UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO COMPEL DENIED: March 7, 2007

CBCA 95

MOUNTAIN VALLEY LUMBER, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Alan I. Saltman and Richard W. Goeken of Saltman & Stevens, PC, Washington, DC, counsel for Appellant.

Kenneth S. Capps, Office of the General Counsel, Department of Agriculture, Denver, CO; and Jennifer T. Newbold, Office of the General Counsel, Department of Agriculture, Missoula, MT, counsel for Respondent.

POLLACK, Board Judge.

The Forest Service (FS) of the United States Department of Agriculture (USDA) awarded Mountain Valley Lumber, Inc. (MVL) the Three Mile Timber Sale on May 26, 1999. The FS suspended the contract on October 4, 1999. The suspension continued until October 29, 2001, when it was lifted. The FS suspended the contract based on an adverse decision by the United States District Court in *Heartwood v. United States Forest Service*, 73 F. Supp. 2d 962 (S.D. Ill. 1999), *aff'd*, 230 F.3d 947 (7th Cir. 2000). The complaint was filed in *Heartwood* on September 16, 1998. There, plaintiffs essentially challenged the FS adoption of a Categorical Exclusion (CE) for a number of management activities.

The discovery road in this case has not been smooth.[1] On June 30, 2005, Judge Anne Westbrook of the Department of Agriculture Board of Contract Appeals issued a decision in which she addressed disputes regarding various documents for which the FS claimed privilege. After her retirement, I took over as presiding judge. I then also issued rulings dealing with discovery. Those included a ruling on intervention dated January 12, 2006; a ruling dated January 13, 2006, on a Motion for Reconsideration of Judge Westbrook's earlier ruling; then a ruling (unpublished) dated March 24, 2006, dealing with various documents for which the FS sought protection under privileges; and then another, dated July 18, 2006, which addressed documents held by the Department of Justice (DOJ) and Council on Environmental Quality (CEQ), documents which DOJ had refused to produce. That last ruling provided that the board would draw certain adverse inferences because of DOJ's failure to provide various documents. On August 2, 2006, DOJ, while still contending that the board had no jurisdiction to require documents under subpoena, did provide a privilege log identifying and describing eight documents. More detail as to the privileges claimed is set out below. Along with that log was "Declaration of Matthew J. McKeown In Support of Department of Justice Claim of Privilege." Mr. McKeown is Principal Assistant Attorney General of the Environmental and Natural Resources Division of the Department of Justice.

At that point, it appeared that the issues as to DOJ discovery may have been resolved. However, on September 15, 2006, the board received the appellant's Motion to Compel Production of Documents on the Government's Privilege Log of August 2, 2006. There appellant asked the board to direct DOJ to produce the documents to appellant or, in the alternative, have the board review the documents *in camera*.

The privilege log, provided by DOJ, identifies eight documents and is accompanied by a declaration from Mr. McKeown. In his declaration, Mr. McKeown addressed the processes within DOJ as to the creation of the documents and provided explanation to support his statements that all documents were privileged as work product and attorney-client documents. Additionally, in the case of Documents 6 through 8, he stated that they also qualified under the deliberative process exception. Each of the eight documents was identified by date and each identified the individuals who created and received the document or documents. Mr. McKeown also included a narrative as to each document, further identifying its form and describing the general subject matter each addressed.

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[1] Several decisions involving discovery disputes have been published. *Mountain Valley Lumber, Inc.*, AGBCA 2003-171-1, 06-1 BCA ¶ 33,172; 06-1 BCA¶ 33,173; 06-2 BCA ¶ 33,339.

In its motion, appellant makes several arguments in support of its request that the documents be produced and released to it. Those arguments address the use of the deliberative process privilege, the attorney-client privilege, and the work product privilege. Regarding the documents identified as attorney-client, appellant alleges that the Government has failed to carry its burden of establishing that the documents are protected by attorney-client privilege because, among other deficiencies, the Government has failed to prove that the documents contain protected communication between a client and its attorney. In regard to the work product exception, appellant asks the Board to find that either the work product doctrine does not extend into what appellant describes as "this subsequent litigation," or alternatively, find that based on the circumstances of the case, the Government assertion of the work product doctrine is outweighed by MVL's evidentiary need for the documents. Appellant asks that the Board order the production of the eight documents or, alternatively, that the Board examine the documents *in camera* to determine whether portions of the documents meet the elements of each privilege.

Several comments as to the documents need to be made for purposes of background and context. Documents 1 and 2, each identified as e-mails, were dated November 12, 1998. The remaining documents carry various dates, the earliest, Document 3, being December 12, 1998, and the last, Document 8, being January 19, 2000. As to each document, all senders and receivers are identified as attorneys with DOJ, including the Solicitor General, who was sent Document 8.

Document 1 was described as two e-mails, each of which discussed the issue of whether the National Environmental Policy Act (NEPA) required the preparation of a NEPA document before the promulgation of regulations related to the use of a CE. Mr. McKeown further stated that the documents also reflected the substance of discussions with USDA. Document 2 was described as two e-mails. They regarded identification and interpretation of cases which considered the issue of whether NEPA required the preparation of a NEPA document before the promulgation of a CE. The description did not reference that it reflected discussions with USDA.

Document 3 was described as two e-mails. It was titled, "Categorical Exclusion litigation." The description noted that there was an attached memorandum regarding DOJ preparation to defend the *Heartwood* case, analysis of the applicability of NEPA to the promulgation of the CE, discussion of litigation risks, and analysis of settlement options. Mr. McKeown further noted that the documents reflected the substance of discussions with CEQ and USDA. Document 4 was described as a memorandum which contained case background, merits of the case, analysis of NEPA, and case settlement possibilities. The document also reflected the substance of discussions with USDA. Document 5 was described as a duplicate of Document 4, with the difference being a different font and some

writing of a date in unknown handwriting. Document 6 was several e-mails and concerned a discussion of the district court's decision on cross-motions for summary judgment. It also dealt with procedural matters as to an appeal. Document 7 was a memorandum containing an appeal recommendation evaluating the merits of the appeal and probability of success. It also reflected the substance of discussions with USDA. Document 8 was a memorandum regarding the appeal recommendation which evaluated and analyzed the merits of an appeal. It also reflected the substance of discussions with USDA.

It is clear from the descriptions provided in the declaration from Mr. McKeown that each document involves the matters at issue in the *Heartwood* case, and that DOJ was then acting in its capacity as the attorney responsible for representing USDA in that matter. As Mr. McKeown pointed out, under 28 U.S.C. § 516 (2000), the conduct of litigation in which the United States, an agency, or an officer thereof is a party is reserved to officers of DOJ under the direction of the Attorney General. DOJ was in that mode as to *Heartwood*, starting at least in September 1998, which was prior to the date that any of the listed documents was prepared.

Appellant's request for relief challenges claimed protections under attorney-client, work product, and deliberative process exceptions. I will not here address or analyze the issues as to the deliberative process or attorney-client privileges. That is because, as set out below, I find that the work product privilege is applicable for each document and thus an analysis of the deliberative process and attorney-client privileges is not necessary for this ruling.

As to the work product privilege, appellant argues that the work product doctrine does not extend into this appeal since this appeal is subsequent litigation to the litigation for which the documents were produced. Appellant also argues that based upon the circumstances in this case, the Government's assertion of the work product doctrine is outweighed by MVL's evidentiary need for the documents. Finally, appellant argues that if the Board initially finds privilege, then the Board should view the documents *in camera* to determine if any portion actually meets the elements of each privilege or doctrine and then order the production of the documents, with the truly privileged portions, if any, redacted.

All eight of the documents at issue have been generated by attorneys of DOJ and received by attorneys at DOJ. All of the documents are either described as involving discussions of the issues before the court in *Heartwood* or, in the case of Documents 1 and 2, show that by context. All of the documents post-date the filing in *Heartwood*. None of the exchanges are between individuals outside of DOJ. Clearly the documents qualify as work product. To find or suggest that DOJ was preparing the documents for some purpose other than as part of the litigation is simply not a reasonable conclusion to be drawn.

Attorney-client and work product privileges differ in a number of respects. As pointed out by the FS, the attorney-client privilege protects communications by an attorney to a client, co-counsel, or others involved with the attorney's legal services to the client, as long as those communications embody the attorney's legal advice. *In re FiberMark*, 330 B.R. 480, 500 (Bankr. D. Vt. 2005). Work product privilege has different elements from that of attorney-client. The work product privilege is not only distinct, but also broader than attorney-client. Under it, attorney work product and/or opinion work product, such as attorney legal strategy or evaluation of a case's strengths and weaknesses, are almost absolutely privileged. *Hickman v. Taylor*, 329 U.S. 495, 508 (1947); *Leonen v. Johns-Manville*, 135 F.R.D. 94 (D.N.J. 1990).

The work product privilege protects documents and tangible things prepared in anticipation of litigation that are otherwise non-privileged. It protects documents such as memorandums, letters, and e-mails. *In re EchoStar Communications Corp.*, 448 F.3d 1294, 1301 (Fed. Cir.) (citing *Judicial Watch, Inc. v. Department of Justice*, 432 F.3d 366 (D.C. Cir. 2005)), *cert denied*, 127 S.Ct. 846 (2006). As stated by the court in *EchoStar* at 1301, "We recognize work product immunity because it promotes a fair and efficient adversarial system by protecting 'the attorney's thought processes and legal recommendations' from the prying eye of his or her opponent. *Genentech[, Inc. v. United States International Trade Commission]*, 122 F.3d [1409] at 1415 [Fed. Cir. 1997]."

Referencing Federal Rule of Civil Procedure 26(b)(3), the Court in *EchoStar* points out that the so-called "opinion" work product deserves the highest protection from disclosure, 448 F.3d at 1303 (citing *United States v. Adlman*, 134 F.3d 1194, 1197 (2d Cir. 1998)). The *EchoStar* Court, in explaining the importance of the privilege, points out at 1301 that proper preparation of a client's case demands the attorney assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories, and plan his strategy without undue and needless interference. The Court continued, quoting *Hickman*, 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."

While the sanctity of work product is clearly important, it is not absolute. There can be circumstances where the disclosure of material is made notwithstanding the work product privilege. The use, however, is limited, given the need and importance of protecting an attorney's thought processes. *Leonen*, 135 F.R.D. at 97 n.2, citing *Sporck v. Peil*, 759 F.2d 312 (3d Cir.), *cert. denied*, 474 U.S. 903 (1985)). As the court said in *EchoStar*, a party can discover certain types of work product if it has "substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent . . . by other means." 448 F.3d at 1302. The Court goes on to note that the rule:

> only allows discovery of "factual" or "non-opinion" work product and requires a court to "protect against the disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative." [Fed. R. Civ. P. 26(b)(3)]; *accord United States v. Adlman*, 134 F.2d 1194, 1197 (2d Cir. 1998); *Martin Marrietta Corp.* [v. Pollard], 856 F.2d [619] at 626 [(4th Cir. 1988), *cert. denied*, 490 U.S. 1011(1989)].

An important element of the work product privilege is that in providing wide-reaching protection, the work product exception, unlike other claimed privileges, does not distinguish between factual and deliberative material. In the decision of the court in *Judicial Watch*, a case which was addressing a Freedom of Information Act (FOIA) dispute, the court made clear that the status of the work product privilege, in both a FOIA and a litigation situation, pulled much more than simply opinion under the umbrella. The court made clear that once it is established that the work product privilege is applicable, the entire document is privileged. *Martin v. Office of Special Counsel*, 819 F.2d 1181, 1187 (D.C. Cir. 1987). That is in contrast to how material may be treated under the deliberative process privilege. There, as the court explained in *Judicial Watch*, "Factual material is not protected under deliberative process privilege unless it is 'inextricably intertwined' with the deliberative material." 432 F.3d at 372 (citing *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (per curiam)). The court in *Judicial Watch* pointed out that no such showing is required under the attorney work product doctrine, citing *Martin Marrietta*. Accordingly, in *Judicial Watch* the court concluded that because the e-mails, there in issue, were attorney work product, the entire contents of the documents -- the facts, law, opinions, and analysis -- were exempt from disclosure.

Appellant acknowledges the general impact of work product in protecting a document created by an attorney. That said, however, it then sets out arguments which it contends allow or require the Board to release the documents in this case. Appellant argues that even if the documents would qualify as work product, that does not protect the documents in issue because those documents were prepared for a prior case that is now complete. Essentially, appellant argues that since the documents were not prepared in contemplation of this case, the MVL contract appeal, the documents lose any privilege.

In regard to the cases dealing with this issue, there is a three-way split of authority as to what standard to apply. *Federal Deposit Insurance Corp. v. Cherry, Bekaert & Holland*, 131 F.R.D. 596, 604-05 (M.D. Fla. 1990). As set out in *Leonen*, 35 F.R.D. at 94, some courts extend the protection of the work product rule to an unrelated case, regardless of the lack of connection of the issues or facts between the actions. In that regard, *Leonen* cited *Panter v. Marshall Field & Co.*, 80 F.R.D. 718, 724 (N.D. Ill. 1978). In *Panter*, the court stated that the weight of modern authority supports the conclusion that the work product

privilege extends to documents prepared in anticipation of prior, terminated litigation, regardless of the interconnectedness of the issues or facts. 80 F.R.D. at 724 (citing *In re Murphy*, 560 F.2d 326, 333-35 (8th Cir. 1977)). Other courts, including the court in *Leonen* and the court in *Federal Deposit Insurance Corp.*, have chosen to follow the line of cases which requires that there be a close connection in parties or subject matter when the documents are from a prior closed case. 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure: Civil 2d* § 2024 (2d ed. 1994); *Jaroslawicz v. Engelhard Corp.,* 115 F.R.D. 515, 517 (D.N.J. 1987); *Levingston v. Allis-Chalmers Corp.*, 109 F.R.D. 546 (S.D. Miss. 1985); *see also Hercules Inc. v. Exxon Corp.*, 434 F. Supp. 136, 153 (D. Del. 1977). The third alternative, the one urged by appellant, takes the position that the privilege applies only if the materials were prepared in anticipation of the very suit before the court. Under this application, documents prepared for one case are discoverable in another. *See United States v. International Business Machines Corp.*, 66 F.R.D. 154, 178 (S.D.N.Y. 1974). In support of its position, appellant also cites *Southern Union Co. v. Southwest Gas Corp*., 205 F.R.D. 542, 549 (D. Ariz. 2002), and *Honeywell, Inc. v. Piper Aircraft Corp*., 50 F.R.D. 117, 119 (M.D. Pa. 1970).

I have examined the various cases cited, as well as a significant number of others. I find that the better authority and the authority with the greatest support is that the privilege continues notwithstanding the termination of a case. Further, I find that the better case law holds that the privilege should be sustained even if the litigation is not related.

In *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 487 F.2d 480 (4th Cir. 1973), the court said that, on balance, it thought that the legal profession and interests of the public were better served by recognizing the qualified immunity of work product materials in a subsequent case, as well as in that case for which the documents were prepared. The court went on in a footnote to comment on the line of cases requiring matters to be closely related. There the court said, "to dispose of this delicate and important question by such a technical touchstone is incompatible with the essential basis of the *Hickman* decision." *Id*. at 484 n.15. It is of note, however, that in *Duplan*, the court also stated that if a party seeking discovery could demonstrate the substantial need and undue hardship specified in the rule and recognized in *Hickman*, the district court would order production.

In *Federal Election Commission v. Christian Coalition*, 179 F.R.D. 22 (D.D.C. 1998), the court stated, as to Federal Rule 26(b)(3):

> The text of the rule leaves three noticeable gaps: (1) whether work product protection extends to materials prepared for any litigation or to only materials prepared for the litigation that generated the work product; (2) whether work product protection survives termination of the litigation that generated the

> work product; and (3) whether materials prepared by or for a non-party for separate litigation should be treated as work product in subsequent or parallel litigation.

Id. at 23-24. The court then noted that different courts have come to different conclusions on how broadly to apply the work product privilege. The court stated,

> The more considered view appears to be that work product protection applies (1) to materials prepared for any litigation, *see* [*Federal Trade Commission v.*] *Grolier* [*Inc.*], 462 U.S. [19] at 26 . . .; and that (2) because the rule applies equally to one-time litigants and repeat players, the protection survives the termination of the litigation for which it was prepared, *id*. at 30-31. . . (Brennan, J. concurring). . . .

Id. at 24.

The above-cited reference to the concurrence of Justice Brennan in *Federal Trade Commission v. Grolier Inc.*, a case which ultimately turned on a statutory interpretation of FOIA, is nevertheless applicable to the privilege issue in this case. In that concurrence, Justice Brennan opened with the statement that he agreed wholeheartedly with the court that Federal Rule 26(b)(3) does not itself incorporate any requirement that there be actual or potential related litigation before the protection of the work product doctrine applies. In his concurrence, he continued, "As the Court notes, 'the literal language of the Rule protects materials prepared for *any* litigation or trial as long as they were prepared by or for a party to the subsequent litigation.'" 462 U.S. at 29.

The district court in *Information Systems, Inc. v. International Brotherhood of Electric Workers*, 2002 WL 31093619 (S.D.N.Y. Sept. 17, 2002), also referenced the views of Justice Brennan on this topic. That court quoted the following language from *Grolier*:

> The need to protect work product is at its greatest when the litigation with regard to which the work product was prepared is still in progress; but it does not follow that the need for protection disappears once that litigation (and any "related litigation") is over. The invasion of "[a]n attorney's thoughts, heretofore inviolate," and the resulting demoralizing effect on the profession, are as great when the invasion takes place later rather than sooner. More concretely, disclosure of work product connected to prior litigation can cause real harm to the interests of the attorney and his client even after the controversy in the prior litigation is resolved.

The district court then went on to say,

> The emerging view among the circuits which have struggled with the issue thus far seems to be that the work product privilege does extend to subsequent litigation. One circuit, the Third Circuit, appears to extend the work product privilege only to "closely related" subsequent litigation. A broader view, exemplified by the Fourth, Sixth and Eighth Circuits, is that the privilege extends to all subsequent litigation, related or not.

While the court did not identify the specific authorities relied upon at the cited Circuits, but for the Fifth, the court did provide a list of other citations, supporting the extension of work product to subsequent litigation. Among the cases cited were: *Maine v. Norton*, 208 F. Supp. 2d 63, 67-68 (D. Maine 2002); *Winton v. Board of Commissioners of Tulsa County*, 188 F.R.D. 398, 401-02 (N.D. Okla. 1999); *Federal Election Commission v. Christian Coalition*, 179 F.R.D. 22, 24; *Jumper v. Yellow Corp.*, 176 F.R.D. 282, 286 (N.D. Ill. 1997); and *In re Grand Jury Proceeding*, 43 F.3d 966, 971 (5th Cir. 1994).

While I have concluded that the appropriate standard is the one which does not terminate the privilege at the end of a case, I point out that had I opted to adopt the second alternative, which calls for cases or parties to be closely connected, then the documents at issue here would still have been protected.

I now turn to the remaining arguments, which deal with the evidentiary need for the documents and the request that the Board view the documents *in camera* in order to segregate out unprotected from protected material. I start with Federal Rule of Civil Procedure 26(b)(3). As noted by the court in *Southern Union Co. v. Southwest Gas Corp.*, 205 F.R.D. 542, 548 in 1970, the Supreme Court, in an effort to address inconsistent opinions in federal courts after *Hickman v. Taylor*, adopted Rule 26(b)(3). That rule provides in relevant 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 material in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Appellant makes the argument that it has a substantial need for these documents and cannot obtain equivalent information elsewhere as to the reasonableness of FS decisions in going forward with the sale. Among the issues in this appeal is whether the FS acted reasonably in awarding a contract to appellant and in carrying out its environmental responsibilities. In examining the reasonableness, we look at the actions of the FS at the time of both award and pre-award. In presenting its motion, appellant revives an argument it made to Judge Westbrook, early on in these proceedings. It argues that the FS has placed the legal advice it received from DOJ at issue, thereby waiving any work product protection. My view on the "at issue" waiver remains as it has been. There is no basis under the "at issue" waiver to release the documents in dispute here.

This appeal is about the actions of the FS. The documents being sought here are legal views and opinions by DOJ in carrying out its role as an attorney to the FS. There is no evidence of source documents from the FS. It would be expected that the documents might reflect some FS input, gleaned by the DOJ attorneys preparing the documents in dispute. However, to whatever extent that input is reflected, it would be reflected in summaries, created by DOJ lawyers, as to what was said and conveyed. We are thus seeing that information through DOJ's eyes, with DOJ attorneys having sorted out what was important and what was not.

The following excerpts from *Hickman v. Taylor* are particularly pertinent in identifying how I see the scope of discovery in these cases, and what I see as the legitimate need to protect documents prepared by attorneys in cases of this nature. In commenting upon the role of a lawyer, the Court stated:

> Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways - aptly though roughly termed by the Circuit Court of Appeals in this case [153 F.2d 212, 223] as the "Work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial.

> The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

329 U.S. at 511.

In addressing the reliability and use of attorney-gathered information, the *Hickman* Court continued addressing the release of oral statements made to counsel, stating:

> Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production. The practice forces the attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses' remarks. Such testimony could not qualify as evidence; and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness. The standards of the profession would thereby suffer.

329 U.S. at 512-13.

The above make clear that the release of information created or put together by an attorney is information that should be protected. This case is not about the impressions of the DOJ attorneys. Rather, it is about the actions of the FS in awarding the contract and carrying out its environmental responsibilities and whether the FS actions were unreasonable so as to constitute breach.

Appellant argues that the best, and possibly only, evidence of whether the FS actions were unreasonable was the objective advice the FS received during the *Heartwood* case, focusing here on legal advice from DOJ. I do not agree. Certainly, advice and opinions from individuals within and outside the FS would likely be useful in determining the reasonableness or unreasonableness of the FS actions. However, the actions themselves, not someone's take on them, are the central issue here. Our legal system provides for certain protections to a litigant and his or her attorney. In setting out that protection the law recognizes that certain information which could be helpful to an opposing party is shielded.

Finally, the use of *in camera* inspection is a matter of discretion for the trial judge. It is not automatic. It is appropriate in a number of circumstances, but should be utilized for good and proper reason and not simply because it is requested. Generally, the party opposing the privilege needs to show a factual basis sufficient to support a reasonable good faith belief that *in camera* inspection may reveal evidence that information in the materials

is not privileged. The primary case cited for guidance is *United States v. Zolin*, 491 U.S. 554 (1989), a case involving the use of the crime fraud exception to the attorney-client privilege. In *Zolin*, the Internal Revenue Service (IRS) was attempting to secure documents relating to the tax returns of L. Ron Hubbard, founder of the Church of Scientology. The church opposed the production of two tapes, claiming the tapes were protected under attorney-client privilege. IRS countered, contending that the tapes fell under the exception for communications in furtherance of future illegal conduct, the crime fraud exception. The crime fraud exception carries with it its own set of parameters; nevertheless, *Zolin* is guidance for a wider range of cases.

In *Zolin*, the Court set several parameters, among which was the requirement that the party opposing the privilege must present sufficient evidence to support the reasonable belief that *in camera* review may yield evidence establishing the exception's applicability. 491 U.S. at 572. The Court continued that once the threshold showing was made, the decision whether to examine the documents *in camera* needed to be made in light of facts and circumstances of the particular case, among which was the likelihood that the evidence produced, together with other available evidence before the tribunal, would establish that the privilege should not apply.

A number of courts have followed the sentiments set out in *Zolin* and particularly have demonstrated a reluctance to engage in an *in camera* inspection when there is no indication that the documents are other than privileged, as described by the proponent, and where there is no reason to suspect that the proponent is being less than truthful in his or her description. In *Standard Chartered Bank v. Ayala International Holdings*, 111 F.R.D. 76 (S.D.N.Y. 1986), the court addressed a request that the judge review *in camera* each document still being withheld. The court pointed out that opposing counsel apparently believed that Ayala's counsel could not be trusted to determine privilege. The court commented that if it was to review each and every document withheld in litigation as privileged, for no other reason than counsel's distrust of his or her adversary, the courthouse could hardly function. The court pointed out that Ayala's counsel had an ethical duty as well as a duty under Fed. R. Civ. P. 11 to make a truthful, good-faith determination of what documents were privileged and to present a proper listing. As to those documents for which Standard legitimately questioned the privilege designation, the court stated that Standard should point them out specifically to the court. Similarly, in *Glaxo, Inc. v. Novopharm Ltd.*, 148 F.R.D. 535 (E.D.N.C. 1993), that court, citing *Standard*, also declined to review documents, again rejecting as an adequate basis opposing party's counsel asking the court not to accept representations made by his opponent. As in *Standard*, the court noted that it would depend on Glaxo's counsel to abide by the court's holdings with respect to privilege and to produce those documents which under the court's order are not protected. In *Guy v. United Healthcare Corp.*, 154 F.R.D. 172 (S.D.

Ohio 1993), that court also declined to review documents *in camera* on the basis of the implicit determination that the representations made by defense counsel were untrue.

In *Renfield Corp. v. E. Remy Martin & Co.*, 98 F.R.D. 442, 445 (D. Del. 1982), that court provided its view on a request for an *in camera* inspection. There the court ruled in a memorandum opinion in an antitrust action that *in camera* inspection would not be made. The court pointed out that a party has no right to an *in camera* inspection of documents where his or her opponent files an affidavit setting forth facts sufficient to justify a claim of privilege and there is no record basis for questioning the veracity of the affidavit.

In assessing here whether to inspect the documents *in camera*, I find it important that the privilege at issue is the work product privilege and not attorney-client or deliberative process. DOJ has asserted and I have found that each of the documents falls under that privilege. That privilege, as noted above, has a broader scope and coverage than the other named privileges and, as such, there is less room and less likelihood that the documents would contain non-privileged material.

The decision on whether or not to review documents *in camera* needs to be made on a case by case basis. Here, in assessing whether to invoke an *in camera* inspection of the DOJ documents in dispute, I have examined the declaration of Mr. McKeown and how he described the documents. Based on the description of the documents and the explanation, I find no reasonable doubt that the documents meet the test for privilege. I see no indication that the documents contain non-privileged material and find that there is no likelihood that the review of the documents would result in their disclosure. Appellant has provided no basis to suggest otherwise.

Of course, there can be no absolute certainty that the documents have nothing within them that would warrant disclosure. However, the discovery system does not operate on the basis of remote possibilities. Accordingly, because I find there is not sufficient reason to have a good faith belief that the documents being sought here may reveal non-privileged evidence, and because there is no basis to disbelieve or question the representations of DOJ, I deny the request for *in camera* inspection.

Decision

Appellant's **MOTION TO COMPEL IS DENIED**.

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HOWARD A. POLLACK
Board Judge