the circumstances. *United States v. Nobles, 422 U.S. at 239-40*. In fact, in most respects, the discussion of a third party waiver is virtually the same for both the attorney-client privilege and the work product doctrine. A voluntary disclosure of work product, for some or any inexplicable benefit, to a third party, especially if the party is an adversary, may waive the immunity. *In re Steinhardt Partners, L.P., 9 F.3d 230, 234-37 (2d Cir. 1993)*; *see also In re Grand Jury Proceedings, 219 F.3d at 191*; *Strougo v. BEA Associates, 199 F.R.D. at 521-22*. "Once a party allows an adversary to share in an otherwise privileged document," "the need for the privilege disappears," and may disappear forever, even as to different and subsequent litigators. *In re Steinhardt Partners, 9 F.3d at 235* [**95] (citing *United States v. Nobles, 422 U.S. at 239*). As an illustration, when a party makes a strategic decision, no matter how broad and sweeping or limited, to disclose privileged information, a court can find an implied waiver. *In re Grand Jury Proceedings. 219 F.3d at 190-92*. Moreover, a party cannot partially disclose a privileged document nor selectively waive the privilege and then expect it to remain a shield. *Id. at 191*. However, there is no *per se* rule that all voluntary disclosures constitute a waiver of the work product doctrine because there is no way the court can anticipate all of the situations when and how such disclosure is [*139] required. *In re Steinhardt Partners, 9 F.3d at 236* (*i.e.*, privilege not waived if shared with someone of common interest). There are times when a waiver can be broad and other times when it has to be narrowly construed. Each case must be judged on its own circumstances and merits. *See Strougo v. BEA Associates, 199 F.R.D. at 521-22*. We will concentrate our analysis of waiver vis-a-vis the Interfor Report since it is the focus of two litigations.

2. Analysis [**96] of Raniere

Ross argues that by sharing the Interfor Report and the sting operation with Keith Raniere NXIVM vitiated the attorney-client privilege and/or work product doctrine. Raniere is not a party to the Ross litigation, a paid employee of NXIVM, and does not have an official title or designation with NXIVM, even though he claims to be the founder of Rational Inquiry TM, the business platform for its ESP Program. NXIVM refers to Raniere as a full-time, unpaid "volunteer" advising it on all aspects of its business. Ross contends "given [Raniere's] wholesale lack of any relationship with NXIVM, presentation of any confidential information to him should be deemed a waiver." However, despite the euphemisms, Raniere is more than a volunteer or titular advisor of NVIXM, he is the supreme authority of all things NXIVM. *See* Dkt. No. 68, Exs. E (*Forbes* article) & J (brochure for the "Vanguard Week"); *see generally* O'Hara Decl. Holding such a lofty role, lack of remuneration and titles notwithstanding, he would be privy to all of the matters, including litigation, that all of NXIVM's employees and agents would know, and would be consulted regularly about them. In fact, as [**97] reflected in the record, O'Hara spoke to Raniere directly and even addressed correspondence and memoranda to his attention. On occasion, O'Hara deferred to Raniere. Raniere is not some mere or informal advisor, he is the quintessential insider of this business on every aspect confronting it. Any disclosure to Raniere was consistent with maintaining secrecy and at the time the Interfor Report was shared with him it was not meant to get into the hands of an adversary, and hence no waiver of the protection. All of this information was being shared with him for his benefit as well. Thus, the lack of title or being relegated to a volunteer status does not in and of themselves offend the protection afforded the documents nor create a waiver.

Likewise, O'Hara suggests that there has been a third-party waiver when communications and documents were shared with James Loperfido who is NXIVM's accountant. Dkt. No. 68, Defs.' Mem. of Law at p. 16. We agree with O'Hara that if the documents were merely shared with Loperfido without some nexus to an attorney giving advice, no privilege would attach and thus would constitute a waiver if there was a pre-existing privilege. *United States v. Adlman I, 68 F.3d at 1495* [**98] (citing *United States v. Arthur Young Co., 465 U.S. 805, 817, 104 S. Ct. 1495, 79 L. Ed. 2d 826 (1984)*; *United States v Bein, 728 F.2d 107, 112 (2d Cir. 1984)*. Conversely, an exemption from the waiver accrues if such communications are shared with an agent of the attorney, which may include investigators and accountants retained to assist the attorney in rendering legal advice and instruction. *United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989)* (accountant); *United States v. McPartlin, 595 F.2d 1321, 1336-37 (7th Cir. 1979)* (investigator); *United States v. Kovel, 296 F.2d 918, 921-24 (2d Cir. 1961)* (disclosures to an accountant does not waive attorney-client privilege).

The record as to whether there is a waiver in terms of Loperfido's receipt of any document is not fully developed by O'Hara who has the burden of establishing the waiver. Neither O'Hara nor any other party for that matter, has explained Loperfido's role in this matter and placed it in context for the Court. We do not know if Loperfido received any documents directly from O'Hara or NXIVM representatives. We do not know, at least from this record, if Loperfido [**99] was assisting NXIVM's lawyers to understand NXIVM's records. In this respect, O'Hara has failed to meet his burden on this issue.

3. Analysis of Sitrick Company

We must now turn to whether a third-party waiver occurred when the Interfor [*140] Report was shared with the public relations firm Sitrick Company on or about November 24, 2004.

After being the subject of an unflattering expose in *Forbes* magazine, at the same time litigation against Ross was raging with the matter on appeal to the Second Circuit and ultimately going to the United States Supreme Court, NXIVM hired Sitrick primarily to combat negative press and create a long term and short term public relations strategy and hopefully generate positive press. Consistent with most of NXIVM's outside contractors, O'Hara entered into a written retainer with Sitrick which stated in part that Sitrick would provide advice and public relations in connection with various legal concerns. Inserted into this agreement are boilerplate terms that "all communications, correspondence, instruments and writings between **Sitrick and Attorney** shall be deemed to constitute attorney work-product and otherwise protected by the attorney-client [**100] privilege." Dkt. No. 72, Ex. B, at p. 2 (emphasis added). We must reiterate again, at this juncture, that blanket confidentiality clauses invoking the attorney-client privilege and work product doctrine do not necessarily make it so. It is the facts, circumstances, and purpose that determine whether a communication with an attorney will deserve protection and its the anticipation of litigation that will convert a document into legal work product. The record indicates that Sitrick commenced rendering public relations services to NXIVM from October 2004, and possibly continues to this day. Dkt. No. 72, Ex. B (Sitrick's billing).

Even though O'Hara signed this retainer agreement with Sitrick, he avers that he had very limited contact with Sitrick and may have participated in one conference with the public relations firm on or about November 3, 2004. Dkt. No. 72, O'Hara Decl., at PP 7 & 8, Ex. B. Nolan and Heller, the law firm representing NXIVM in its lawsuit against Ross, was present during this same meeting, but, there is no other recording indicating that Sitrick had any further conferences with this or any other law firm who may be been representing NXIVM. *See* Dkt. No. 72, Ex. [**101] B.

O'Hara disclaims that he neither provided nor received any material from Sitrick. He disavows providing the Interfor Report on Ross to Sitrick especially in light of the fact that he has so vociferously disowned any involvement or association with it. The likely source of the Interfor Report was Interfor itself. Sitrick's detailed billing records indicate that it mostly had contact with Keefe, Salzman, and Interfor, pertaining predominately to NXIVM's public relations issues. True, Sitrick reviewed legal documents, pleadings, judicial decisions and the like, and participated in strategy discussions about Ross and the litigation, but the predominate services Sitrick furnished were monitoring relevant news coverage, collecting information on Ross and others, vetting and pitching news stories to reporters, researching and locating friendly reporters, capitalizing on positive developments, creating a press kit, and otherwise formulating a public relation strategy.

O'Hara's hiring of Sitrick was a facade and not for the purpose of helping O'Hara provide legal advice to NXIVM but to give cover to communications between NXIVM, Interfor, and Sitrick. O'Hara never used Sitrick's services [**102] and as far as the record reveals neither did any other law firm working on behalf of NXIVM. Only NXIVM's principles availed themselves of Sitrick's professional services. O'Hara and his law firm were used as an intermediaries in name only - a mule - with the anticipated effect of concealing all conversations and all actions under the cloak of an attorney-

client privilege or work product, without any particular professional involvement on his part. O'Hara's involvement was nothing more than a tool to achieve secrecy, not to give legal advice. NXIVM unwittingly cites *Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53 (S.D.N.Y. 2000)* and *In re Subpoena dated March 24, 2003, 265 F. Supp. 2d 321 (S.D.N.Y. 2003)* in support of their proposition that the work product characteristic of the Interfor Report persisted in Sitrick's hands. Rather than rendering that support, these precedents countermine its contention.

Even the most proficient and prolific attorneys have to resort to consultation with others [*141] in order to render full and complete legal services to their clients. That is how the legal world now turns. As a harbinger of things to come, such as [**103] media firms assisting attorneys in mega-litigation cases with economic, political, and social ramifications for their clients, the Second Circuit considered the debate whether the attorney-client privilege would include communication with non-lawyers, such as accountants and public relations firms who do not have a similar privilege, in *United States v. Kovel, 296 F.2d 918 (2d Cir. 1961)*. There, an attorney had hired an accountant to help him interpret her client's financial circumstances in order for the lawyers to render full and accurate advice. Noting that accounting concepts may be analogous to a foreign language for most lawyers, the presence of the accountant to help clarify certain complicated factors outside the lawyer's bailiwick should not defeat the attorney-client privilege. The critical factor that vivifies the privilege under these circumstances is that the "communication be made in confidence for the purpose of obtaining legal advice from the lawyer. . . . If what is sought is not legal advice but only accounting services . . . or if the advice sought is the accountant's rather than the lawyer's, no privilege exists. *Id. at 922*. Thus, [**104] [HN34] the extension of the privilege to non-lawyer's communication is to be narrowly construed. If the purpose of the "third party's participation is to improve the comprehension of the communication between attorney and client," then the privilege will prevail. *United States v. Ackert, 169 F.3d 136, 139 (2d Cir. 1999)* (ruling that the communication "between an attorney and a third party does not become shielded by the attorney-client privilege solely because the communication proves important to the attorney's ability to represent the client").

This legal notion that even a public relations firm must serve as some sort of "translator," much like the accountant in *Kovel*, was visited in *Calvin Klein Tradmark Trust. 198 F.R.D. 53*. Much like the services being rendered here, the public relations firm in *Calvin Klein* was found to have simply provided ordinary public relations advice and assisted counsel in "assessing the probable public reaction to various strategic alternatives, as opposed to enabling counsel to understand aspects of the client's own communications that could otherwise be appreciated in the rendering of legal advice." *198 F.R.D. at 54-55* [**105] (citing *United States v. Ackert, 169 F.3d at 139*). Thus, no attorney client privilege was extended to its communications with either the client or the firm. *Id. at 53-55*. A similar result occurred in *Haugh v. Schroder Inv. Mgmt. North Am. Inc., 2003 U.S. Dist. LEXIS 14586, 2003 WL 21998674 (S.D.N.Y. Aug. 25, 2003)*, wherein the court found that the record did not show the public relations specialist performed anything other than standard public relations services for the plaintiff, and noting that a media campaign is not a legal strategy. *See also De Beers LV Trademark Ltd. v. De Beers Diamond Syndicate Inc., 2006 U.S. Dist. LEXIS 6091, 2006 WL 357825 (S.D.N.Y. Feb. 15, 2006)*.

NXIVM places great reliance upon *In re Subpoena, 265 F. Supp. 2d 321*, in support of its claim that the Interfor Report is cloaked by a privilege. *In re Subpoena* deviates slightly from the analogous interpreter test laid out by the Second Circuit and other district courts within the Circuit and resolves for itself the ultimate issue that if an attorney efforts to influence public opinion on behalf of her client are services, "then the rendition of which also should be facilitated by applying [**106] the privilege to relevant communications which have this as their object." *Id. at 326*. That court proceeded to establish elements to help distinguish the consultant's ordinary public relations services from other frank discussions of facts and strategies between lawyer and consultant which would earn protection. *Id. at 330-31*. Notwithstanding the cogent reasoning that incorporates modern realities and intentions in addressing how profile cases are handled in the courtroom and the court of public opinion, we are not prepared to make that same deviation from the narrowly tailored test of *Kovel* and *Ackert.*

For several critical reasons, which we alluded to above, we are also not prepared to apply to our case the *Calvin Klein Trademark* determination that work product protection is not waived when "the attorney provides the work product to the public relations consultant whom he has hired and who [*142] maintains the attorney's work product in confidence . . .[especially] if . . . the public relations firm needs to know the attorney's strategy in order to advise as to the public relations[.]" *198 F.R.D. at 55*. In a general context, [**107] we may agree. Sharing work product with a third party with the intent of maintaining its secrecy and preventing it from falling into the hands of the adversary is a generally accepted principle. But this is not a bright line rule and there are just too many situations for such a strict rule to exist. The waiver of the doctrine depends upon the circumstances and each case is judged on its own facts. *United States v. Nobles,*

422 U.S. at 239-42. In a case like ours, a work product document must lose its essential character when it is given even to a friendly third party who advances it for purposes other than the anticipation of litigation.

First, even utilizing *Calvin Klein Trademarks* as a guide, Sitrick did not receive the Interfor Report from an attorney and there is no evidence in the record that Sirick consulted with any of NXIVM's lawyers about the contents of the Report and its relative significance to the *Ross* litigation. Remember Sitrick's agreement was with O'Hara, as an agent of NXIVM, and also remember that he was not privy to the on-going communications between his client and Sitrick. If we were to rely on the Terms of Engagement, it would be the [**108] communications between Sitrick and O'Hara that arguably may garner work product status, and not the communications with others. O'Hara states that there were no such communications between him and Sitrick. O'Hara gave no direction nor instruction nor sought any translation from Sitrick to help him aid other lawyers to advise NXIVM. Second, Sitrick's relationship with O'Hara was nothing short of smoke and mirrors. Sitrick was hired to clean up NXIVM's damaged image and the litigation. O'Hara's component was just camouflage to mask the overall nature of their conversations. Sitrick used this Report to further their research of Ross so that they could pander the sensitive yet damaging information to sympathetic reporters. The underlying and transparent intent was to use the contents of the Interfor Report to promulgate certain images of both Ross and NXIVM or deflect further media intrusion by Ross and others. *See* Dkt. No. 72, Ex. B. The retainer agreement and the relationship are nothing short of a pretense crafted by clever people to attempt what they could not ordinarily do under their own auspices. *See* Dkt. No. 72, Ex. A (Salzman email about signing the retainer agreement [**109] so that attorney-client privilege is established). It is hypocritical to claim that a document is confidential one moment and then share such documents with a host of others to be used for something other than litigation. Even *Calvin Klein Trademark* initially observed that [HN35] "as a general matter public relation advice, even if it bears on anticipated litigation, falls outside the ambit of protection of the so-called work product . . . because the purpose of the rule is to provide a zone of privacy for strategizing about the conduct of litigation itself, not for strategizing about the effects of the litigation on the client's customers, the media, or on the public generally." *198 F.R.D. at 55*.

Delivering the Interfor Report to Sitrick was a deliberate, affirmative and selective strategic decision to disclose this information for another benefit other than aiding the lawyer pitched in the battle of litigation. *In re Grand Jury Proceedings, 219 F.3d 175, 192 (2d Cir. 2000)*. The benefit was for control of the airwaves and print media, which NXIVM hoped to profit. Although it was shared with the expectation of secrecy until revealed, the longitudinal expectation [**110] was to make the content of the Report fodder for grander public discourse. [HN36] A party cannot selectively share a work product and then expect it to remain as a shield. Just as the attorney-client privilege cannot be used as a shield and sword, neither can a work product document, especially one that does not include an attorney's impression, opinions, or strategies. And for all of these reasons, we find that the Interfor Report is now stripped of its work product protection.

In a footnote reference, Ross raises an at issue waiver as being applicable in this case. Dkt. No. 67, Intervenor's Mem. of Law at p. 37, n. 27. We need not address the at issue waiver because the record is not fully developed in any manner. Placing the discussion [*143] in a footnote is a reflection of the underdevelopment of the record on this issue. However, we have looked at the Complaint in this case and we are unable to see such an at issue waiver at this time. This finding does not necessarily preclude a finding of an at issue waiver in District Court of New Jersey. Clearly, it should be left to the New Jersey District Court to determine if there exists an at issue waiver in the case before it.

F. Discovery for [**111] the Purpose of Supporting Ross' Counterclaims in the New Jersey Action

Ross asks this Court to uphold his subpoena and permit discovery as to the sting operation and possibly any other misconduct directed at him. In support of this application, Ross contends that he is in substantial need of this information to prosecute his counterclaims in the New Jersey Action. Recently, Ross moved the District Court of New Jersey to permit him to amend his answer and add counterclaims based upon the facts and circumstances of the sting operation. Originally, he sought to add causes of action for harassment and invasion of privacy. [33] However, during oral arguments on this and other motions, Magistrate Judge Falk found that a common law cause of action for fraud was also apparent under these facts. After considerable analysis, Magistrate Judge Falk granted in part and denied in part Ross' motion to amend. *See* New Jersey Order, dated Jan. 10, 2007. The private invasion cause of action was allowed to stand and the harassment charged was dismissed. *See* NJ. Tr. at pp. 112-25.

33 These two causes of action are unknown to New York and may be distinctly common law only in New Jersey. NJ Tr. at p. 121.

[**112] In his review, Judge Falk found that Ross, the other defendants, and even the court was entitled to

more information and that would entail discovery. Accordingly, he denied the NXIVM and Interfor's motion to quash the subpoena for Interfor, which was before him. NJ Tr. at pp. 99 & 111-14. We concur in Judge Falk's findings and likewise **deny** NXIVM's Motion to Quash the subpoena that has been served upon O'Hara. The facts surrounding the sting operation are germane to Ross' counterclaims and he is entitled to explore and ascertain any admissible evidence to support his claim. In this respect, both O'Hara and Ross should be cognizant that there are still boundaries that they may not cross where the attorney-client privilege still remains viable. As we have previously noted, O'Hara wore many professional hats in consulting for NXIVM and there are times, maybe many times, when O'Hara, in fact, provided legal advice. We have already specifically identified his legal role during the period of July 1, 2004 until January 2005, which he acknowledged in his March 11, 2005 termination letter. So Ross and O'Hara should not conclude that this Decision and Order has opened the corral doors [**113] to allow that which may be protected by the attorney-client privilege to be trampled. O'Hara must walk a tight rope and not reveal those confidences truly protected. He should not succumb to his personal and legal animus and unveil that which he knows may be attorney-client privilege. Yet, if there is a question about privileges, all parties should be mindful that neither the attorney-client privilege nor the work product doctrine protects factual information. If Ross limits his inquires to the Interfor Report and the sting operation, he and O'Hara should not open Pandora's box.

Conversely, by granting Ross the right to subpoena O'Hara for a deposition, we are respectfully **denying,** in part, NXIVM's application for a further and all encompassing protective order that seals all communications and documents, except for those documents we have already held to be cloaked with the attorney-client privilege and our pronouncements immediately below. Furthermore, NXIVM's request is much too broad and lacks specificity and we cannot ignore that there is already a Confidentiality Stipulation/Order in place that must be honored. [34] Granted that this Court has found [*144] that some of NXIVM's [**114] purported Protected Information has no legal protection or that legal protection has been waived. However, there may still exist more Protected Information of which this Court has not had the opportunity to review nor address. Obviously, O'Hara has had a penchant to expose sensitive information about NXIVM both publicly and privately, for whatever whim or motive, and we agree with NXIVM that, in some respect, he should be restrained. To this extent, except for the permitted discovery previously mentioned, this Court shall issue a further Protective Order that O'Hara shall not disclose any other Protected Information without seeking further approval from this Court or NXIVM pursuant to the terms of the Confidentiality Stipulation/Order, dated July 20, 2006. [35]

34 We note that Magistrate Judge Falk denied NXIVM's motion for a sealing order but granted an umbrella protective order. New Jersey Order, dated Jan. 10, 2007; NJ Tr. at pp. 26-30 & 58-63.

35 This Court lacks the ability to rein in all of O'Hara's public statements prior July 20, 2006, and the corresponding publications of those statements. We cannot unsay what has already been said in the public forum. *In re von Bulow, 828 F.2d at 99*. Put another way, "the genie is out of the bottle . . . [and we] have not the means to put the genie back." *Gambale v. Deutsche Bank AG, 377 F.3d 133, 144 (2d Cir. 2004)*. However, we do have the ability to confine the extent and degree of O'Hara's further public pronouncements that may tread upon any attorney-client privilege that still subsists. [HN37] Courts retain inherent supervisory authority over discovery and can extend a protective order to squelch any abuses. *See FED. R. CIV. P. 26(c)*.

[**115] G. NXIVM's Motion to Compel

NXIVM's Motion to Compel has two components: (1) return Plaintiffs' files now in the possession of O'Hara and (2) to be able to depose O'Hara for an additional day.

Plaintiffs charged that they have made several demands of O'Hara to return their original documents to them. In reference to the Motion compelling O'Hara to return these files to them in order to prevent further dissemination of Plaintiffs' Protected Information, Plaintiffs refers us to *Sage Realty Corp. v. Proskauer Rose Gotz & Mendelsohn L.L.P, 91 N.Y.2d 30, 689 N.E.2d 879, 666 N.Y.S.2d 985 (1997)*. In that case, the New York Court of Appeals noted that a client has "presumptive access to the attorney's entire file on the matter" and ultimately ruled that the plaintiff was entitled to inspect and copy materials held by the attorney. *Id. at 37*.

What is not clear to this Court is whether these documents are in fact original documents or documents created by O'Hara during the course of his multifarious roles. O'Hara agrees that Plaintiffs may access those files in his possession and asserts that he has indeed complied with their demands and produced copies of his files, with certain exceptions. [**116] And, if Plaintiffs have received these documents as O'Hara proffers, then on what basis do Plaintiffs believe that such disclosure is inadequate. Without more specificity, we are hard pressed to grant Plaintiffs relief. The thrust of Plaintiffs' request for return of the documents is to minimize O'Hara's distribution of them to third parties. However, this Court just

granted a protective order directing O'Hara not to disclose any further Protected Information without the Court's or Plaintiffs' approval and this should be sufficient protection. Therefore, based upon this record, the Motion to return files is **denied.**

Next, Plaintiffs require O'Hara to produce his communications with third parties concerning NXIVM. It is uncontroverted that O'Hara has spoken with third-parties about NXIVM. We know that he has spoken to Ross, reporter Chet Hardin, and reporters from the *Albany Times Union* and *Schenectady Daily Gazette.* He may have even spoken to *Forbes Magazine.* NXIVM has pled a legal malpractice cause of action against him and through this Motion has, at least, laid the framework that O'Hara may have violated some of their confidences and some of his ethical obligations [**117] to them. In order to prosecute their claim and to determine what else O'Hara may have revealed about NXIVM, NXIVM is entitled to all of **his initiated** communications with third-parties from January 2005 to present. We have limited the entitlement to his initiated communications because they would certain be in violation of the Confidentiality Stipulation/Order, more likely to occur, and more easy to trace. The probability of others asking O'Hara to disclose Protected Information seems rather unlikely, slim, even remote. [*145] We are also persuaded because of the convoluted nature of these claims, facts and issue, and O'Hara's inextricable involvement in all of these contentions that an additional day of deposition should be granted.

O'Hara has no objection to a deposition by Plaintiffs and a separate deposition as related to the *Ross* litigation but complaints that he is being compelled to a third day of testimony. Dkt. No. 68, Defs.' Mem. of Law at p. 21. Under normal circumstances, O'Hara would be subjected to a one day, seven hour deposition. *FED. R. CIV. P. 30(d)(2).* However, O'Hara has placed himself into the thicket of things and invariably [**118] caused himself to be subjected to two separate depositions. But for his leak of the Interfor Report and the sting operation, he may have rested below the radar and may not have been served with a subpoena to be deposed in the New Jersey case. But he has acknowledged these leaks, and we have upheld Ross's subpoena. Also due to his extracurricular activities, he has placed himself into the unenviable position of having to endure two days of depositions in this case. He has become pivotal on a number of issues, which probably cannot be fully explored within the seven hours. Since this Court has the authority to allow additional time, and also finds that NXIVM has made a compelling application for that additional time, if needed, O'Hara shall submit to a two-day deposition in this case. *Id.*

Foreboding that there may be a number of contentious issues regarding O'Hara's depositions and recognizing the rising level of tension among all of the parties, the Court directs that O'Hara's depositions shall take place in the James T. Foley Courthouse, Attorney's Lounge on the Fourth Floor, Albany, New York, so that this Court will be in close proximity to respond immediately to any issue or [**119] difficulties that may arise. So that we may be prepared to respond to hyper-technical objections and the like, the parties are directed to put this Court on notice of the dates and times of O'Hara's depositions.

IV. CONCLUSION

Most if not all of the pleadings, legal memoranda, and exhibits before this Court have been submitted *in camera* and are noted on the case docket as sealed. Moreover, this Memorandum Decision and Order has keenly discussed in acute detail what has been considered by one or more of the parties to be confidential information. Consistent with the mandates of *Lugosch v. Pyramid Co., 435 F.3d 110 (2d Cir. 2006),* this Court intends on unsealing all of the pleadings, memoranda, exhibits, and transcripts as judicial documents. However, because the Memorandum-Decision and Order pertains to sensitive information, and it is unknown if any party intends on filing objections to this Decision, the Court will seal this Decision and Order for ten (10) days to permit the filing of any objections, if desired, with the District Court. If objections are filed the Court will maintain this Order under seal until those objections are fully considered by the District [**120] Court. In lieu of this Memorandum Decision and Order, this Court will issue a brief Order noting the granting and denying of Motions. Nonetheless, the parties will be served with a full copy of this Memorandum-Decision and Order so that they may contemplate the viability of an appeal.

In terms of the Intervenor Ross, he will receive a redacted version of this Memorandum Decision and Order excising a portion of the third-party waiver analysis. On that issue, confidential information was presented to the Court which was not shared with Ross.

Based upon all of the foregoing, it is hereby

ORDERED, that Plaintiffs' Omnibus Motion (Dkt. No. 57) is **granted in part and denied in part,** consistent with our Decision above. More specifically,

. Motion for a Protective Order is **granted in part and denied in part;**

. Motion to Compel further production of its files is **denied;**

. Motion to Compel O'Hara to produce his initiated communications with third parties is **granted;**

. Motion for an additional day of deposition of O'Hara, pursuant to *FED. R. CIV. P. 30(d)(2),* is **granted;**

. Motion to Quash Ross' Subpoena [**121] is **denied;** and it is further

[*146]

ORDERED, that Ross' Opposition to Plaintiffs' Omnibus Motion (Dkt. No. 67) is **granted in part and denied in part,** consistent with our Decision above. More specifically,

. Motion to stay our Decision and defer to the adjudication of the issues by the District Court of New Jersey is **denied;**

. Application to waive any privileges as to the Interfor Report and sting operation is **granted;**

. Subpoena granting permission to depose O'Hara is **granted;** and it is further

ORDERED, that O'Hara's Opposition to Plaintiffs' Omnibus Motion (Dkt. Nos. 58 & 68) is **granted in part and denied in part.** More specifically,

. Application to waive any privileges as to certain documents is **granted;**

. Opposition to Motion to Compel is **denied;**

. Opposition to a second day of deposition is **denied;** and it is further

ORDERED, that Plaintiffs and Defendants shall be served with a copy of this sealed Memorandum-Decision and Order and are required to maintain the Order's confidentiality until either the time for appeals has exhausted or any appeal has been fully considered by the District [**122] Court. Intervenor Ross shall be served with a sealed, redacted copy of this Memorandum-Decision and Order under the same direction; and it is further

ORDERED, that this Memorandum-Decision and Order and all of the pleadings, memoranda of law, exhibits, transcripts and letters, related to this Omnibus Motion and Opposition thereto, shall remain or be filed under seal for ten (10) days. If objections are filed, all of these judicial documents shall remain sealed until the appeal to the District Court has been completed; and it is further

ORDERED, that in the interim pending any appeal of this Memorandum-Decision and Order, the Clerk of the Court shall file on the case docket an abridged Order, which recites only the rulings; and it is further

ORDERED, that any and all depositions of O'Hara shall occur at the James T. Foley Courthouse, Fourth Floor Attorney's Lounge, 445 Broadway, Albany, New York.

IT IS SO ORDERED.

Albany, New York

February 9, 2007

RANDOLPH F. TREECE

United States Magistrate Judge

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Dennis Rossi, Appellant, v. Blue Cross and Blue Shield of Greater New York, Respondent

[NO NUMBER IN ORIGINAL]

Court of Appeals of New York

73 N.Y.2d 588*; *540 N.E.2d 703*; *542 N.Y.S.2d 508*; *1989 N.Y. LEXIS 668

May 2, 1989, Argued
June 6, 1989, Decided

PRIOR HISTORY: Appeal, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of that court, entered May 12, 1988, which (1) reversed, on the law and the facts, an order of the Supreme Court (William P. McCooe, J.), entered in New York County, granting a motion by plaintiff for production by defendant of an internal memorandum from a corporate staff attorney to a corporate officer regarding a corporate form that was the subject of an imminent defamation action, and (2) granted a motion by defendant for a protective order. The following question was certified by the Appellate Division: "Was the order of this Court, which reversed the order of the Supreme Court, properly made?"

Rossi v Blue Cross & Blue Shield, 140 AD2d 198.

DISPOSITION: Order affirmed, etc.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff physician appealed the judgment of the Appellate Division of the Supreme Court in the First Judicial Department (New York), which concluded an internal memorandum from defendant insurance corporation's staff attorney to a corporate officer communicating advice regarding a company form that was the subject of an imminent defamation action was protected from disclosure in that action by the attorney-client privilege.

OVERVIEW: The physician contended that the memorandum was discoverable. The court held that the attorney-client privilege protected the memorandum from discovery. According to the court, the memorandum was clearly an internal, confidential document not accessible to anyone outside the insurance corporation. The court also held that the memorandum was written for the purpose of facilitating the rendition of legal advice or services in the course of a professional relationship. Furthermore, the court held that the memorandum referred to the corporate counsel's conversations with the physician's counsel and expressed the corporate counsel's views regarding the rejection language of the form. The court also held that nothing suggested that a document was passed on to the corporate counsel to avoid its disclosure. Finally, the court held that public policy considerations did not require discovery of the memorandum because nothing he gave rise to the level of subverting the lawful and honest purposes for which the attorney-client privilege existed.

OUTCOME: The court affirmed the judgment of the lower court.

LexisNexis(R) Headnotes

Evidence* > *Privileges* > *Attorney-Client Privilege* > *Scope

[HN1] Corporations, as other clients, may avail themselves of the attorney-client privilege for confidential communications with attorneys relating to their legal matters. A corporation's communications with counsel, no less than the communications of other clients with counsel, are encompassed within the legislative purposes of *N.Y. C.P.LR. 4503*, which include fostering uninhibited dialogue between lawyers and clients in their professional engagements, thereby ultimately promoting the administration of justice. The privilege applies to communications with attorneys, whether corporate staff counsel or outside counsel. Finally, while the cases largely concern communications by clients to their attorneys, *N.Y. C.P.L.R. 4503* speaks of communications between the attorney and the client, and the privilege thus plainly extends as well to the attorney's own communications to the client.

Evidence > Privileges > Attorney-Client Privilege > General Overview

[HN2] Unlike the situation where a client individually engages a lawyer in a particular matter, staff attorneys may serve as company officers, with mixed business-legal responsibility; whether or not officers, their day-to-day involvement in their employers' affairs may blur the line between legal and nonlegal communications; and their advice may originate not in response to the client's consultation about a particular problem but with them, as part of an ongoing, permanent relationship with the organization. In that the attorney-client privilege obstructs the truth-finding process and its scope is limited to that which is necessary to achieve its purpose, the need to apply it cautiously and narrowly is heightened in the case of corporate staff counsel, lest the mere participation of an attorney be used to seal off disclosure.

Evidence > Privileges > Attorney-Client Privilege > General Overview

[HN3] Not every communication from staff counsel to a corporate client is privileged. No ready test exists for distinguishing between protected legal communications and unprotected business or personal communications; the inquiry is necessarily fact-specific. However, certain guideposts to reaching this determination may be identified by looking to the particular communication at issue in this case.

Evidence > Privileges > Attorney-Client Privilege > General Overview

[HN4] For the attorney-client privilege to apply when communications are made from client to attorney, they must be made for the purpose of obtaining legal advice and directed to an attorney who has been consulted for that purpose. By analogy, for the privilege to apply when communications are made from attorney to client, whether or not in response to a particular request, they must be made for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship.

Evidence > Privileges > Attorney-Client Privilege > General Overview

[HN5] Communications from an attorney to a client dealing with the substance of imminent litigation generally will fall into the area of legal rather than business or personal matters. That the memorandum does not reflect legal research is not determinative, where the communication concerns legal rights and obligations and where it evidences other professional skills such as lawyer's judgment and recommended legal strategies.

Evidence > Privileges > Attorney-Client Privilege > General Overview

[HN6] So long as the communication is primarily or predominantly of a legal character, the attorney-client privilege is not lost merely by reason of the fact that it also refers to certain nonlegal matters. Indeed, the nature of a lawyer's role is such that legal advice may often include reference to other relevant considerations.

HEADNOTES

Disclosure -- Material Exempt from Disclosure -- Privileged Communications -- Attorney-Client Privilege -- Communication from Corporate Staff Counsel to Corporate Client

Corporations may avail themselves of the attorney-client privilege for confidential communications with attorneys relating to their legal matters (*CPLR 4503 [a]*), whether the attorneys are corporate staff counsel or outside counsel, and the privilege extends to the attorney's own communications to the client. However, for the privilege to apply when communications are made from attorney to client -- whether or not in response to a particular request -- they must be made for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship. In addition, the need to apply the privilege cautiously and narrowly is heightened in the case of corporate staff counsel, lest the mere participation of an attorney be used to seal off disclosure. Accordingly, an internal memorandum from a corporate staff attorney to a corporate officer communicating advice regarding a company form that was the subject of an imminent defamation action is protected from disclosure in that action by the attorney-client privi-

lege. The subject memorandum was clearly an internal, confidential document, and nothing indicates that anyone outside the defendant company had access to it. The author functioned solely as a lawyer for defendant client, and his communication to his client was plainly made in the role of attorney. Further, it is plain from the content and context of the communication that it was for the purpose of facilitating the lawyer's rendition of legal advice to his client regarding conduct that had already brought his client to the brink of litigation, and nothing suggests that this is a situation where a document was passed on to a defendant's attorney in order to avoid its disclosure. Moreover, for policy reasons the privilege should not give way here because of the nature of the alleged wrong or the death of the authoring attorney.

COUNSEL: *Steven Cohen* and *Arnold V. Goldstein* for appellant. I. The May 2, 1985 memo is not privileged and is discoverable. *(Koump v Smith, 25 NY2d 287*; *Graf v Aldrich, 94 AD2d 823*; *Zimmerman v Nassau Hosp., 76 AD2d 921*; *People v Belge, 59 AD2d 307*; *Allied Artists Picture Corp. v Raab Prods., 38 AD2d 537*; *Matter of Jacqueline F., 47 NY2d 215*; *Hoffman v Ro-San Manor, 73 AD2d 207*.) II. The document was prepared in the ordinary course of business and is multipurpose. *(Chemical Bank v National Union Fire Ins. Co., 70 AD2d 837*; *Crowe v Lederle Labs., 125 AD2d 875*; *Mold Maintenance Serv. v General Acc. Fire & Life Assur. Corp., 56 AD2d 134*; *Westhampton Adult Home v National Union Fire Ins. Co., 105 AD2d 627*; *New England Seafoods v Travelers Cos., 84 AD2d 676*; *E. B. Metal Indus. v State of New York, 138 Misc 2d 698*; *Crow-Crimmins-Wolff & Munier v County of Westchester, 123 AD2d 813*; *Hawley v Travelers Indem. Co., 90 AD2d 684*; *Millen Indus. v American Mut. Liab. Ins. Co., 37 AD2d 817*; *Brandman v Cross & Brown Co., 125 Misc 2d 185*.) III. A document is discoverable when there is a strong public policy. *(Matter of Priest v Hennessy, 51 NY2d 62*; *Matter of Jacqueline F., 47 NY2d 215*; *Upjohn Co. v United States, 449 U.S. 383*.)

Kevin B. Pollak and *John V. Fabiani, Jr.*, for respondent. I. The May 2, 1985 memo is a privileged communication between attorney and client. *(Matter of Vanderbilt [Rosner -- Hickey], 57 NY2d 66*; *Matter of Priest v Hennessy , 51 NY2d 62*; *Matter of Grand Jury Subpoena [Bekins Record Stor. Co.], 62 NY2d 324*; *Allied Artists Picture Corp. v Raab Prods., 38 AD2d 537*; *Rockwood Natl. Corp. v Peat, Marwick, Mitchell & Co., 60 AD2d 837*; *Ford Motor Co. v Burke Co., 59 Misc 2d 543*; *O'Keeffe v Bry, 456 F Supp 822*; *Matter of Jacqueline F., 47 NY2d 215*; *Crowe v Lederle Labs., 125 AD2d 875*.) II. The May 2, 1985 memo is the work product of an attorney. *(Kenford Co. v County of Erie, 55 AD2d 466*; *Victory Mkts. v Purer, 51 AD2d 895*; *Hoffman v Ro-San Manor, 73 AD2d 207*; *Warren v New York City Tr. Auth., 34 AD2d 749*; *Wickham v Socony Mobil Oil Co., 45 Misc 2d 311*.) III. The May 2, 1985 memo is material prepared for litigation. *(Crowe v Lederle Labs., 125 AD2d 875*.)

JUDGES: Kaye, J. Chief Judge Wachtler and Judges Simons, Alexander, Titone, Hancock, Jr., and Bellacosa concur.

OPINION BY: KAYE

OPINION

[*590] [***508] **OPINION OF THE COURT**

An internal memorandum from a corporate staff attorney to a corporate officer communicating advice regarding a company form that was the subject of an imminent defamation action is protected from [**704] disclosure in that action by the attorney-client privilege (*CPLR 4503 [a]*).

[***509] As alleged in the complaint, in April 1984, plaintiff, a physician specializing in radiology, opened a facility for medical diagnostic testing through the use of a Diasonics NMR (nuclear magnetic resonance) Imaging Scanner. Over the next year and a half, plaintiff performed NMR scans on numerous patients, among them subscribers of defendant health insurer, Blue Cross and Blue Shield. Defendant allegedly rejected more than 2,000 claims by plaintiff's patients seeking reimbursement for the scans. In rejecting claims, defendant sent its subscribers a form containing the following statement: "Your contract does not cover procedures which are experimental or whose effectiveness is not generally recognized by an appropriate governmental agency." Apparently, the procedure had in fact been approved by the Federal Food and Drug Administration, National Center for Devices and Radiological Health.

After several times notifying defendant of the FDA approval and unsuccessfully seeking correction of the statement, on May 2, 1985, plaintiff drew up a summons and complaint for defamation. In the complaint, plaintiff pleaded that hundreds of his patients who had received defendant's rejection notice condemned him for using an unapproved, experimental nuclear procedure that could harm them physically. Plaintiff alleged that Blue Cross knew that the language used in rejecting his patients' claims was false and fraudulent, but [*591] that it nonetheless persisted in sending the statement to his patients, gravely damaging his practice and reputation.

The focus of this appeal is an internal Blue Cross memorandum dated May 2, 1985 -- the date of the summons and complaint -- from Edward Blaney, Jr., to Dr. Mordecai Berkun. Blaney was a lawyer employed by

Blue Cross on its counsel's staff, not a company officer; Berkun was an officer of Blue Cross and its Medical Director. Copies of the memorandum were indicated for C. Ammarati, Blue Cross Vice-President of Professional Affairs (Berkun's staff superior), and J. L. Shurtleff, Blue Cross Vice-President and General Counsel (Blaney's staff superior).

In response to discovery requests, defendant identified the Blaney memorandum but withheld production on grounds of attorney-client privilege, work product and material prepared for litigation. While the document has not been made public, defendant has described its contents, paragraph by paragraph, as follows. According to defendant, the first paragraph refers to conversations between Blaney and plaintiff's attorney regarding a possible defamation suit based on the rejection form; the second concerns conversations between Blaney and the FDA regarding plaintiff's NMR Imaging System; the third paragraph sets forth Blaney's understanding of Blue Cross' NMR reimbursement policy and his understanding of new language that was going to be used to deny NMR claims; and the final paragraph expresses Blaney's opinion and advice regarding the rejection language of the form, and requesting comments from the Medical Director.

On plaintiff's motion for production of the memorandum in its entirety, Supreme Court reviewed the document in camera and directed that it be turned over to plaintiff. A divided Appellate Division reversed, concluding that the memorandum was a privileged attorney-client communication as well as work product, and it granted plaintiff leave to appeal to this court on a certified question. The dissenters would have ordered production because the thrust of the memorandum "concerns the quality of a business judgment and does not in any significant way involve a lawyer's learning and professional skills reflecting legal research or theory." (*140 AD2d 198, 201*.) We now affirm on the ground that the memorandum is privileged, and therefore do not reach the alternative arguments advanced by defendant.

To begin with points of agreement, no one questions that [HN1] [*592] corporations, as other clients, may avail themselves of the attorney-client privilege for confidential communications with attorneys relating to [**705] their legal matters *(see, Upjohn Co. v United States, 449 U.S. 383*; [***510] 5 Weinstein-Korn-Miller, *NY Civ Prac para. 4503.06*; McCormick, Evidence § 87, at 206-209 [Cleary 3d ed 1984]). A corporation's communications with counsel, no less than the communications of other clients with counsel, are encompassed within the legislative purposes of *CPLR 4503*, which include fostering uninhibited dialogue between lawyers and clients in their professional engagements, thereby ultimately promoting the administration of justice *(see, Matter of Vanderbilt [Rosner -- Hickey], 57 NY2d 66, 76*; *Matter of Priest v Hennessy, 51 NY2d 62, 67-68*; *Matter of Jacqueline F., 47 NY2d 215, 218-219*; *Hurlburt v Hurlburt, 128 NY 420, 424)*. The privilege applies to communications with attorneys, whether corporate staff counsel or outside counsel *(see, e.g., Allied Artists Picture Corp. v Raab Prods., 38 AD2d 537*). Finally, while the cases largely concern communications by clients to their attorneys, *CPLR 4503* speaks of communications "between the attorney * * * and the client" (*CPLR 4503 [a]*), and the privilege thus plainly extends as well to the attorney's own communications to the client *(Matter of Creekmore, 1 NY2d 284, 296*; Richardson, Evidence § 415, at 410 [Prince 10th ed]; 5 Weinstein-Korn-Miller, *NY Civ Prac para. 4503.11a*).

Beyond these points of agreement, the attorney-corporate client privilege has raised nettlesome questions -- particularly as to communications from corporate agents to counsel *(see, e.g.*, Waldman, *Beyond Upjohn: The Attorney-Client Privilege in the Corporate Context, 28 Wm & Mary L Rev 473* [1987]; Saltzburg, *Corporate and Related Attorney-Client Privilege Claims: A Suggested Approach, 12 Hofstra L Rev 279* [1984]; Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege, 57 NYU L Rev 443* [1982]). But even where the communication in issue is -- as here -- from the staff attorney to the corporate agent, difficult questions may arise.

For example, [HN2] unlike the situation where a client individually engages a lawyer in a particular matter, staff attorneys may serve as company officers, with mixed business-legal responsibility; whether or not officers, their day-to-day involvement in their employers' affairs may blur the line between legal and nonlegal communications; and their advice may originate not in response to the client's consultation about a particular problem but with them, as part of an ongoing, [*593] permanent relationship with the organization. In that the privilege obstructs the truth-finding process and its scope is limited to that which is necessary to achieve its purpose *(Matter of Priest v Hennessy, supra, at 68*; *Matter of Jacqueline F., supra, at 219*), the need to apply it cautiously and narrowly is heightened in the case of corporate staff counsel, lest the mere participation of an attorney be used to seal off disclosure *(see*, Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 Yale LJ 953, 970-973 [1956]; 5 Weinstein-Korn-Miller, *NY Civ Prac para. 4503.06*).

Obviously, [HN3] not every communication from staff counsel to the corporate client is privileged. It is equally apparent that no ready test exists for distinguishing between protected legal communications and unprotected business or personal communications; the inquiry is necessarily fact-specific (8 Wigmore, Evidence §

2296, at 566-567 [McNaughton rev ed 1961]). However, certain guideposts to reaching this determination may be identified by looking to the particular communication at issue in this case. Here, as the Appellate Division noted, the "memorandum is clearly an internal, confidential document. Nothing indicates that anyone outside the defendant company had access to it." (*140 AD2d, at 199*.) Moreover, there is no dispute as to the author's status or role. Blaney functioned as a lawyer, and solely as a lawyer, for defendant client; he had no other responsibility within the organization. His communication to his client was plainly made in the role of attorney. [HN4]

[**706] For the privilege to apply when communications are made from client to attorney, [***511] they "must be made for the purpose of obtaining legal advice and directed to an attorney who has been consulted for that purpose." *(Matter of Grand Jury Subpoena [Bekins Record Stor. Co.]., 62 NY2d 324, 329*.) By analogy, for the privilege to apply when communications are made from attorney to client -- whether or not in response to a particular request -- they must be made for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship *(see, Matter of Creekmore, supra, at 296*). Here that test is met.

The subject of the memorandum was plaintiff's imminent defamation suit based on the language of defendant's rejection form. The memorandum, written the very day plaintiff's summons and complaint were drafted, began by referring to Blaney's conversations with plaintiff's counsel and went on to express the lawyer's views regarding the rejection language of [*594] the form. [HN5] Communications from an attorney to a client dealing with the substance of imminent litigation generally will fall into the area of legal rather than business or personal matters *(see, Britton v Lorenz, 45 NY 51, 57*; *Whiting v Barney, 30 NY 330, 334)*. That the memorandum does not reflect legal research is not determinative, where the communication concerns legal rights and obligations and where it evidences other professional skills such as lawyer's judgment and recommended legal strategies *(see*, 8 Wigmore, Evidence § 2296, at 567 [McNaughton rev ed 1961]).

[HN6] So long as the communication is primarily or predominantly of a legal character, the privilege is not lost merely by reason of the fact that it also refers to certain nonlegal matters *(id.; see also*, Gergacz, *Attorney-Corporate Client Privilege*, at 3-30 [1987]). Indeed, the nature of a lawyer's role is such that legal advice may often include reference to other relevant considerations *(see, United States v United Shoe Mach. Corp., 89 F Supp 357, 359)*. Here, it is plain from the content and context of the communication that it was for the purpose of facilitating the lawyer's rendition of legal advice to his client. While we are mindful of the concern that mere participation of staff counsel not be used to seal off discovery of corporate communications, here "[nothing] suggests that this is a situation where a document was passed on to a defendant's attorney in order to avoid its disclosure." (*140 AD2d, at 199* [citing *Radiant Burners v American Gas Assn., 320 F2d 314, cert denied 375 U.S. 929]*.) It appears that Blaney was exercising a lawyer's traditional function in counseling his client regarding conduct that had already brought it to the brink of litigation.

Plaintiff finally asserts that even if the memorandum is privileged, the privilege should give way to "strong public policy considerations," citing *Matter of Priest v Hennessy (51 NY2d 62, supra)* and *Matter of Jacqueline F. (47 NY2d 215, supra)*. The "strong public policy considerations" are defendant's alleged massive fraud and Blaney's death. Neither the nature of the alleged wrong nor the attorney's unavailability rises to the level of subverting the lawful and honest purposes for which the privilege exists; indeed, were Blaney alive, the communication still would be shielded from discovery. Protecting this memorandum from disclosure in plaintiff's defamation action is, in the circumstances, consistent with the lawful and honest aims of the privilege to foster uninhibited communication between lawyer and client in the fulfillment of the professional relationship.

[*595] Accordingly, the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the affirmative.

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UNITED STATES OF AMERICA, ex rel. ELIN BAKLID-KUNZ, Plaintiff, v. HALIFAX HOSPITAL MEDICAL CENTER and HALIFAX STAFFING, INC., Defendants.

Case No: 6:09-cv-1002-Orl-31TBS

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION

2012 U.S. Dist. LEXIS 158944

November 6, 2012, Decided
November 6, 2012, Filed

PRIOR HISTORY: United States ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr., 2011 U.S. Dist. LEXIS 59949 (M.D. Fla., June 6, 2011)

COUNSEL: [*1] For USA, ex. rel., Plaintiff: Joyce R. Branda, Michael D. Granston, Patricia M. Fitzgerald, LEAD ATTORNEYS, Adam Jeffrey Schwartz, US Department of Justice - Civil Division, Washington, DC; Ralph E. Hopkins, LEAD ATTORNEY, US Attorney's Office - FLM, Orlando, FL.

For Elin Baklid-Kunz, Relator, Plaintiff: Christopher Craig Casper, LEAD ATTORNEY, James Hoyer Newcomer & Smiljanich, P.A, Tampa, FL; Elaine Stromgren, John Ray Newcomer, Jr., LEAD ATTORNEYS, James, Hoyer, Newcomer & Smiljanich, P.A., Tampa, FL; Stacey Godfrey Evans, LEAD ATTORNEY, Katherine V. Hernacki, PRO HAC VICE, Amy M. Stewart, L. Lin Wood, Wood, Hernacki & Evans, LLC, Atlanta, GA; Jeffrey T. Holm, Terrence McQuade, PRO HAC VICE, Scott Carroll Withrow, Withrow, McQuade & Olsen, LLP, Atlanta, GA; Marlan B. Wilbanks, PRO HAC VICE, Ty M. Bridges, Wilbanks & Bridges, LLP, Atlanta, GA; Susan S. Gouinlock, PRO HAC VICE, Susan Gouinlock Ltd., Law Offices, Atlanta, GA.

For Halifax Hospital Medical Center, doing business as Halifax Health, also known as Halifax Community Health System, also known as Halifax Medical Center, Halifax Staffing, Inc., Defendants: Adam P. Schwartz, LEAD ATTORNEY, Carlton Fields, PA (Tampa), Tampa, FL; [*2] Amy Hooper Kearbey, LEAD ATTORNEY, Amandeep S. Sidhu, David O. Crump, Theodore Reed Stephens, PRO HAC VICE, McDermott, Will & Emery, LLP, Washington, DC; Anthony Nolan Upshaw, LEAD ATTORNEY, McDermott, Will & Emery, LLP, Miami, FL; Bruce J. Berman, LEAD ATTORNEY, Carlton Fields, PA (Miami), Miami, FL; Gabriel L. Imperato, Broad and Cassel, Ft Lauderdale, FL.

JUDGES: THOMAS B. SMITH, United States Magistrate Judge.

OPINION BY: THOMAS B. SMITH

OPINION

ORDER

The following motions are before this Court for resolution:

1. Relator Elin Baklid-Kunz's Renewed Motion for Determination of Defendants' Privilege Claims and Memorandum in Support Thereof (Doc. 137);

2. United States' Motion to Alter the Amended Case Management and Scheduling Order (Doc. 145);

3. Relator's Renewed Motion for In Camera Review (Doc. 151);

4. United States' Motion to Compel the Production of a Response to Interrogatory No. 2 and Documents Improperly Withheld (Doc. 152);

5. Relator's Motion to Modify the Amended Case Management and Scheduling Order (Doc. 155);

6. Halifax's Motion to Strike the Declaration of Mary Ann Norvik (Doc. 164); and

7. Halifax's Motion to Designate as Confidential the Deposition Transcript of Relator Elin Baklid-Kunz, dated August [*3] 20, 2012 (Doc. 175).

I. Background

On June 16, 2009, Elin Baklid-Kunz ("Relator" or "Ms. Kunz"), filed this qui tam action against Halifax Medical Center, d/b/a Halifax Health, a/k/a Halifax Community Health System, a/k/a Halifax Medical Center and Halifax Staffing, Inc. (collectively referred to as "Halifax"),[1] for alleged violations of the Civil False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733. (Doc. 1). Relator is Halifax's Director of Physician Services and has been employed by the Daytona Beach hospital for more than fifteen years. (Doc. 29). She alleges that Defendants (1) received improper and excess compensation from the federal government and (2) paid illegal kickbacks, profit-sharing incentives and other illegal compensation to physicians in violation of the Stark Amendment to the Medicare Act, 42 U.S.C. § 1395nn and the Anti-Kickback Act, 42 U.S.C. § 1320a-7b. (Id.).

1 According to the allegations in the Government's Complaint in Intervention, Halifax Hospital provides inpatient and outpatient health care services and owns and operates hospitals in Volusia County and surrounding counties. (Doc. 73 ¶ 8). Halifax Staffing, a wholly owned and operated subsidiary of Halifax Hospital, [*4] provides staffing services to Halifax Hospital in exchange for payments to cover the cost of employee salaries, benefits, and administrative costs. (Id. ¶ 11).

On November 4, 2011, the United States of America intervened on behalf of the Department of Health and Human Services ("HHS") and the Centers for Medicare & Medicaid Services ("CMS"), to sue Defendants for damages resulting from false claims submitted to the Medicare and Medicaid programs in violation of the FCA. (Doc. 73). In its Complaint in Intervention, the United States alleges: the presentation of false claims (Count I); the use of false statements to get false claims paid (Count II); the creation of false records material to an obligation to pay (Count III); unjust enrichment (Count IV); payment by mistake (Count V); and disgorgement, constructive trust, and accounting (Count VI). (Id.). Defendants deny all allegations of wrongdoing. (Docs. 47 and 112).

The Court entered a scheduling order on January 5, 2011 (Doc. 22) and amended it on January 3, 2012 (Doc. 92). Currently, the parties have until December 21, 2012 to complete discovery. On February 17, 2012, Relator filed her original Motion for Determination of Defendants' [*5] Privilege Claims (Doc. 102) and amended the motion on July 31, 2012. (Doc. 137). I directed the parties to file a representative sample of the documents for in camera review, and on September 13, 2012, I heard oral argument on the matter. Upon consideration of all relevant filings and case law, and being otherwise fully advised, I hereby resolve the motions as follows.

II. Law

The Federal Rules of Civil Procedure "strongly favor full discovery whenever possible." Farnsworth v. Procter & Gamble Co., 758 F.2d 1545, 1547 (11th Cir. 1985). Parties may obtain discovery of "any nonprivileged matter that is relevant to any party's claim or defense . . ." FED. R. CIV. P. 26(b)(1). It is not necessary that the material be admissible at trial "if the discovery appears

reasonably calculated to lead to the discovery of admissible evidence." Id. Under the federal rules, a party is permitted to assert the attorney-client privilege to prevent certain otherwise discoverable information from being produced, as an "exception to the general rule that the law is entitled to every man's evidence." In re Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 789, 795 (E.D. La. 2007); see FED. R. CIV. P. 26(b)(5). "The [*6] purpose of the attorney-client privilege is to encourage open and complete communication between a client and his attorney by eliminating the possibility of subsequent compelled disclosure of their confidential communications." In re Seroquel Prod. Liab. Litig., No. 6:06-md-1769-Orl-22DAB, 2008 U.S. Dist. LEXIS 39467, 2008 WL 1995058, at *2 (M.D. Fla. May 7, 2008) (citing United States v. Noriega, 917 F.2d 1543, 1550 (11th Cir. 1990)). The privilege applies only to communications and does not extend to facts. See United States ex rel. Locey v. Drew Med., Inc., No. 6:06-cv-564-Orl-35KRS, 2009 U.S. Dist. LEXIS 5586, 2009 WL 88481, at *1 (M.D. Fla. Jan. 12, 2009) (quoting Upjohn Co. v. United States, 449 U.S. 383, 395-96, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)). Because it is an exception to the general rule, courts narrowly construe the privilege and place the onus of proving its applicability on the proponent. See In re Vioxx, 501 F. Supp. 2d at 799 n.15; see also In re Seroquel, 2008 U.S. Dist. LEXIS 39467, 2008 WL 1995058, at * 2 ("The party invoking the attorney-client privilege has the burden of proving that an attorney-client relationship existed and that the particular communications were confidential.").

A. Attorney-Client Privilege Standard

The party invoking the privilege must establish that [*7] (1) the professed privilege holder is or sought to become the attorney's client; (2) the person to whom the communication was made was a licensed attorney "or his subordinate" acting in the capacity of a lawyer at the time the communication was made; (3) the communication concerns a fact that was communicated to the attorney by his client outside the presence of strangers; (4) for the purpose of obtaining a legal opinion, legal services, or "assistance in some legal proceeding;" (5) the communication was not made "for the purpose of committing a crime or tort;" (6) the professed holder actually claimed the privilege; and (7) he did not waive the privilege. Noriega, 917 F.2d at 1550. For the privilege to apply the communication must be confidential, meaning that the professed privilege holder "(1) intended [the communication] to remain confidential *and* (2) under the circumstances [the communication] was *reasonably* expected and understood to be confidential." Id. at 1551 (emphasis in original); see Paul R. Rice, Electronic Evidence Law and Practice 193 (2d ed. 2008). Stated another way, "[t]he key elements of the privilege . . . are (1) the attorney; (2) the client; (3) a communication; [*8] (4) the confidentiality that was anticipated and preserved; and (5) the legal advice or assistance (as opposed to business or personal advice) that was the primary purpose of the communication." 1 Paul R. Rice, Attorney-Client Privilege in the United States § 2:1 (2012). "The privilege also provides a derivative protection to responsive communications from attorney to the client to the extent that those communications reveal the content of prior confidential communications from the client." Rice, Electronic Evidence 193-94.

B. Applicability of the Privilege to Corporations

"[T]he attorney-client privilege applies to corporations" and protects communications to corporate counsel for purpose of obtaining legal advice. In re Vioxx, 501 F. Supp. 2d at 796; see also Upjohn, 449 U.S. at 390. Communication between corporate client and outside litigation counsel are cloaked with a presumption of privilege. Rice, Electronic Evidence 258. Communications between corporate client and corporate counsel--on the other hand--involve a much different dynamic and require the proponent to satisfy a "purpose and intent" threshold test. "[M]odern corporate counsel have become involved in all facets of the [*9] enterprises for which they work. As a consequence, in-house legal counsel participates in and renders decisions about business, technical, scientific, public relations, and advertising issues, as well as purely legal issues." In re Vioxx, 501 F. Supp. 2d at 797. As such, general "[b]usiness advice, unrelated to legal advice, is not protected by the privilege even though conveyed by an attorney to the client," because the purpose and intent is not to communicate legal advice. Id. (quoting In re CFS-Related Securities Fraud Litig., 223 F.R.D. 631 (N.D. Okla. 2004)).

Simply labeling a document "Confidential - Attorney Client Privilege" is not "a sufficient basis for legally presuming or even logically assuming a primary legal purpose." Rice, Electronic Evidence 260. And, simply funneling non-privileged information through an attorney

does not automatically encase the document in the privilege. In re Vioxx, 501 F. Supp. 2d at 797. "The content of the message must request legal assistance, and the information conveyed must be reasonably related to the assistance sought." Rice, Electronic Evidence 260; Tyne v. Time Warner Entm't Co., 212 F.R.D. 596 n.4 (M.D. Fla. 2002) (the attorney-client [*10] privilege "label may serve to put recipients on notice that the document is confidential, but it does not at all prove the existence of privilege.").

The privilege also protects "communications between corporate employees in which prior [legal] advice received is being transmitted to those who have a need to know in the scope of their corporate responsibilities." In re Vioxx, 501 F. Supp. 2d at 797. In some cases, the privilege may also be extended to protect "information gathered by corporate employees for transmission to corporate counsel for the rendering of legal advice[.]" 1 Edna Selan Epstein, The Attorney-Client Privilege and the Work Product Doctrine 151-52 (5th ed. 2007) (The court, relying on the proposed but never adopted Rule 503(b) of the federal rules, "concluded it was not necessary for the attorney to be either the sender or direct recipient of the privileged communications. The documents at issue were documents gathered to prepare a patent application and forward to patent counsel.") (citing In Eutectic v. Metco,61 F.R.D. 35, 37 (E.D.N.Y 1973)). A draft of a document is protected by attorney-client privilege if it was "prepared with the assistance of an attorney for [*11] the purpose of obtaining legal advice or, after an attorney's advice, contained information a client considered but decided not to include in the final version." In re Seroquel, 2008 U.S. Dist. LEXIS 39467, 2008 WL 1995058, at *3. A draft is not protected "[i]f the ultimate document is purely a business document which would not have received any protection based upon privilege in any event . . ." Id.

C. The Assertion of Privilege Over Email Communication

The advent of email has added to the difficulty of determining the purpose and intent of communications that involve corporate legal counsel. In re Vioxx, 501 F. Supp. 2d at 798. In the corporate setting, "the content of what was communicated to legal counsel by the client and . . . the substance of the advice rendered by the lawyer in response" are typically protected by attorney client privilege. Rice, Electronic Evidence 248. This principle applies to email communication so long as corporate counsel's participation in the communications was "primarily for the purpose of rendering legal advice or assistance." In re Vioxx, 501 F. Supp. 2d at 798.

Courts have held that when a communication is simultaneously emailed to a lawyer and a non-lawyer, the corporation "cannot [*12] claim that the primary purpose of the communication was for legal advice or assistance because the communication served both business and legal purposes." In re Seroquel, 2008 U.S. Dist. LEXIS 39467, 2008 WL 1995058, at *4; In re Vioxx, 501 F. Supp. 2d at 805 (citing United States v. Chevron Corp., No. C 94-1885 SBA, 1996 U.S. Dist. LEXIS 8646, 1996 WL 444597, at *2 (N.D. Cal. 1996) ("When a document is prepared for simultaneous review by non-legal as well as legal personnel, it is not considered to have been prepared primarily to seek legal advice and the attorney-client privilege does not apply."); United States v. Int'l Bus. Mach. Corp., 66 F.R.D. 206, 213 (S.D.N.Y 1974) ("If the document was prepared for purposes of simultaneous review by legal and non-legal personnel, it cannot be said that the primary purpose of the document is to secure legal advice.")). In such cases, the email and attachments are not privileged and are discoverable. When an email is sent to a lawyer and non-lawyers in the corporation are *copied*, it "raise[s] a question as to whether the primary purpose of the communication was for legal advice or assistance." In re Vioxx, 501 F. Supp. 2d at 812.

A privileged communication may be subsequently emailed to non-legal personnel [*13] only if the additional recipients are being sent the communication "to apprise them of the legal advice that was sought and received." In re Vioxx, 501 F. Supp. 2d at 810; see also Santrade, Ltd. v. General Elec. Co., 150 F.R.D. 539, 545 (E.D.N.C. 1993) ("[D]ocuments subject to the privilege may be transmitted between non-attorneys (especially individuals involved in corporate decision making) so that the corporation may be properly informed of legal advice and act appropriately.").

It is expected that the party asserting the privilege will satisfy Federal Rule of Civil Procedure 26(b)(5)(A) by identifying the allegedly protected documents in its privilege log. See Fiore v. Goodyear Tire & Rubber Co., Case No. 2:09-cv-843-FtM-29SPC, 2010 U.S. Dist. LEXIS 122512, at *5 (M.D. Fla. Nov. 3, 2010) ("This

[Rule 26(b)(5)(A)] disclosure is done in the form of a privilege log.") (citing Pitts v. Francis, Case No. 5:07cv169/RS/EMT, 2008 U.S. Dist. LEXIS 41894, at *13 (N.D. Fla. May 28, 2008) ("To preserve the privilege, the objecting party must provide a log or index of withheld materials . . ."). The privilege log must contain "a description of the withheld documents that would be sufficient [*14] for [the requesting party] to assess the privilege and protection claims." Knights Armament Co. v. Optical Sys. Tech., Inc., Case No. 6:07-cv-1323-Orl-22KRS, 2009 U.S. Dist. LEXIS 14271, at *18 (M.D. Fla. Feb. 10, 2009); see Tyne, 212 F.R.D. at 598 ("Rule 26 (b)(5) requires that a privilege log sufficiently describe the privileged documents so as to permit other parties, and the court, to assess the applicability of the privilege.").

Whether each email in an email string should be listed separately in a privilege log is a matter upon which courts differ. The Eleventh Circuit Court of Appeals has yet to rule on the issue. I adopt the position (for which there is overwhelming support) that each email in an email string must be listed separately so the court (and the opposing party) may make an attorney-client privilege determination with regards to each email in the string. See In re Vioxx, 501 F. Supp. 2d at 812 (Email strings "in which attorneys were ultimately involved were usually inappropriately listed on the privilege log as one message."); Tri-State Truck Ins., Ltd. v. First Nat'l Bank of Wamego, Case No. 09-4158-SAC, 2011 U.S. Dist. LEXIS 3610, at *3 (D. Kas. Jan. 13, 2011) ("[L]itigants [*15] generally must list each email within a string as a separate entry on the privilege log rather than listing the email string as a single entry . . . the Court was able to review each email within the string to ascertain the applicability of the attorney-client privilege . . ."); Rice Electronic Evidence 253 ("Each e-mail is a separate communication (like separate letters and memoranda) and should be described separately in the privilege log . . . [t]he fact that e-mail communications are electronically tied together because they were sequentially created does not change their fundamental character."). As court-appointed "Special Master"[2] Rice stated in In re Vioxx, "[s]imply because technology has made it possible to physically link these separate communications (which in the past would have been separate memoranda) does not justify treating them as one communication and denying the demanding party a fair opportunity to evaluate privilege claims raised by the producing party." In re Vioxx, 501 F. Supp. 2d at 812. "For the adversarial system to function properly, each message needs to be identified and described in a manner that fairly permits the opposing side to assess whether the [*16] claim of privilege is valid." Rice, Electronic Evidence 255.

2 In In re Vioxx, District Judge Fallon appointed Paul R. Rice, author of two of the treatises cited herein, "Special Master," pursuant to Federal Rule of Civil Procedure 53. 501 F. Supp. 2d at 791. "The Court requested that Special Master Rice review the 2,000 representative documents, as well as approximately 600 additional documents" and "make recommendations as to whether or not Merck's claim of privilege should be upheld." Id. at 792.

III. Discussion

The Relator seeks a privilege determination for seven categories of documents: (1) the compliance referral log; (2) all documents and/or communications described in the right hand column of "Relator's Hearing Exhibit 2" which are not to or from an attorney; (3) all documents and/or communications that relate to audits and reviews performed by Halifax's Case Management Department, Compliance Department, Finance Department and/or any hospital department other than the Legal Department; (4) all documents and/or communications that relate to fair market value determinations or analyses with respect to physician compensation, including drafts; (5) all documents produced to the United [*17] States in response to subpoenas in 2009 and/or 2010;[3] (6) all email strings described in Exhibit D to the Renewed Motion with redactions of any emails that are subject to the privilege; and (7) the documents filed under seal as Relator's Hearing Exhibits 6,7 and 8 (crime fraud exception documents). I have examined the documents presented by the parties for in camera review and find as follows:

3 The Relator has stated that she is concerned about the "documents produced to the United States in response to [the] 2009 subpoenas," while Halifax specifically referenced documents produced in response to the 2009 and 2010 subpoenas. See Email from L. Lin Wood, Relator's Counsel to the Honorable Thomas B. Smith, United States Magistrate Judge (Sept. 19, 2012, 04:41 pm EST); Email from Amandeep S. Sidhu, Halifax's Counsel to the Honorable Thomas B. Smith, United States Magistrate Judge

(Oct. 2, 2012, 07:14 pm EST).

A. Category 1

The parties disagree over whether Halifax's referral log is protected by attorney-client privilege. Relator argues that the referral log is a factual record "that is kept of all reports about compliance issues that might need to be investigated." (Tr. 21-22). She maintains [*18] that the log was kept in Halifax's normal course of business and that the reports were not routinely shared with the Legal Department. (Doc. 137 at 13). In her declaration, Relator explained that the referral log was a tool used by the Compliance Department to manage "day-to-day complaints." (Kunz Decl., Doc. 137-3 ¶ 13). She stated that as a "Compliance employee, [she] had access to the referral log and [she] would input status comments as [she] looked into the referrals," or complaints. (Id.).

Halifax concedes that the referral log was maintained by the Compliance Department, but argues that it is protected from disclosure because it was prepared "for the purpose of obtaining legal advice" and "in anticipation of possible litigation and/or adverse administrative proceedings relating to the issues identified on it by the Compliance Department." (Doc. 150 at 13). Halifax argues that its intention that the log remain confidential is evidenced by the "header and footer on the log indicating its privileged and confidential nature." (Id.). Compliance Director, George Rousis, affirmed that his office maintained the log "to facilitate [his] discussions with [Halifax's General Counsel,] David [*19] Davidson and the Halifax Legal Department regarding the level of litigation risk and potential exposure stemming from reported incidents" and that he was instructed by Mr. Davidson[4] to do so in 1998. (Rousis Decl., Doc. 150-1 at 30).

> 4 In his declaration, Mr. Davidson stated that he oversees Mr. Rousis' "maintenance of the Compliance Referral Log[.]" (Davidson Decl., Doc. 177-1 ¶ 2).

At the hearing, Relator relied on Exhibit 3, which is a questionnaire (Deloitte & Touche LLP internal audit form) entitled, "Form 1430SHC-- - - - -Questionnaire Regarding Compliance with Federal Health Care Entity Laws and Regulations." This questionnaire memorializes Mr. Rousis' answers to a series of questions. When asked whether Halifax had written procedures for investigating offenses, Mr. Rousis stated that the procedures were written in a "Compliance Program Reference Manual," and added that investigations are documented in an "Issue and Concerns Log," which had been renamed the referral log. (Hrn'g. Ex. 3, p. 6). Mr. Rousis stated that any corrective action taken ("policy/standards development to address identified gaps, process improvements, additions to education curriculum, and voluntary refunds") [*20] was documented in the referral log. (Id. at 6-7). He also explained that the log was reviewed quarterly by the "Compliance Committee," but failed to specify the make-up of the committee and whether it included employees from the Legal Department. (Id.).

The parties submitted a representative sample of the referral log (Individual Communications 97, 98, and 99) for in camera review. Each incident cover sheet is addressed to the attention of Mr. Davidson, General Counsel, and all pages are stamped "Confidential Attorney-Client Privileged Information." This is not dispositive of the privilege issue. A document is not privileged simply because the custodian wants it to be or because it is marked as such. In her declaration, Ms. Kunz stated that the content of the log was sometimes generated by "employees who saw conduct that they thought might be inappropriate" and was a recordation of factual accounts that were accessible for editing/commenting by non-lawyer employees in the Compliance Department. (Kunz's Decl., Doc. 137-3 ¶ 13). To resolve this issue, I must first determine whether the referral log is fact or communication. See United States ex rel. Locey, 2009 U.S. Dist. LEXIS 5586, 2009 WL 88481, at *1 (The privilege [*21] applies only to communications and does not extend to facts.) (quoting Upjohn Co., 449 U.S. at 395-96). If the content of the log constitutes communication, and not fact, I must consider whether the content of the message evidences a request for legal assistance or the transmission of legal advice previously sought. Rice, Electronic Evidence 260; Tyne, 212 F.R.D. at 596 n.4.

I have reviewed the content of Individual Communications 97, 98, and 99 and find that none of them evidence legal advice sought or received. In no instance has a lawyer commented on the information recorded nor has an employee in the Compliance Department indicated that he or she would seek advice of counsel. Some of the information in the log can only be characterized as a recordation of fact. For instance, on February 28, 2008, Ms. Kunz recorded the following:

> Compliance provided Beth Hollis, Manager for IMC with a Self Audit Checklist in order for the department to do self audit of critical care codes. In the conversation, it was brought up that the physicians no longer used the prolonged care code. However, when compliance ran a utilization report for Dr. Arcot, Prolonged care (CPT 99356) was billed 30 times [*22] for January and part February 2008.

(Indiv. Comm. No. 97). Other log entries clearly contain email communications; however, the privilege does not apply because (1) the communications are between non-lawyers, (2) they do not reflect "prior [legal] advice received [that] is being transmitted to those who have a need to know in the scope of their corporate responsibilities," and (3) the communications do not expressly reflect "information gathered by corporate employees for transmission to corporate counsel for the rendering of legal advice[.]" In re Vioxx, 501 F. Supp. 2d at 796; Epstein, The Attorney-Client Privilege 151. Therefore, to the extent the remainder of the referral log contains the types of entries produced for the Court's in camera review, they are not privileged and must be produced. To the extent any of the remaining entries in the privilege log contain privileged information, as categorized in section II, supra, those entries shall first be redacted and then produced.

B. Category 2

At the hearing, Relator offered into evidence a chart which it used to compare the descriptions of documents over which Halifax maintains privilege with documents over which it has withdrawn [*23] previously asserted claims of privilege. (Tr. 18-19; Hrn'g Ex. 2). Relator argues that the document descriptions are essentially identical and that Halifax has not met its burden necessary to sustain the privilege. (Tr. 20). In response, Halifax argues that its assertion of attorney-client privilege is proper simply because its organization is structured so that "the compliance department operates under the supervision and oversight of [the] legal department." (Tr. 60). I am not persuaded by this argument. Halifax's organizational structure is of no consequence. Halifax bears the burden of proving that the primary purpose and intent of each allegedly privileged document was to seek or give legal advice. Halifax has failed to meet its burden with regards to the descriptions of the documents under the following headings: "facilitate the provision of compliance advice," "facilitate the rendering of compliance advice,"[5] "reflecting request for compliance advice," "for the purpose of obtaining compliance advice," "reflecting provision of compliance advice," "reflecting compliance advice," and "request for and provision of compliance advice." These documents are not privileged and are discoverable. [*24] The description of the legal documents for which privilege has been withdrawn do not offer any insight into the validity of the privilege assertions over the documents in the right column. I cannot tell from the descriptions whether the protection is properly asserted, which, I recognize is Relator's complaint. It is my expectation that the parties can resolve this issue given the Court's guidance outlined in section II of this order. If the parties are not able to resolve this issue, Relator may file a renewed motion within fourteen days from the date of this order. If this should occur, I will order that the relevant documents be produced for in camera review.

> 5 The last description in this list reveals communication that involved "A. Pike." It is my understanding that A. Pike is a member of Halifax's legal department. See (Doc. 137-1 at 11). Based on the description of this privilege log entry, the primary purpose of this communication was not to give or receive legal advice. The description clearly articulates that the purpose of this communication was to "facilitate the rendering of compliance advice." In addition, it is clear from the description that the communication was sent [*25] to others besides "A. Pike," which also weighs against a privilege finding. See Int'l Bus. Mach. Corp., 66 F.R.D. at 213 ("If the document was prepared for purposes of simultaneous review by legal and non-legal personnel, it cannot be said that the primary purpose of the document is to secure legal advice."); In re Seroquel, 2008 U.S. Dist. LEXIS 39467, 2008 WL 1995058, at * 4; In re Vioxx, 501 F. Supp. 2d at 805 (citing Chevron Corp., 1996 U.S. Dist. LEXIS 8646, 1996 WL 444597, at *2 ("When a document is prepared for simultaneous review by non-legal as well as legal personnel, it is not considered to have been prepared primarily to seek legal advice and the attorney-client privilege does not apply.")).

C. Category 3

Relator seeks a privilege determination for documents or communications that relate to audits and reviews performed by Halifax's Case Management Department, Compliance Department, Finance Department and/or any hospital department other than the Legal Department. Examples of these communications and documents are contained within the "Representative Communication Issues" binder submitted to the Court for in camera review. This binder contains the documents listed in Exhibit A to Relator's motion--an exhibit that both parties agree [*26] represents the "core documents" in the dispute. See (Tr. 13 (Relator's counsel: "[W]e believe that the claims that they're taking with respect to those documents, the representative sample, when you look at that and deal with it in essence by four or five categories, you will not only have solved the obstacle that prevents us from using them, but you also have overcome the obstacles that exist with respect to the thousands of [other] documents . . ."); Tr. 55 (Halifax's counsel: "[T]he core documents at issue, which are the Exhibit A documents, are privileged because they contain legal advice, were prepared for the purpose of obtaining or rendering legal advice, or involve the communication of legal advice.")). I have conducted an in camera review and I find that, for the most part, these communications are not protected by the attorney-client privilege. My ruling with respect to all of the individual communications, including those within category 3, is set forth in the table below:

Plaintiff's Individual Communication Number	**Defendant's Document Number**	**Court's Ruling**
1	39	Privileged.
2	79 and 80	Not privileged.
3	94	Not privileged.
4	2	Not privileged.
		o No attorney "to" or "from."[6]
		o No legal advice sought or
		received.
		o The primary purpose of
		document is to assure that the
		hospital's internal process
		successfully identifies the short
		stay admissions that do not meet
		the stated criteria.
5	2	Not privileged.
		o Communication between non-
		legal employees
		o No legal advice sought or
		received.
		o No indication that
		correspondence was at the

		behest of counsel or made in
		preparation to confer with
		counsel.
6	2	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
7	2	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
8	2	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
9	2	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
10	2	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
11	2	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
12	2	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
13	2	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
14	2	Not privileged.
		o No attorney "to" or "from."

		o No legal advice sought or
		received.
15	7	Not privileged.
		o Attorney listed among many
		recipients in the "to" field. When
		communication is simultaneously
		emailed to a lawyer and a non-
		lawyer, the corporation "cannot
		claim that the primary purpose of
		the communication was for legal
		advice or assistance because the
		communication served both
		business and legal purposes." In re Seroquel, 2008 U.S. Dist. LEXIS 39467, 2008 WL 1995058, at * 4;
		In re Vioxx, 501 F. Supp.2d at 805
		(citing Chevron Corp., 1996 U.S. Dist. LEXIS 8646, 1996 WL 444597, at *2
		("When a
		document is prepared for
		simultaneous review by non-legal
		as well as legal personnel, it is
		not considered to have been
		prepared primarily to seek legal
		advice and the attorney-client
		privilege does not apply."); Intn'l Bus. Machines Corp., 66 F.R.D. at 213
		("If the document was
		prepared for purposes of
		simultaneous review by legal and
		non-legal personnel, it cannot be
		said that the primary purpose of
		the document is to secure legal
		advice.")).
16	13	Not privileged.
		o Attorney listed among many
		recipients in the "to" field.
17	14	Not privileged.
		o Attorney listed among many

		recipients in the "to" field.
18	14	Not privileged.
		o Attorney listed among many
		recipients in the "to" field.
19	14	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
20	14	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
21	14	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
22	14	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
23	14	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
24	14	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
25	14	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
26	14	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
27	14	Not privileged.

		o No attorney "to" or "from."
		o No legal advice sought or
		received.
28	14	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
29	14	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
30	14	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
31	14	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
32	14	Not privileged.
		o Attorney listed among many
		recipients in the "to" field.
33	14	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
34	14	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
35	14	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
36	14	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or

		received.
37	14	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
38	15	Not privileged.
		o Attorney listed among many
		recipients in the "to" field.
39	16	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
40	16	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
41	17	Not privileged.
		o Attorney listed among many
		recipients in the "to" field.
42	19	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
43	19	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
44	19	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
45	19	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
46	19	Not privileged.
		o No attorney "to" or "from."

		o No legal advice sought or
		received.
47	19	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
48	19	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
49	22	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
50	22	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
51	22	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
52	22	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
53	22	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
54	22	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
55	22	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or

		received.
56	22	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
57	22	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
58	22	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
59	22	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
60	22	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
61	22	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
62	22	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
63	22	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
64	22	Not privileged.
		o Attorney listed among many
		recipients in the "to" field.
65	22	Not privileged.

		o Attorney listed among many
		recipients in the "to" field.
66	22	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
67	22	Not privileged.
		o Attorney listed among many
		recipients in the "to" field.
68	24	Not privileged.
		o Attorney listed among many
		recipients in the "to" field.
69	29	Not privileged.
		o Attorney listed among many
		recipients in the "to" field.
70	49	Not privileged.
71	58	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
72	58	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
73	58	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
74	58	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
75	58	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
76	58	Not privileged.

		o No attorney "to" or "from."
		o No legal advice sought or
		received.
77	58	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
78	58	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
79	58	Not privileged.
80	58	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
81	58	Not privileged.
82	59	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
		o The "Attorney-Client Work
		Product" stamp is immaterial.
		See Rice Electronic Evidence, p.
		260 (Simply labeling a document
		"Confidential - Attorney Client
		Privilege" is not "a sufficient basis
		for legally presuming or even
		logically assuming a primary
		legal purpose. The content of the
		message must request legal
		assistance, and the information
		conveyed must be reasonably
		related to the assistance
		sought."); see also Tyne v. Time Warner Entm't Co., 212 F.R.D. 596 n. 4 (M.D. Fla. 2002)
83	60	Not privileged.

		o No attorney "to" or "from."
		o No legal advice sought or
		received.
		o The "Attorney-Client Work
		Product" stamp is immaterial.
		See Rice Electronic Evidence, p.
		260 (Simply labeling a document
		"Confidential - Attorney Client
		Privilege" is not "a sufficient basis
		for legally presuming or even
		logically assuming a primary
		legal purpose. The content of the
		message must request legal
		assistance, and the information
		conveyed must be reasonably
		related to the assistance
		sought."); see also Tyne v. Time
		Warner Entm't Co., 212 F.R.D.
		596 n. 4 (M.D. Fla. 2002).
84	79	Not privileged.
85	80	Not privileged.
86	84	Not privileged.
87	94	Not privileged.
88	105	See section III.G, infra.
89	105	See section III.G, infra.
90	113	See section III.G, infra.
91	182	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
92	182	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
93	182	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or

		received.
94	182	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
95	184	Not privileged.
		o Attorneys listed among many
		recipients in the "to" field.
		o The primary purpose of this
		communication is to disseminate
		policy regarding the use of
		auxiliary staff by hospital-based
		physicians (compliance advice).
		There is no evidence that this
		review is being done at the
		behest of the legal department.
96	193	Not privileged.
		o There is no indication that this
		"Shelly" is Shelly Shiflet
		o No legal advice sought or
		received.
		o The primary purpose of this
		communication is to convey
		results of a review conducted by
		the Compliance Department.
97	174	See section III.A, supra.
98	182	See section III.A, supra.
99	182	See section III.A, supra.

6 I [*27] have consulted the list attached to Relator's motion to determine the identities of the communication authors and recipients. (Doc. 137-1 at 11).

D. Category 4

Relator seeks a privilege determination for all documents and/or communications that relate to fair market value determinations or analyses with respect to physician compensation, including drafts. I have conducted an in camera review of these documents. My ruling with respect to these individual communications is set forth in the table at section III.C of this order.

E. Category 5

The Government argues that Halifax waived any privilege with respect to the following twenty-eight (28) documents when it produced them in response to

subpoenas dated December 14, 2009 and August 9, 2010:

> PTF 0003649; PTF 0008556, PTF 0005792; PTF 0001159; PTF 0002857; PTF 0002859; PTF 0008411; PTF 0001539; PTF 0008806; PTF 0008833; PTF 0008722; PTF 0008860; HAL 0005534; HAL 0028827; HAL 0030624; HAL 0032255; HAL 0033097; HAL 0033695; HAL 0005312; HAL 0330102; HAL 0242656; HAL 0347538; HLFX-PST 0294540; HLFX-PST 0294541; HLFX-PST 0295340; HLFX-PST 0295341; HAL-1 0133092; and HAL-1 0131004.

(Doc. [*28] 154). The Government explains how it came to acquire the documents:

> Based on the allegations in the complaint, the United States initiated an investigation of various allegations raised by Relator. As part of its FCA investigation, the United States Department of Health and Human Services Office of Inspector General ("HHS OIG") issued three administrative subpoenas for various documents maintained by Halifax. The subpoenas, two dated December 14, 2009, and the other dated August 9, 2010, required Halifax to identify any document not produced by reason of a claim of privilege, and to provide to the United States sufficient information to assess the validity of the privilege asserted. See Subpoenas dated December 14, 2009 and August 9, 2010 (attached as Exhibits 1-3 to the Declaration of Adam J. Schwartz ("Schwartz Decl.")). Halifax began producing documents pursuant to the subpoenas on January 22, 2010, and continued to produce documents pursuant to the subpoena through March 4, 2011. Despite the explicit requirement that Halifax identify any documents being withheld on the basis of a claim of privilege, at no point during the United States' FCA investigation did Halifax produce a privilege [*29] log to the United States identifying documents withheld as privileged.

(Id. at 2-3).

By March 2011, Halifax had ceased producing documents to the Government in satisfaction of the subpoenas. (Schwartz Decl., Doc. 154-1 ¶ 5). The Government has produced competent evidence to establish that on the face of the subpoenas it directed Halifax to identify any documents not produced by reason of a claim of privilege. (Schwartz Decl., Doc. 154-1 ¶ 4; Doc. 154-2 at 8; Doc. 154-3 at 8; Doc. 154-4 at 8). No privilege identification was made. In April 2011, Halifax was made aware of the documents upon which the Government intended to rely. (Doc. 154 at 3; Schwartz Decl., Doc. 154-1 ¶¶ 7-9). Again, no assertion of privilege was made.

In November 2011, Halifax made general privilege assertions to the Relator--not to the Government, who, by that time, had intervened in the action. (Doc. 154 at 4). In January 2012, the Government sequestered the documents that were the basis of Halifax's November 2011 privilege claim. (Id.). March 5, 2012, was the first time Halifax asserted its specific privilege claims in a privilege log. (Doc. 154-7 at 1-3).

To the extent any of these documents are protected, my determination [*30] of whether Halifax waived the privilege is guided by United States Fid. & Guar. Comp. v. Liberty Surplus Ins. Co., 630 F. Supp. 2d 1332 (M.D. Fla. 2007). Under Liberty Surplus, courts must consider:

> (1) The reasonableness of the precautions taken to prevent inadvertent disclosure, (2) the amount of time it took the producing party to recognize its error, (3) the scope of the production, (4) the extent of the inadvertent disclosure, and (5) the overriding interest of fairness and justice.

630 F. Supp. 2d at 1336. First, Halifax concedes that it did not take any significant precautions to prevent the disclosure of privileged material and that it produced documents in response to the government's subpoenas without conducting a manual privilege review. See Tr. 43. This factor weighs against a finding that the documents are privileged. See In re Fountainebleau Las Vegas Contract Litig., Case No.

09-02102-MD-GOLD/GOODMAN, 2011 U.S. Dist. LEXIS 4105, at *37 (S.D. Fla. Jan. 7, 2011) ("[I]n order to preserve a privilege claim, a party 'must conduct a privilege review prior to document production.'").

Second, the evidence of record has established that Halifax (1) failed to lodge a privilege objection [*31] to these documents until November 2011, which was approximately eight months after production under the 2009 and 2010 subpoenas had concluded, and (2) failed to identify its specific privilege assertions in a privilege log until March 2012. Halifax delayed even though it was made aware of the documents upon which the Government intended to rely as early as April 14, 2011. "[A] responding party's failure to make a timely and specific objection to a discovery request waives any objection based on privilege." Liberty Surplus, 630 F. Supp. 2d at 1340; see Third Party Verification, Inc. v. Signaturelink, Inc., Case No. 6:06-cv-415-Orl-22DAB, 2007 U.S. Dist. LEXIS 32238, at *8 (M.D. Fla. May 2, 2007) ("A party who fails to file timely objections waives all objections, including those based on privilege or work product."). This factor weighs against a finding that the documents are protected.

The third and fourth factors weigh neutrally. Halifax has produced thousands of documents in this litigation. The Government argues that Halifax only waived the privilege for twenty-eight documents. (Doc. 154). The number of documents at issue is an extremely small portion of the total number of documents [*32] produced.

Lastly, the Government has relied on these documents for more than a year and to withhold them now would be unfair considering that Halifax failed to take meaningful precautions to prevent the disclosure of privileged information and failed to assert privilege until eight months after production under the subpoenas had concluded. This factor weighs against a privilege finding.

The balance of the Liberty Surplus factors weighs against Halifax's privilege assertions. To the extent any of the documents produced in response to the Government's 2009 and 2010 subpoenas were protected by attorney-client privilege, the privilege was waived.

F. Category 6

Relator seeks a privilege determination as to all email strings described in Exhibit D to the Renewed Motion with redactions of any emails that are subject to the privilege. I have conducted an in camera review of the random sample of communications identified at the hearing and provided to the Court. As an initial matter, each email string listed in Halifax's privilege log must be disassembled and each email listed separately in an amended privilege log. In re Vioxx, 501 F. Supp. 2d at 812; Tri-State Truck, 2011 U.S. Dist. LEXIS 3610, at *3; [*33] Rice, Electronic Evidence 253. For the sake of clarity, my rulings correspond to the document numbers as they were presented to me. To the extent any of these documents consist of email strings, my rulings pertain to each individual email in the string, except where noted. I find that some of these communications are protected by the attorney-client privilege, others are not. My specific ruling with respect to each of the fifteen (15) communications that comprise the random sample, is set forth below:

Tab Number	Document ID:	Court's Ruling
1	HAL0343413	Privileged.
		o Email sent to A. Pike in Legal
		Department for purposes of
		seeking legal advice.
2	HAL0343999	Not privileged.
		o Email correspondence involves
		A. Pike and D. Davidson from the
		Legal Department, but the
		purpose of the communication to

		resolve a business/Human
		Resources related issue. The
		communication does not involve
		the request for or transmission of
		legal advice.
3	HAL0301892	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
4	HAL0345376	Not privileged.
		o A. Pike is the recipient of one of
		the emails, but the purpose of the
		communication is not to request
		or transmit legal advice. Rather,
		the sender explicitly intends to
		"keep [A. Pike] in the loop," with
		regards to a Human Resources
		issue.
		o No legal advice sought or
		received.
5	HAL0336000	The emails sent at 9:52 am and 9:57 am
		are privileged and shall be redacted.
		The remaining emails are not privileged
		and must be produced because they do
		not seek legal advice.
6	HAL0327948	Privileged.
		o Emails sent to A. Pike and S.
		Shiflet in Legal Department for
		purposes of seeking legal advice.
7	HLFXHLTH-E00293778	Not privileged.
		o No attorney "to" or "from."
		o S. Shiflet is copied, but no legal
		advice is sought or received.
8	HLFXHLTH-E00421414	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or

		received.
9	HLFXHLTH-E00227484	Privileged.
		o These email messages were
		sent between G. Rousis,
		Halifax's corporate lawyers and
		outside counsel for purposes of
		seeking legal advice.
10	HLFXHLTH-E00490411	Privileged.
		o Emails sent to S. Shiflet in Legal
		Department for purposes of
		seeking legal advice.
11	HLFXHLTH-E00440765	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
12	HLFXHLTH-E00131137	Not privileged.
		o These emails were either sent or
		received by A. Pike and/or S.
		Shiflet (among other non-lawyer
		employees). The purpose of the
		communication is to circulate the
		minutes from a meeting. The
		emails do not reflect a request for
		or transmission of legal advice.
13	HLFXHLTH-E00455166	Privileged.
		o The attorney-client privilege
		protects "communications
		between corporate employees in
		which prior [legal] advice
		received is being transmitted to
		those who have a need to know
		in the scope of their corporate
		responsibilities." In re Vioxx, 501F. Supp. 2d at 797.
14	HLFXHLTH-E00482596	The emails sent at 12:03 pm and 5:05
		pm are not privileged and must be
		produced.
		o S. Shiflet is the recipient of one of

		the emails, but the purpose of the
		communication is not to request
		or transmit legal advice.
		The remaining emails are privileged.
		o These email messages involved
		S. Shiflet and outside counsel for
		purposes of seeking legal advice.
15	HLFXHLTH-E00168325	Privileged.
		o The attorney-client privilege
		protects "communications
		between corporate employees in
		which prior [legal] advice
		received is being transmitted to
		those who have a need to know
		in the scope of their corporate
		responsibilities." In re Vioxx, 501 F. Supp. 2d at 797.

G. [*34] **Category 7**

Relator argues that attorney-client privilege does not protect documents 88, 89, and 90 in Exhibit A to Relator's motion because "they evidence an attorney aiding in the commission of a fraud." (Doc. 137 at 18). Halifax maintains that the crime-fraud exception does not apply because Relator is unable to meet her threshold burden of proof. (Doc. 150 at 12). I have reviewed these communications in camera.[7]

> 7 Thus, Relator's Renewed Motion for In Camera Review (Doc. 151) is GRANTED.

It is well established that "[t]he attorney-client privilege does not protect communications made in furtherance of a crime or fraud." In re Grand Jury Investigation (Schroeder), 842 F.2d 1223, 1226 (11th Cir. 1987). These types of communications "are subject to disclosure as an exception to the attorney-client privilege." In re Warner, 87 B.R. 199, 202 (M.D. Fla. 1988). The party invoking the crime-fraud exception must establish:

> First, there must be a prima facie showing that the client was engaged in criminal or fraudulent conduct when he sought the advice of counsel, that he was planning such conduct when he sought the advice of counsel, or that he committed a crime or fraud subsequent to receiving [*35] the benefit of counsel's advice. Second, there must be a showing that the attorney's assistance was obtained in furtherance of the criminal or fraudulent activity or was closely related to it.

In re Grand Jury Investigation (Schroeder), 842 F.2d at 1226. "Mere allegations or suspicions of fraud are not enough." In re Warner, 87 B.R. at 202. In this case, Relator alleges that Halifax violated the Stark Amendment by "providing improper financial incentives to staff physicians (who are referring Medicare and other Government beneficiaries) unrelated to their personal performance of services[.]" (Doc. 29 ¶¶ 98, 99-146).

The Relator has offered no evidence to rebut Halifax's argument that she was not legally authorized to take document number 90 from the hospital. See (Tr. 55).

Therefore, Relator has not met her burden. Sackman v. Liggett Group 173 F.R.D. 358, 365 (E.D.N.Y. 1997) (the court found no waiver where paralegal stole privileged document and gave it to her lawyers) (citing Mayman v. Martin Marietta Corp., 886 F. Supp. 1243, 1246 (D. Md. 1995) (court will not consider records removed without authority on the applicability of the crime-fraud exception)); see Smith v. Armour Pharm. Co., 838 F. Supp. 1573, 1575-77 (S.D. Fla. 1993) [*36] (under Florida law a publicly disclosed stolen document does not lose its privileged status). Consequently, document number 90 is privileged and will not be produced.

Communications 88 and 89 are email messages between Ms. Pike, in Halifax's Legal Department, and Mr. Foster of the hospital's Finance Department that were eventually forwarded to Relator. The hospital's General Counsel and two employees from the Accounting Department are copied on the messages. The first prong of the In re Grand Jury Investigation (Schroeder) test "is satisfied by a showing of evidence that, if believed by a trier of fact would establish the elements of some violation that was going on or about to be committed." Gutter v. E.I. Dupont de Nemours, 124 F. Supp. 2d 1291, 1299 (S.D. Fla. 2000) (quoting In re Grand Jury Investigation (Schroeder), 842 F.2d at 1226). The court is permitted to "examine the privileged communications themselves to determine whether they further a crime or fraud[.]" United States v. Boender, 649 F.3d 650, 656 (7th Cir. 2011). I have reviewed communications 88 and 89 and find that Relator has made a prima facie showing that Halifax was engaged in or about to be engaged in fraudulent [*37] conduct when it sought Ms. Pike's advice. See Gutter, 124 F. Supp. 2d at 1299. Secondly, I find that Relator has offered sufficient evidence to show that Ms. Pike's assistance was sought and obtained in order to allow the Finance Departments to make payments to the oncologists. Therefore, upon due consideration I find that the crime-fraud exception applies to vitiate the attorney-client privilege over communications 88 and 89 and these documents must be produced.

IV. Motion to Compel Interrogatory No. 2

Parties may obtain discovery of "any nonprivileged matter that is relevant to any party's claim *or defense* . . ." FED. R. CIV. P. 26(b)(1) (emphasis added). Federal Rule of Civil Procedure 33 allows parties to serve upon each other interrogatories which relate to any matter that may be inquired into under Rule 26(b). The handbook entitled Middle District Discovery (2001) directs that "[i]nterrogatories should be brief, simple, particularized, unambiguous, and capable of being understood. . . ." Middle District Discovery (2001) at 15.

Rule 33 directs that each interrogatory be answered "separately and fully in writing under oath." FED. R. CIV. P. 33(b)(3). An opposing party must state its [*38] grounds for objection with specificity. See id. at (b)(4). Objections to discovery must be "plain enough and specific enough so that the court can understand in what way the [discovery is] alleged to be objectionable." Panola Land Buyers Asso. v. Shuman, 762 F.2d 1550, 1559 (11th Cir. 1985) (quoting Davis v. Fendler, 650 F.2d 1154, 1160 (9th Cir. 1981)). Upon motion, the court may compel a party to answer the interrogatories. See FED. R. CIV. P. 37(a)(3)(B)(iii). If the motion to compel is granted, the court must direct the party whose conduct necessitated the motion, "or the attorney advising that conduct, or both," to compensate the movant for "reasonable expenses incurred in making the motion, including attorney's fees," except in certain limited circumstances. FED. R. CIV. P. 37(a)(5)(A).

The Government served Halifax with interrogatories, including the following:

> Interrogatory No. 2: Identify all documents, communications, and facts Halifax Hospital Medical Center and Halifax Staffing, Inc. relied upon or intend to rely upon in support of the affirmative defenses asserted by Halifax Hospital Medical Center and Halifax Staffing, Inc. i[n] the Answer to the United States' Complaint [*39] in Intervention.

(Doc. 153 at 2). Halifax responded to interrogatory 2 as follows:

> Response: Halifax objects to this request on the grounds that it is overly broad, vague, and unduly burdensome. Subject to the foregoing general and specific objections, Halifax responds that "documents, communications, and facts" on which Halifax "relied upon or intends to rely upon" have not yet been determined and will be disclosed as required by the Court's Scheduling Order

> and in accordance with the applicable Federal Rules.

(Doc. 153 at 3). The Government was not satisfied with Halifax's response and asked it to provide a supplement. (Doc. 153 at 3; Doc. 153-5). Halifax refused. (Doc. 153 at 3; Doc. 153-6). The Government now asks this Court to compel Halifax to "provide a response to United States Interrogatory No. 2 and produce all responsive documents identified on Halifax's 4th Privilege Log that were improperly withheld from production." (Doc. 153). Specifically, the Government has asked this court to compel the disclosure of the documents listed in Exhibit 6 to the motion to compel, which include

> [D]ozens of additional communications regarding internal audits that were apparently never seen by [*40] an attorney on the theory that someone in the legal department directed the performance of the audit. Finally, Halifax has withheld spreadsheets and other factual information sent by non-lawyers to business and legal personnel that do not appear to have been for the purpose of obtaining legal advice.

(Doc. 153 at 6). Halifax maintains that its response was appropriate under the federal and local rules of this Court. (Doc. 157). The parties provided me with a sampling of the documents listed in Exhibit 6 to the Government's motion. I have conducted an in camera review of those documents and find as follows with regards to the sample communications:[8]

Tab Number	Document ID From	Court's Ruling
	Exhibit 6	
1	HLFXHLTH-E00022728	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
2	HLFXHLTH-E0044440	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
3	HLFXHLTH-E0045130	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
4	HLFXHLTH-E00105298	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
5	HLFXHLTH-E00209388	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
6	HLFXHLTH-E00329556	Not privileged.

		o No attorney "to" or "from."
		o No legal advice sought or
		received.
7	HLFXHLTH-E00436245	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
8	HLFXHLTH-E00527004	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
9	HLFXHLTH-E00022199	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
10	HLFXHLTH-E00114304	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
11	HLFXHLTH-E00227879	Not privileged.
		o A. Pike is listed in the "To" field,
		but the purpose and intent of the
		email is to transmit a meeting
		agenda.
12	HLFXHLTH-E00389632	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
13	HLFXHLTH-E00390287	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
14	HLFXHLTH-E00390728	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
15	HLFXHLTH-E00391082	Not privileged.

		o No attorney "to" or "from."
		o No legal advice sought or
		received.
16	HLFXHLTH-E00410557	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
17	HLFXHLTH-E00410800	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
18	HLFXHLTH-E00412504	Not privileged.
		o S. Shiflet participated in the
		discussion, but the purpose and
		intent of the document was to
		facilitate a group discussion.
		o No legal advice sought or
		received.
19	HLFXHLTH-E00527011	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
20	HLFXHLTH-E00527031	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
21	HLFXHLTH-E00527043	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
22	HLFXHLTH-E00527108	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
23	HLFXHLTH-E00527121	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or

		received.
24	HLFXHLTH-E00527136	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
25	HLFXHLTH-E00527157	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
26	HLFXHLTH-E00527171	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
		o No indication that draft document
		was created at the behest of
		counsel or made in preparation
		to confer with counsel.
27	HLFXHLTH-E00527198	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
28	HLFXHLTH-E00527224	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
29	HLFXHLTH-E00527527	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
30	HLFXHLTH-E00527267	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
		o No indication that memo or
		attached document were created
		at the behest of counsel or made
		in preparation to confer with

		counsel.
31	HLFXHLTH-E00527278	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
32	HLFXHLTH-E00527294	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.
33	HLFXHLTH-E00527310	Not privileged.
		o No attorney "to" or "from."
		o No legal advice sought or
		received.

In [*41] addition, I direct Halifax to amend its response to the Government's Interrogatory No. 2. I am confident that Halifax is capable of providing the Government with a factual basis for the asserted affirmative defenses without disclosing protected information or revealing, in detail, a narrative of its case.[9]

8 Each email string listed in Halifax's privilege log must be disassembled and each email listed separately. In re Vioxx, 501 F. Supp. 2d at 812; Tri-State Truck, 2011 U.S. Dist. LEXIS 3610, at *3; Rice, Electronic Evidence 253. For the sake of clarity, my rulings correspond to the document numbers as they were presented to me. To the extent any of these documents consist of email strings, my rulings pertain to each individual email in the string, except where noted.

9 I reject Relator's argument that Halifax waived attorney-client privilege because it asserted affirmative defenses to the Stark Law allegations. (Doc. 137 at 17). The facts of this case are distinguished from other cases in which defendants' "advice of counsel" defense vitiated the privilege. See SEC v. Wall St. Capital Funding, LLC, Case No. 11-20413-CIV-GRAHAM/GOODMAN, 2011 U.S. Dist. LEXIS 63186, at *21 (S.D. Fla. June 10, 2011) [*42] ("Defendants cannot assert the advice of counsel advice while simultaneously and strategically selecting which communications to disclose for self-serving purposes and which communications to retain as confidential."); Southeastern Mech. Servs., Inc. v. Brody, Case No. 8:08-cv-1151-T-30EAJ, 2009 U.S. Dist. LEXIS 80834, at *8 (M.D. Fla. Aug. 25, 2009) ("Waiver by implication may occur when a client places the attorney-client relationship directly at issue or when a client asserts reliance on an attorney's advice as an element of a claim or defense."); Inmuno Vital, Inc. v. Telemundo Group, Inc., 203 F.R.D. 561, 564 (S.D. Fla. 2001) ("It is well-established that when a party asserts a defense, such as the advice of counsel defense, that makes an attorney's advice an issue in the litigation, that party waives the attorney client privilege.").

Although the Government did not make a specific request for the award of its expenses, Federal Rule of Civil Procedure 37(a)(5) requires the Court to award expenses in connection with a motion to compel unless (a) the motion was filed without the moving party having made a good faith effort to obtain the discovery without court action, (b) the Court [*43] determines that the response of the non-moving party was substantially justified, or (c) if other circumstances make an award of expenses unjust. FED. R. CIV. P. 37(a)(5)(A). Based on the circumstances of this case and the nature of the discovery dispute, as described herein, I find that an award of expenses would be unjust. FED. R. CIV. P. 37(a)(5)(A)(iii).

V. Motions to Amend the Scheduling Order

Relator and the Government have filed motions requesting that the Court modify the Amended Case Management and Scheduling Order (Doc. 92) to extend the expert report disclosure deadline. (Doc. 155; Doc. 145). Halifax has objected. (Doc. 159; Doc. 156). Upon due consideration, the motions are **GRANTED.** Relator and the Government shall have until December 21, 2012 to disclose their expert reports. Likewise, Halifax shall have until February 11, 2013 to submit its expert report. The Court will enter a second amended scheduling order forthwith.

VI. Conclusion

Accordingly, it is hereby **ORDERED** that:

1. Relator Elin Baklid-Kunz's Renewed Motion for Determination of Defendants' Privilege Claims and Memorandum in Support Thereof (Doc. 137) is **GRANTED IN PART and DENIED IN PART;**

a. The motion is **GRANTED** [*44] to the extent Relator requests a determination of Halifax's privilege claims.

b. The motion is **DENIED** to the extent Relator requests attorneys' fees for her efforts to obtain Court determination of the privilege claims.

2. United States' Motion to Alter the Amended Case Management and Scheduling Order (Doc. 145) is **GRANTED;**

3. Relator's Renewed Motion for In Camera Review (Doc. 151) is **GRANTED;**

4. United States' Motion to Compel the Production of a Response to Interrogatory No. 2 and Documents Improperly Withheld (Doc. 152) is **GRANTED;**

5. Relator's Motion to Modify the Amended Case Management and Scheduling Order (Doc. 155) is **GRANTED;**

6. Halifax's Motion to Strike the Declaration of Mary Ann Norvik (Doc. 164) is **DENIED;**[10] and

7. Halifax's Motion to Designate as Confidential the Deposition Transcript of Relator Elin Baklid-Kunz, dated August 20, 2012 (Doc. 175) is **DENIED WITHOUT PREJUDICE.**[11]

10 Halifax has failed to show any legal authority or good faith basis for its requested relief. Its reliance on Local Rule 3.01(c) and (g) is misplaced.

11 Halifax filed a motion to designate as confidential the entire transcript of Relator's August 20, 2012 deposition testimony. (Doc. 175). Halifax argues, [*45] inter alia, that "a majority of the transcript also relates directly to privileged communications and information between Relator and Halifax employees and in-house counsel." (Doc. 176). Throughout this order, I have declared non-privileged communications and documents over which Halifax had previously asserted attorney-client privilege. Accordingly, Halifax's motion is denied without prejudice to be reasserted, to the extent appropriate, once the parties have considered the effect of the rulings herein.

DONE and **ORDERED** in Orlando, Florida on November 6, 2012.

/s/ Thomas B. Smith

THOMAS B. SMITH

United States Magistrate Judge