Monday, October 19
2:30 pm–4:00 pm

103 In-house Counsel as Witnesses

Jeffrey Brenner
Partner
Nixon Peabody LLP

Evelyn Lim
General Counsel
First Wind

Marc Pappalardo
General Counsel
Breakthrough Management Group International

Steven Richard
Counsel
Nixon Peabody LLP

Faculty Biographies

Jeffrey Brenner

Jeffrey Brenner is a litigation partner and team leader of Nixon Peabody's real estate team and construction team. He concentrates his practice in land use matters, zoning issues, and complex real estate, commercial, land use, and tort litigation. He has successfully represented many clients in court and arbitrations in eminent domain cases, tax appeals, zoning appeals, title disputes, boundary disputes, and construction disputes involving owners, general contractors, and subcontractors.

Mr. Brenner has argued in the Rhode Island Supreme Court and the United States Court of Appeals for the First Circuit. He has also handled cases through trial in state and federal courts, and he has appeared before many administrative and municipal boards throughout Rhode Island. Mr. Brenner frequently handles construction and commercial arbitrations and mediations administered by the American Arbitration Association.

Previously, Mr. Brenner was elected to the Town Council in Barrington, Rhode Island. He has been president of the Barrington Town Council and was a member of the Zoning Board in Barrington and served as chairman. Mr. Brenner is also a member of the Barrington Democratic Town Committee and previously served as chairman.

Mr. Brenner received a JD from Washington College of Law of the American University and BA from the University of Pennsylvania.

Evelyn Lim

Evelyn Lim is senior vice president and deputy general counsel of First Wind in Newton, MA.

Prior to joining First Wind, Ms. Lim was a partner in the finance group in the Los Angeles office of McDermott, Will & Emery LLP. While at McDermott, Ms. Lim spent time in London representing a Greek construction company in connection with its financing of the construction and operation of a submerged tunnel roadway in Greece. Prior to that, Ms. Lim was an associate in the Los Angeles office of Milbank, Tweed, Hadley & McCloy, LLP where she represented the issuer in connection with the bond financing of the Monterrey-Cadereyta toll road in Mexico, which was named "Infrastructure Deal of the Year - Americas" for 2004 by Project Finance Magazine. She also represented the underwriters in a cross-border dual tranche senior secured bond financing of the Autopista Central toll road in Santiago, Chile, which was named "Best Project Finance Deal" for 2003 by Euromoney. Prior to moving to Los Angeles, Ms. Lim worked as an associate in the New York office of Milbank, Tweed, Hadley & McCloy, LLP representing underwriters in private and public offerings of debt and equity securities, including Rule 144A/Regulation S, high-yield and structured debt offerings, monetizations of energy contracts and other structured products.

She received a BS from Cornell, and a JD from Fordham University School of Law.

Marc Pappalardo

Marc Pappalardo is the vice president and general counsel of Breakthrough Management Group International Inc. In this role, Mr. Pappalardo oversees all of BMGI's legal matters globally.

Prior to joining BMGI he practiced law as a litigator in Phoenix with Greenberg Traurig, where he handled general commercial litigation matters, and also at Beus Gilbert, where his practice focused on securities litigation. Prior to that, Mr. Pappalardo served as a felony prosecutor for the Maricopa County Attorney's office. Mr. Pappalardo has had extensive first chair litigation experience in a wide variety of cases, including copyright and trademark infringement, securities litigation matters, contract disputes, and employment litigation.

Mr. Pappalardo received his BS in from Villanova University and his JD from Penn State University.

Steven Richard

Stephen M. Richard is counsel to Nixon Peabody, LLP in Providence, RI. In his business litigation practice, he regularly handles complex trials and appellate arguments involving a diverse range of legal issues, including employment discrimination statutes, intellectual property, civil rights, the D'Oench Duhme doctrine, commercial contract disputes, antitrust, RICO, taxation, municipal home rule charters, receiverships, and zoning. In the area of employment and labor law, Mr. Richard has successfully defended employers in cases brought under Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and other state and federal discrimination statutes. He has also advised employers on practical and preventive measures to avoid workplace claims.

Prior to joining the firm, Mr. Richard was a partner at Tillinghast Licht LLP. He has also held positions at the Providence law firm of Winograd, Shine & Zacks, and at Ropes & Gray in that firm's Boston office.

Mr. Richard is a member of the American Bar Association and the Rhode Island Trial Lawyers Association, and is active in the Rhode Island Bar Association's Federal Court Bench/Bar Committee. Mr. Richard is also a member of the Massachusetts Epsilon Chapter of Phi Beta Kappa.

He received a BA from Boston University and a MBA from Bryant College. Mr. Richard earned his JD from the Notre Dame Law School.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. Filed January 11, 2007 SUPERIOR COURT

CRAIG WALTZ, ET AL. Plaintiffs	:	
V.	:	C. A. NO. PC 02-2436
EXXON MOBIL CORPORATION, f/k/a EXXON CORPORATION, and f/k/a MOBIL CORPORATION Defendants	:	
THEODORE GARILLE, Executive Director for the PASCOAG UTILITY DISTRICT Plaintiff	:	
V.	:	C. A. NO. PC 02-2437
EXXON MOBIL CORPORATION, f/k/a EXXON CORPORATION, and f/k/a MOBIL CORPORATION Defendants	:	
JANICE ST. OURS, Individually and on behalf of all other similarly situated plaintiffs Plaintiffs	:	
V.	:	C. A. NO. PC 03-0079
EXXON MOBIL CORPORATION, f/k/a EXXON CORPORATION, and f/k/a MOBIL CORPORATION Defendants	:	

DECISION RE: PLAINTIFFS' MOTIONS TO COMPEL PRODUCTION OF DOCUMENTS

SAVAGE, J. These motions to compel production of documents, filed by the plaintiffs in these three related actions, arise out of a discovery dispute between the parties over

documents that the defendants claim are protected by the attorney-client and work product privileges. The focus of this present dispute concerns the discoverability of 187 documents listed in the defendants' revised privilege log.

In its Decision, this Court addresses the legal issues regarding the attorney-client and work product privileges presented by the parties. This Court orders the defendants to review the disputed documents, in light of this Decision, and to produce any additional documents or redacted portions thereof that are properly discoverable. This Decision is without prejudice to the plaintiffs' rights, thereafter, to renew their motions to compel as to any documents that remain in dispute.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The facts relevant to this matter are largely undisputed. On April 11, 2003, the plaintiffs served upon the defendants requests for production of documents. See Deft's Mem. In Opp. at 2. In response to those requests, the defendants produced "hundreds of boxes of documents." Id. However, in connection with plaintiffs' requests, the defendants also withheld a number of documents on the basis of the attorney-client privilege, the joint defense privilege and/or the work product doctrine. Id. Defendants provided the plaintiffs with a lengthy privilege log, identifying the documents that they withheld. Id. Plaintiffs then moved to compel production of certain documents identified in the defendants' privilege log. Id. at 3. During a "meet and confer" conference held on November 23, 2004, the defendants provided the plaintiffs with a revised privilege log, and the parties were able to narrow the number of documents in dispute to approximately 200. Id. Following a later status conference with the Court, the defendants supplied to the plaintiffs an additional 14 documents listed on their revised privilege log, leaving 187

documents in dispute. This Court directed the defendants to submit to it the disputed documents should later *in camera* review of them become necessary. The defendants complied with this directive.

Plaintiffs have moved to compel the production of these disputed documents and have filed several memoranda in support of their position. Defendants have responded with objections to the plaintiffs' motions and have submitted several exhibits to support their objections.

Plaintiffs first argue that the documents identified in the defendants' privilege log as subject to the attorney-client privilege are not privileged. Plaintiffs support their claim by arguing that those documents fall into at least one of the following five categories which make them non-privileged attorney-client communications:

> (1). Documents that do not show on their face that an employee of the defendant had the authority to obtain or act on legal advice on behalf of the corporation.
>
> (2). Memoranda between non-lawyer corporate employees which have been carbon copied or forwarded to legal counsel for screening purposes.
>
> (3). Communications between counsel and the defendants' employees that were shared with third parties or used in prior litigation.
>
> (4). Handwritten notes which simply identify an attorney, but that do not contain confidential legal advice.
>
> (5). Communications where the dominant purpose of the memoranda is not to provide or obtain legal advice or assistance, but rather to provide business advice.

Plaintiffs contend further that any attorney-client privilege asserted by the defendants as to these disputed documents has been waived implicitly because the documents are critical to resolution of the claims asserted in this case. Plaintiffs next argue that the documents identified in the defendants' privilege log as subject to the work product privilege are not privileged as they were not prepared in anticipation of litigation.

Defendants respond that they have properly asserted the attorney-client privilege as to the disputed documents. In response to the plaintiffs' arguments, defendants assert:

> (1). Employees of the defendants do not need to have special "authority" to seek or act upon legal advice before a document is considered privileged.
>
> (2). Internal memoranda sent between non-attorney employees of the defendants which are carbon copied to legal counsel are privileged if they contain or seek advice of counsel.
>
> (3). None of the documents identified on the privilege log have been disclosed to "non-joint defendant" third parties or were used in prior litigation.
>
> (4). The handwritten notes were either written by an attorney or reflect an attorney's legal advice and, thus, are privileged.
>
> (5). All documents for which a privilege was claimed were directed at the defendants' attorneys for the purpose of seeking legal, not business, advice.

Defendants also argue that they have not waived the attorney-client privilege as to any of the disputed documents. Finally, the defendants contend that, to the extent that the attorney-client privilege does not cover the disputed documents listed on their privilege log, those documents are protected work product.

This Court will address these legal issues regarding privilege in seriatim. This Decision will establish a legal rubric to guide the parties as to the further discoverability of the documents at issue.

ANALYSIS

A. ISSUES OF ATTORNEY-CLIENT PRIVILEGE

It is well established in this jurisdiction that "communications by a client to his or her attorney for the purpose of seeking professional advice, as well as the responses made by the attorney to such inquiries, are privileged communications not subject to disclosure." State v. Grayhurst, 852 A.2d 491, 512 (R.I. 2004) (citing Mortgage

Guarantee & Title Co. v. Cunha, 745 A.2d 156, 158-59 (R.I. 2000)); Callahan v. Nystedt, 641 A.2d 58, 61 (R.I. 1994)). To successfully invoke the attorney-client privilege, the following elements must be established:

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

State v. von Bulow, 475 A.2d 995, 1004 (R.I.1984) (quoting United States v. Kelly, 569 F.2d 928, 938 (5th cir.), cert. denied, 439 U.S. 829 (1978)). Of course, the burden of establishing the existence of the attorney-client privilege rests on the party seeking to prevent disclosure of protected information. Id. at 1005.

Generally, attorney-client communications are protected unless the privilege has been explicitly or implicitly waived by the client. Grayhurst, 852 A.2d at 512. The Rhode Island Supreme Court has cautioned, however, that "exceptions to the attorney-client privilege should be made only when the reason for disclosure outweighs the potential chilling of essential communications." Mortgage Guarantee & Title Co. v. Cunha, 745 A.2d at 159 (citing Upjohn Co. v. United States, 449 U.S. 383 389-90 (1981)). The attorney-client privilege may be waived through disclosure of a confidential communication to a third party. See, e.g., State v. von Bulow, 475 A.2d 995 (R.I.1984). Waiver also may occur implicitly "when a party puts an attorney-client communication at

issue . . . ." See, e.g., Grayhurst, 852 A.2d at 512. This type of waiver occurs "[w]hen the client's conduct touches a certain point of disclosure, [as] fairness requires that his privilege shall cease." Finally, waiver can occur "when the contents of the legal advice is integral to the outcome of the legal claims of the action." See, e.g., Mortgage Guarantee & Title Co. v. Cunha, 745 A.2d at 159. Mindful of these precepts, this Court will now address the arguments advanced by the parties.

1. Whether Corporate Employees Need Corporate Authority to Seek or Act upon Legal Advice for their Communications with Corporate Counsel to be Protected by the Attorney-Client Privilege

The first issue is whether corporate employees need special "authority" from the corporation to seek or act upon legal advice before a document is considered privileged. Plaintiffs contend that documents between corporate employees and counsel that do not show on their face that the employee had the authority to obtain or act upon legal advice on behalf of the corporation are not privileged. Defendants respond that employees of the corporation do not need to have special "authority" to seek or act upon legal advice to make such documents privileged.

This issue has never been addressed by the Rhode Island Supreme Court. A number of federal courts, including the United States Supreme Court, however, have ruled on the issue. In Upjohn Co. v. U.S., the United States Supreme Court clearly rejected the so called "control group" test for the broader "subject-matter test." 449 U.S. 383, 390 (1981). The "control group" test upholds the attorney-client privilege only if the individual speaking to the attorney "was vested by the corporation with the *authority both to seek legal advice and to participate significantly in the corporation's response to this advice*." See In re Avantel, 343 F.3d 311, 315 n.1 (5th Cir. 2003) (emphasis added).

Under the broader "subject matter" test, communications made between an attorney and virtually any employee within a corporation seeking or acting upon legal advice from the attorney are protected. Id. Thus, an employee in a corporate setting no longer needs "authority" to seek or act upon legal advice for a communication with counsel to be privileged.

Since the proper focus under the "subject matter" test is whether legal advice is sought or acted upon by the employee and whether it concerns the duties of employment, and not whether the employee had "authority," see In re Avantel, 342 F.3d at 315 n.1, the plaintiffs' argument as to privilege must be rejected. Defendants thus are ordered to review the disputed documents in this category; they may maintain a privilege only as to any communication where a corporate employee sought or acted upon legal advice concerning the duties of his or her employment. Any documents falling outside the scope of this privilege must be produced.

2. Whether Memoranda Exchanged between Non-Attorney Corporate Employees are Protected by the Attorney-Client Privilege when they are Carbon Copied to Corporate Counsel

The second issue is whether memoranda exchanged between non-attorney corporate employees that are carbon-copied, or "cc'd," to legal counsel are privileged. This issue, too, is one of first impression in this jurisdiction, although a number of federal courts have considered the question.

The weight of authority supports the proposition that merely carbon copying communications made between two non-attorneys to corporate in-house counsel is "clearly insufficient to establish the privilege. . . ." See In re Avantel, 343 F.3d at 320-21; see also Yurik v. Liberty Mutual Ins. Co., 201 F.R.D. 465, 471 (D.C. Az. 2001) (holding

that the defendant failed to offer any legal authority establishing that the attorney-client privilege extends to communications which are carbon copied to house counsel); Cont'l Ill. Nat'l Bank and Trust Co. of Chicago v. Indemnity Ins. Co. of N. Am., 1989 U.S. Dist. LEXIS 13004 at *8 (N.D. Ill. 1989) (stating that a letter carbon copied to an attorney fell beyond the scope of the attorney-client privilege because it was not primarily directed to an attorney, did not seek legal advice, and merely served to keep the attorney informed of the content of the letter); Royal Surplus Lines Ins. v. Sofamor Danek Group, 190 F.R.D. 463, 475 (W.D. Tenn. 1998) ("Simply sending a carbon copy to in-house counsel does not cloak a routine business communication with attorney-client privilege. The communication must have been for the purpose of securing legal advice."). It is also true, however, that carbon copying a document to an attorney does not automatically disqualify it from being protected by the attorney-client privilege. See In re Avantel, 343 F.3d at 321. Thus, the proper focus of the inquiry must be placed on the subject matter of the communication, i.e., whether the communication was made for the purpose of securing or acting upon legal advice. Id.; see also Royal Surplus Lines Ins., 190 F.R.D. at 475; Amway Corp. v. Proctor & Gamble Co., 2001 U.S. Dist. LEXIS 4561 at *22-23 (W.D. Mich. 2001). This analysis squares with this state's rule of protecting, as privileged, only those communications that are made by a client to his or her attorney "for the purpose of seeking professional advice . . . ." See Grayhurst, 852 A.2d at 512.

Consistent with this state and federal authority, therefore, a communication made between two non-attorney corporate employees which is merely carbon copied to the corporation's counsel will be protected only if the communication was made for the purpose of securing primarily either: (1) an opinion on law; (2) legal services; or (3)

assistance in some legal proceeding. See Rosati, 660 A.2d at 265. Conversely, a communication that was made for the purpose of securing business advice or public relations strategies, that was generated for informational purposes, or that consists of any other incidental communication to an attorney should not be protected by the attorney-client privilege, regardless of whether it was carbon copied to corporate counsel.

In this case, therefore, the defendants may not simply rely on the fact that a document between non-attorney corporate employees was carbon copied or "cc'd" to counsel for the corporation to claim that the document is protected by the attorney-client privilege. They must revisit this category of documents listed on their privilege log in light of these precepts and produce to plaintiffs any such communications that were not made for the purposes of seeking or acting upon legal advice. Defendants may continue to assert the attorney-client privilege as to any of these documents that were made for the primary purpose of securing an opinion on the law, legal services or assistance in a legal proceeding.

3. Whether Documents used in Prior Litigation or Shared with Non-Party Trade Organizations are Protected by the Attorney-Client Privilege

The third argument raised by the plaintiffs actually encompasses two separate legal questions: (1) whether communications allegedly withheld by the defendants that were used in prior litigation must be disclosed; and (2) whether documents shared between the defendants and non-party trade organizations to which they belonged are privileged. As to the first issue, it hardly could be claimed that any documents disclosed in prior litigation would remain "confidential" -- an essential element of the attorney-client privilege. See generally von Bulow, 475 A.2d 995 (R.I. 1984). Accordingly, to the

extent that they have not done so already, the defendants should disclose any such documents to the plaintiffs.

With respect to the second issue, it is well-established that the disclosure of confidential communications to a third party generally will result in a waiver of the attorney-client privilege. See id. Although the Rhode Island Supreme Court has not considered this issue, a number of jurisdictions recognize certain exceptions to this rule.

One of the most common exceptions is the so-called "joint defense" or "common-interest" rule. See Cavallaro v. United States, 284 F.3d 236, 249-52 (1st Cir. 2002). Under this doctrine, communications made between a lawyer and certain third parties remain privileged. Id. This type of protection is generally invoked when one counsel is representing two or more clients in the same action or when separate lawyers are representing two or more clients in a single action. Id. A number of courts have held, however, that communications between a non-party to the litigation also can qualify for the joint defense privilege. See Lugosch v. Congel, 219 F.R.D. 220, 238-39 (N.D.N.Y 2003); Royal Surplus Lines Ins. Co. v. Sofamor Danek Group, Inc., 190 F.R.D. at 472; United States v. Duke Energy Corp., 214 F.R.D. 383, 385-91 (M.D.N.C. 2003).

When determining whether the joint defense privilege applies with respect to communications between a party and an entity that is not a party to the litigation, courts should "examine the actual or potential relationship of the parties" to establish whether a "shared interest in any potential litigation" exists. See Royal Surplus Lines Ins., 190 F.R.D. at 472 (citing Continental Oil Co. v. United States, 330 F.2d 347 (9th Cir. 1964)). Specifically, the weight of authority also favors "considering the actual or potential identity of interest which the parties share rather than limiting the privilege to

communications occurring only after litigation commences." Id. (citing SCM Corp. v. Xerox Corporation, 70 F.R.D. 508, 513 (D.Conn. 1975)). Thus, "[t]he privilege protects the free flow of information for the purpose of receiving legal advice, either in contemplation of litigation or in attempting to avoid it. The common defense, however, must at least be foreseeable." Id. (citing Medcom Holding Co. v. Baxter Travenol Lab, 689 F. Supp. 841, 845 (N.D. Ill. 1988) (noting "the privilege arises out of a need for a common defense, as opposed merely to a common problem"). As a result, one relying on the joint defense privilege must establish that: (1) there was existing litigation or a strong possibility of future litigation; and (2) the materials were provided for the purpose of mounting a common defense against it. Id.

As applied to the case at bar, it is unclear from the parties' memoranda as to the relationship between the defendants and the two trade groups, Western States Petroleum Association (WSPA) and the American Petroleum Institute (API), both prior to and during the litigation. Issues such as whether the defendants and the trade groups reasonably faced a palpable litigation threat at the time of their communications, whether the common interest between the trade groups and the defendants was primarily litigation rather than business focused, and whether their communications were made for the purpose of mounting a foreseeable common defense rather than addressing a common problem, are important to address in determining whether any joint defense privilege exists. With respect to communications between the defendants and these trade organizations, therefore, the defendants must review the disputed documents in light of the precepts outlined by this Court. If the defendants continue to assert the attorney-client privilege as to any remaining documents, they must present additional factual and

legal support for such a claim. Without such information, it simply appears as if the defendants shared confidential information with third parties, thus negating the attorney-client privilege.

4. Whether Handwritten Notes are Protected by the Attorney-Client Privilege

The fourth issue is whether the handwritten notes in dispute are protected by the attorney-client privilege. The narrow issue involving handwritten notes also has not been explicitly addressed by the Rhode Island Supreme Court. As with the issue of corporate employees carbon copying their communications to corporate counsel, however, it is clear that simply placing an attorney's name on a handwritten note does not mean that a privilege exists. The relevant inquiry must be directed toward the subject matter of the document, i.e., whether it contains legal advice that was either given or received.

To make an accurate determination of whether handwritten notes are privileged, a number of factors must be considered, including the identity of the author of the notes and whether the notes reflect discussions from meetings or the attorney's own private thoughts. Chevron Texaco Corp., 241 F. Supp.2d at 1079. If the notes reflect meeting discussions, then information such as the purpose of and participants attending the meetings is relevant to determining if the defendants waived the privilege. Id.

Though the defendants' privilege log does provide limited insight into the circumstances surrounding the documents that the defendants claim are privileged, they have not provided enough information to enable this Court to make a determination as to whether the claim of privilege is properly asserted as to these handwritten notes. Defendants should reassess whether the communications in this category of disputed documents are protected by the attorney-client privilege. If defendants continue to assert

a privilege with respect to any of these handwritten notes, they must present further factual and legal argument to support such a claim, including the identity of the author of such notes, whether they contain the advice of counsel and the identity of any such counsel, whether the legal advice in the communications predominates over any business advice and any further relevant contextual information such as the purpose of and participants in any meetings reflected by the notes.

5. Whether Memoranda which have the Dominant Purpose of Providing Business Rather than Legal Advice are Protected by the Attorney-Client Privilege

The fifth issue is whether memoranda which had the dominant purpose of providing business, rather than legal advice or assistance, are protected by the attorney-client privilege. This issue also has not been addressed specifically by the Rhode Island Supreme Court. A number of federal courts, however, have considered the issue. Additionally, as previously stated, our Supreme Court has held that only communications made for the purpose of securing primarily either: (1) an opinion on *law*; (2) *legal* services; or (3) assistance in some *legal* proceeding qualify under the attorney-client privilege. See Rosati, 660 A.2d at 265 (emphasis added).

The predominant view of the federal courts is that "for a communication to be privileged, it must have been made for the purpose of securing *legal* advice." In re Ford Motor Co., 110 F.3d 954, 965 (3rd Cir. 1997) (emphasis added); see also In re Subpoena Duces Tecum, 731 F.2d 1032, 1037 (2nd Cir. 1984). Thus, "[t]he privilege does not protect an attorney's business advice." U.S. v. Chevron Texaco Corp., 241 F. Supp.2d 1065, 1076 (N.D. Ca. 2001); see also U.S. v. Philip Morris, Inc., 2004 U.S. Dist. LEXIS 27026 at *16-17 (D.C.D.C.); Women's Interart Center, Inc. v. N.Y.C. Econ. Dev., 223

F.R.D. 156, 160 (S.D.N.Y. 2004). With respect to internal communications involving in-house counsel, a party "must make a 'clear showing' that the 'speaker' made the communications for the purpose of obtaining or providing legal advice." Chevron Texaco Corp., 241 F. Supp.2d at 1076 (quoting In re Sealed Case, 737 F.2d 94 (D.C. Cir. 1984)). If legal and business advice are inextricably intertwined, "the legal advice must predominate over the business advice, and not be merely incidental, for the communications to be protected by the attorney client privilege." Philip Morris, Inc., 2004 U.S. Dist. LEXIS 27026 at *16. The proponent of the privilege must make "a clear showing that the communication was intended for legal advice." Id. at *17.; see also Chevron Texaco Corp., 241 F. Supp.2d at 1076.

Considering these federal court precepts and the established law concerning the attorney-client privilege in our own jurisdiction, it is clear that only those communications made for the purpose of obtaining or acting upon legal advice should be protected. If the predominant purpose of the communication, therefore, was to provide business advice, analysis, or strategy, it will not be protected by the attorney-client privilege. Of course, if a communication contains both legal and non-legal advice, the burden is on the proponent of the privilege to establish that it was made for the purpose of obtaining legal advice.

Again, the defendants should review this category of disputed documents in light of these precepts and produce any non-privileged documents to the plaintiffs. To the extent that they continue to claim that any such documents are protected by the attorney-client privilege, defendants must provide further factual and legal support for their claims

that any legal advice in such documents predominates over any business advice and is not merely incidental to it.

6. Issues of Waiver of the Attorney-Client Privilege

Before moving on to the final category of disputed documents with respect to which the defendants assert the work product privilege, this Court must address the argument of waiver raised by the plaintiffs. Plaintiffs contend that the defendants implicitly waived any attorney-client privilege that may have existed with respect to the disputed documents because the content of the legal advice contained in those communications is so integral to the outcome of the legal claims in this action. In this regard, however, the plaintiffs' reliance on Mortgage Guar. & Title Co. v. Cunha, 745 A.2d 156, 159 (R.I. 2000), is misplaced. The type of waiver discussed in that case would apply typically to situations where a party specifically pleads, as an element of the claim, his or her reliance on an attorney's advice or voluntarily testifies regarding portions of the actual advice contained in the communication or places in issue the nature of the attorney-client relationship during the course of the litigation. Id. at 159. In fact, our Supreme Court specifically held that, to find a waiver, a court must be "satisfied that a party has waived the right to confidentiality by placing the content of the communication directly in issue and [that] the issue cannot be determined without an examination of that advice." Id.

The case at bar is distinguishable from the Supreme Court's decision in Mortgage Guar. & Title Co. v. Cunha, supra, because, in that case, a waiver had to be implied in order to proceed with the litigation. In fact, a careful reading of the court's decision reveals that the waiver rule discussed in that case would apply typically in attorney-client

malpractice actions. There is simply no evidence here indicating that the plaintiffs relied on any information given by the defendants' attorneys. Simply arguing that the information contained in privileged communications may be important to the outcome of the case, as the plaintiffs suggest, does not place the content of the communication directly in issue. There is a vast difference between claiming that privileged information may be helpful to an adversary in pursuit of its claim and determining that there would be no case at all without a waiver because the content of the privileged communications are themselves the subject of the dispute. This Court finds, therefore, that the plaintiffs have failed to substantiate their overbroad claims of waiver here.

B. ISSUES OF WORK PRODUCT PRIVILEGE

Whether Certain Disputed Documents are Protected by the Work Product Privilege

The final issue raised by the plaintiffs concerns the work product privilege. Under that doctrine "[a] party shall not require a deponent to produce or submit for inspection any writing obtained or prepared by the adverse party, his attorney . . . *in anticipation of litigation* . . . unless . . . a denial of production or inspection will result in an injustice or undue hardship . . . ." Cabral v. Arruda, 556 A.2d 47, 49 (R.I. 1989) (emphasis added). Additionally, R.I. Sup. Ct. R. Civ. P 26 (b)(3), entitled "Trial Preparation," states:

> a party may 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 (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 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 disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Thus, although the work product doctrine does not provide an absolute privilege, von Bulow, 475 A.2d at 1009, at its core, "it shelters the mental processes of the attorney, providing a privileged area within which he or she can analyze and prepare his or her client's case." See State v. DiPrete, 710 A.2d 1266, 1286 n.13 (R.I. 1998).

As applied to the case at bar, to the extent that the documents in question do not qualify for the attorney-client privilege, they may be protected by the work product privilege. Defendants may invoke this claim of privilege, however, only to the extent the disputed documents were prepared in anticipation of litigation. They should undertake a review of this category of disputed documents to ensure that they were so prepared and identify the authors of such documents and any non-privileged information about them, to the extent they have not done so already. Assuming, for the sake of argument, that the defendants have properly invoked the work product privilege as to these documents in dispute, the plaintiffs have failed, at this juncture, to meet their burden of establishing substantial need and undue prejudice, as they simply have not demonstrated their inability to obtain the information by other means, including other discovery options, such as interrogatories or depositions. Further factual and legal argument from both parties, therefore, may be necessary for this Court to resolve any remaining issues as to this category of disputed documents.

CONCLUSION

The defendants are ordered to review the disputed documents in light of this Decision. The defendants must produce to plaintiffs any documents that are not privileged. If the defendants continue to claim that any of these documents are privileged, they are ordered, where possible, to redact the privileged portions of the documents and to produce to the plaintiffs redacted documents. To this extent, plaintiffs' motions to compel production of documents are granted.

As to any remaining issues of privilege, the defendants shall provide to the plaintiffs, and the plaintiffs shall provide to the defendants, any additional factual and legal arguments to support their respective positions. Both parties must meet and confer to attempt to resolve any remaining issues as to the disputed documents before asking this Court for further hearing. This Decision is rendered without prejudice to the plaintiffs' right to renew their motions to compel production of documents, the defendants' right to invoke claims of privilege consonant with this Decision, or either plaintiffs' or defendants' right to seek an *in camera* review of limited documents after they both have taken the steps outlined by this Court in this Decision.

Counsel shall confer and submit to this Court forthwith for entry three separate agreed upon forms of order, for filing in each case, which are consistent with this Decision. The order shall contain agreed upon dates for compliance with the terms of order outlined by the Court in this Decision.

E-discovery Law Alert

Developments in e-discovery law

A publication of Nixon Peabody LLP

SEPTEMBER 17, 2008

The New Federal Rule of Evidence 502: Why you should care

By Ronald J. Hedges and Jonathan Sablone

On September 8, the House of Representatives passed Senate Bill S.2450, which President Bush recently signed into law. The new Federal Rule of Evidence 502 will, among other things, set a nationwide federal standard for waiver of attorney-client privilege and work product protection, and allow for non-waiver orders that will bind non-parties in federal and state proceedings. Rule 502 will, thus, allow litigants to exchange materials without waiver of privilege or work product protection. However, exactly how Rule 502 will operate is open to debate, as no courts have had an opportunity to interpret or apply it.

The enactment of the new Rule 502 was driven by the challenges associated with electronic discovery. The purposes of the Rule are to reduce the burdens associated with e-discovery (and the often massive exchange of materials in electronic format), provide clear guidance to courts and parties on waiver of attorney-client privilege and work product protection, avoid broad waiver of privilege and work product protection by the disclosure of materials in discovery, and protect parties which enter into non-waiver agreements.

Rule 502 would accomplish these purposes in several ways. It explains that intentional disclosure of privileged materials or work product to federal offices or agencies, or in federal proceedings, gives rise to a waiver of those materials and to "undisclosed" material that concern the same subject matter if these should, "in fairness ... be considered together."

As to inadvertent disclosure of privileged materials or work product in either federal or state proceedings, there should be no waiver under Rule 502 if reasonable steps are taken to prevent disclosure and to promptly rectify any erroneous disclosure. Rule 502 further provides that, under certain circumstances, a disclosure of privileged materials or work product in a state proceeding will not be a waiver in a federal proceeding.

On the other hand, a federal court order that provides that "privilege or protection is not waived by disclosure connected with the litigation" becomes binding "in any other Federal or State proceeding." Finally, Rule 502 essentially offers parties in federal proceedings an option: Rather than secure a non-waiver order, or, if the federal court refuses to enter such an order, the parties may enter into a non-waiver agreement that "is binding only on the parties."

What does Rule 502 mean for litigants in federal courts or for those before federal regulators? First, litigants will need counseling regarding the level of disclosure (if any) of privileged material. There may be circumstances under which protected material should be shared with a federal regulator or an adversary. Care must be taken, however, to limit the scope of any waiver of undisclosed material.

Second, Rule 502 would appear to encourage discussion between parties or with a federal regulator to guard against waiver by inadvertent production. This, in turn, may place an emphasis on reasonable procedures undertaken by parties to protect against inadvertent production and on reasonable procedures to promptly discover any error.

Third, there is the question of how to address these issues by a party to another proceeding. Must that party intervene before the court that issued the order? What arguments must the party make before that court to modify or vacate the order?

Nixon Peabody has the lawyers, resources, and capabilities to counsel clients with respect to all of the privilege, waiver, and electronic discovery issues that are implicated by Rule 502. For more information about Rule 502 and how Nixon Peabody can assist your company with these issues, contact:

If you need assistance on any matter, please call or e-mail Ronald J. Hedges (rhedges@nixonpeabody.com or 212-940-3786) or Jonathan Sablone (jsablone@nixonpeabody.com or 617-345-1342).

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FOCUS - 1 of 1 DOCUMENT

Carol Levine, individually and as executrix of the estate of Philip Levine v. Jeffrey Marshall et al.

95-1504-B

SUPERIOR COURT OF MASSACHUSETTS, AT SUFFOLK

1997 Mass. Super. LEXIS 356

July 18, 1997, Decided

JUDGES: [*1] Patrick J. King, Justice of the Superior Court.

OPINION BY: PATRICK J. KING

OPINION

MEMORANDUM OF DECISION AND ORDER ON MOTION OF DEFENDANTS FIRST SECURITY SERVICES CORPORATION AND JEFFREY MARSHALL TO QUASH AND/OR LIMIT DEPOSITION TESTIMONY

This action alleges personal injuries and wrongful death arising out of a car accident. Defendant First Security Services Corporation moves to quash the notices of deposition for David Traniello, Michael Montuori and Dennis Peloquin and/or to limit the scope of their deposition testimony. Defendant Jeffrey Marshall joins the motion as to the deposition testimony of Michael Montuori and Dennis Peloquin regarding their communications with him. The defendants assert that the anticipated areas of inquiry are protected by the attorney-client privilege and by *Mass.R.Civ.P. 26(b)*. For the reasons set forth below, the defendants' motions will be allowed in part and denied in part.

BACKGROUND

On December 18, 1994, defendant Jeffrey Marshall, an employee of defendant First Security Services Corporation (First Security), was driving an Emmanuel College shuttle van at the intersection of Massachusetts Avenue and Marlborough Street in Boston. The van struck [*2] pedestrians Carol and Philip Levine, killing Philip Levine and seriously injuring Carol Levine.

Plaintiff noticed the depositions of Dennis Peloquin and Michael Montuori, employees of First Security involved in the investigation on the night of the accident. Plaintiff also noticed the deposition of David Traniello, a law clerk employed by First Security who unsuccessfully attempted to locate the personnel file of defendant Marshall. First Security filed a motion to quash and/or limit the deposition testimony of all three employees. Marshall joins in the motion to quash and/or limit the deposition testimony of Peloquin and Montuori.

On January 10, 1997, this court ordered the depositions postponed until a ruling on this motion, and, at a May 29, 1997 hearing, ordered the defendants to file for *in camera* review any privileged documents about which the three witnesses may be asked. The court also directed counsel to furnish the court with a complete copy of Mr. Marshall's deposition transcript. After reviewing the documents filed with the court and after considering the arguments of counsel and the applicable law, the court makes the following rulings.

DISCUSSION

A. Confidential [*3] communications with in-house corporate counsel for First Security

Documents about which the witnesses may be asked include a five-page written statement of defendant Marshall and an "internal attorney privilege memorandum," prepared by Peloquin following his investigation the night of the accident, at the direction of First Security's in-house counsel.

1. Attorney-client privilege

The attorney-client privilege extends to confidential communications between a client or his representative and a lawyer or his representative for the purpose of ob-

taining or rendering professional legal services. Mass. Evid. Standard 503 (West 1995). The privilege is "founded on the necessity that a client be free to reveal information to an attorney, without fear of its disclosure, in order to obtain informed legal advice." *Purcell v. District Attorney for the Suffolk District, 424 Mass. 109, 111, 676 N.E.2d 436 (1997)*. The privilege extends to communications from the client's agent or employee, *Ellingsgard v. Silver, 352 Mass. 34, 40, 223 N.E.2d 813 (1967)*, and to "those whose intervention is necessary to secure and facilitate the communication between attorney and client." *Foster* [*4] *v. Hall, 29 Mass. 89, 93 (1831)* (including interpreters, agents, and attorneys' clerks).

Communications between employees and corporate counsel acting as such are protected by the attorney-client privilege where the communications concerned matters within the scope of the employee's duties, the employee was sufficiently aware that the information sought was for the purpose of obtaining legal advice, and the communications were confidential when made and remained so. *Upjohn Co. v. United States, 449 U.S. 383, 394-95, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1980)* (questionnaire sent to all "foreign general and area managers" concerning accounting audit from company chairman requesting responses directed to company counsel protected by the privilege). "The privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of the information to the lawyer to enable him to give sound and informed advice." *Id. at 390.*

a. Motion of First Security

Marshall's statement, obtained by First Security investigator Peloquin on the night of the accident at the request of First Security's counsel, Lawrence T. Curran, is protected by [*5] the attorney-client privilege and need not be produced to the plaintiff. Marshall's statement was produced in confidence at the request of an attorney for the purpose of rendering legal advice to First Security and given to the attorney's representative.

Peloquin's investigative report, containing a summary of his conversation that night with Marshall, is similarly protected from disclosure by the attorney-client privilege. As First Security's employee directed by in-house counsel to investigate the accident and obtain a statement from Marshall immediately following the accident, Peloquin's communication to in-house counsel was "necessary to secure and facilitate communication" between First Security's employee and its attorney. Peloquin's communication is also protected as he was an employee of First Security reporting to the attorney about actions within the scope of his duties as an investigator for the company.

The plaintiff may depose Peloquin and Montuori, but may not question them regarding their communications related to the accident with First Security's in-house counsel or with First Security employees. These communications are protected by the attorney-client privilege. [*6] See *Upjohn, supra, Ellingsgard, supra*, and *Foster, supra.*

b. Motion of Marshall

Marshall joined the motion to quash and/or limit the deposition testimony, asserting the attorney-client privilege and the work product doctrine as to the documents filed with the court for *in camera* review and related communications. "The burden of proving that the attorney-client privilege applies to a communication rests on the party asserting the privilege." *Purcell, supra at 115* (citations omitted). Marshall has not met his burden in this case because he has not established the existence of an attorney-client relationship. Marshall has not shown an explicit agreement with First Security's in-house counsel for individual legal services relating to the accident. An attorney-client relationship may be implied when a person seeks advice from an attorney within the attorney's professional competence, and the attorney agrees to give such advice. *DeVaux v. American Home Assurance Co., 387 Mass. 814, 818, 444 N.E.2d 355 (1983)*. The court finds no evidence that Marshall sought advice from First Security's in-house counsel concerning his own individual liability [*7] for the accident.

Moreover, in order to assert an individual attorney-client relationship with in-house counsel, "it must be made explicitly clear to counsel that the advice sought is individually rather than in a corporate capacity." *In re Standard Financial Management Corp., 77 B.R. 324, 328 (Bankr. D. Mass. 1987)*. See also *U.S. v. Sawyer, 878 F. Supp. 295 (D.Mass. 1995)*, vacated on other grounds, *85 F.3d 713 (1996)*. In *Sawyer*, an employee who was later charged with violation of the ethics and reporting laws governing lobbyists, met with his employer's in-house counsel during an internal investigation of the alleged violations. At his criminal trial, the court rejected the employee's assertion of the attorney-client privilege for those communications, stating that as an employee, he "had an obligation to aid [his employer's] in-house counsel with their internal investigation." *878 F. Supp. at 296.* Likewise, in this case, there is no evidence that Marshall sought personal legal advice from First Security's in-house counsel, and that counsel agreed to represent him on a personal basis. Marshall simply cooperated in his employer's investigation.

To the extent that [*8] Marshall has been requested by plaintiff to produce the two documents for which he

asserted an attorney-client privilege, Marshall has no such privilege to assert and must produce the documents to the plaintiff.

2. Ethical considerations

The court reviewed *in camera* Marshall's handwritten statement, his deposition testimony and Peloquin's investigative report. The documents contain information which plaintiff's counsel would find highly relevant on the issue of liability. Marshall's deposition testimony concerning what he was doing immediately prior to the fatal accident differs substantially from his handwritten statement and the statement he gave Peloquin at the request of in-house counsel on the night of the accident.

Under the circumstances, First Security's trial counsel [1] is faced with an ethical obligation. Under Disciplinary Rule 7-102(B),

> [a] lawyer who receives information clearly establishing that: (1) His client has, in the course of representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.

[*9]

SJC Rule 3:07, DR 7-102(B)(1). Perjury committed "in the course of an ongoing civil lawsuit" is fraud within the meaning of DR 7-102(B)(1). Mass. Bar Assoc. Committee on Professional Ethics Opinion No. 89-1 (1989). If the client refuses to rectify the fraud, DR 7-102(B)(1) requires the attorney to disclose the fraud if DR 4-101(C)(3) applies. *Id.* See also MBA Opinion Nos. 93-3, 91-6, 91-4. [2] DR 4-101(C)(3) applies where the client "refuses to correct his lie" and the client (1) "intends to repeat the perjury," or (2) "the perjury, together with the future intended conduct in the litigation, will constitute a new and distinct crime." *Id.* Perjury at trial would constitute a new and distinct future crime. In these circumstances, the attorney's disclosure is mandatory [*10] regardless of the privilege. *Id.* Where an attorney is not aware of any intent of the client to commit a future crime, the attorney must nevertheless at least withdraw "where the lawyer knows, for example, that his client has knowingly and falsely authenticated a document that is material to the case" in violation of DR 7-102(A)(7). [3] I*d.*

1 The ethical obligations of trial counsel for First Security extends to Marshall and Peloquin as they are employees and agents of First Security, and a corporation can act only through its employees and agents.

2 This view accords with the amendments to SJC Rule 3:07 effective January 1, 1998. Amended Rule 3.3(a)(4) states that "a lawyer shall not knowingly . . . (4) offer evidence that the lawyer knows to be false . . . If a lawyer has offered, or the lawyer's client or witnesses testifying on behalf of the client have given, material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures." SJC Rule 3:07, 3.3(a)(4), effective January 1, 1998, 25 M.L.W. 2185 (June 16,1997). This duty applies "even if compliance requires disclosure of information otherwise protected by" the attorney's duty to keep confidential client information (Rule 1.6). Id. at 3.3(b). The comment to Rule 3.3 states that "upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures . . . An advocate must disclose, if necessary to rectify the situation, the existence of the client's deception to the court or to the other party." The comment to Rule 1.6 states in part "if the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw . . ." A lawyer "shall withdraw from representation" if it "will result in violation of the rules of professional conduct or other law." SJC Rule 3:07, Rule 1.16(a)(1), effective January 1, 1998, 25 M.L.W. 2183 (June 16, 1997).

[*11]

3 DR 7-102(A)(7) prohibits an attorney from "counseling or assisting his client in conduct that the lawyer knows to be illegal or fraudulent."

Under these circumstances, the court will order First Security's counsel to provide the court with a sealed report of the measures taken to rectify any fraud counsel reasonably determines has been perpetrated on the court and the plaintiff. If she has not yet done so, First Security's counsel must first attempt to persuade Marshall, the employee of her client First Security, to rectify the apparent fraud. The court will permit the further taking of defendant Marshall's deposition regarding his actions immediately prior to the accident. If Marshall's testimony remains consistent with his prior deposition testimony, then it now appears that First Security's counsel must, at a minimum, withdraw from representation. Counsel for

First Security should also attempt to persuade First Security to rectify the apparent fraud by agreeing to the disclosure of the document in question.

If Marshall's trial counsel is aware of the contents of the documents submitted [*12] with the privilege log to the court, he also has a similar ethical obligation, and the court will make the same order to Marshall's trial counsel.

B. Non-privileged documents created in anticipation of litigation

Defendants First Security and Marshall assert the attorney-client and work product doctrine as to (1) the statement of Kristin Finn, a passenger in the van driven by Marshall and witness to the accident, (2) the investigator's memoranda of conversations with Finn, Cynthia Brown, Frederic Hoyos, Angel Camara and Penny Maciejka, all passengers and witnesses to the accident, and (3) the in-house counsel memorandum regarding the photographs of the scene of the accident as well as copies of the photographs themselves.

These items are not protected by the attorney-client privilege because although the statements were made to representatives of First Security's in-house counsel, they were not made by employees or agents of First Security. See *Hickman v. Taylor, 329 U.S. 495, 508, 91 L. Ed. 451, 67 S. Ct. 385 (1946)* ("protective cloak of this privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation [*13] of litigation").

Documents may be discovered which are relevant to the lawsuit and not privileged

> and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent by other means.

Mass.R.Civ.P. 26(b)(3). Peloquin and Montuori took the witness statements and wrote memoranda of their conversations with the witnesses at the direction of in-house counsel for First Security. These documents were generated in anticipation of litigation by representatives of First Security, and were not generated in the ordinary course of business. Cf. *Sham v. Hyannis Heritage House Hotel, Inc., 118 F.R.D. 24 (1987)* (conclusory argument, unsupported by facts, insufficient to show that insurance investigator's report was in anticipation of litigation rather than in the ordinary course of business); *Shotwell v. Winthrop Community Hosp., 26 Mass. App. Ct.* [*14] *1014, 531 N.E.2d 269 (1988)* ("Incident/Deviation/Unusual Occurrence Report" filled out by nurse and filed with quality assurance department not protected by work product doctrine because in the ordinary course of business). The documents, therefore, are entitled to protection under the work product doctrine.

Plaintiff may overcome this protection if she demonstrates a substantial need for the documents and undue hardship in obtaining the materials through other means. Plaintiff has made no such showing. See Order of the Court (Kottmyer, J.), May 31, 1996 (party seeking production of witness statement to make showing of substantial need in writing by June 14, 1996). The court finds that the plaintiff is free to notice the deposition of the witnesses at issue and inquire directly as to their observations. *Hickman, supra at 509*. The court further finds that plaintiff can demonstrate no substantial need or undue hardship in obtaining the information contained in the accident scene photographs and related memorandum because of the report made by the Boston Police Department accident reconstruction team the night of the accident. This report is available to the plaintiff and [*15] contains photographs of the scene. The defendants' motion as to the statement of Kristin Finn, the memoranda of conversations with the other witnesses and the accident scene photographs and related memorandum will be allowed.

C. Deposition of David Traniello

Plaintiff seeks to depose Traniello, a law clerk for First Security's in-house counsel, for the limited purpose of determining the location of defendant Marshall's missing personnel file at First Security. Plaintiff is not seeking to question Traniello regarding attorney-client communications. The court will deny defendant First Security's motion to quash, his notice of deposition for the purpose of locating the missing file.

ORDER

For the foregoing reasons, the court hereby ORDERS as follows:

(1) Defendant First Security's motion to limit the deposition testimony of Dennis Peloquin and Michael Montuori is ALLOWED so as to exclude from the scope of the depositions communications protected by the attorney-client privilege;

(2) Defendant Jeffrey Marshall's motion to limit the deposition testimony of Dennis Peloquin and Michael Montuori is ALLOWED;

(3) Defendant First Security's motion to quash the deposition [*16] testimony of David Traniello is DENIED, except that the scope of the deposition must exclude communications protected by the attorney-client privilege;

(4) Defendant First Security's attorney is ORDERED to submit a sealed statement to the court within 21 days regarding her efforts to meet her ethical obligations in the face of inconsistent testimony offered by her client's employee;

(5) Defendant Marshall's attorney is also ORDERED to submit a sealed statement to the court within 21 days describing his knowledge of the contents of the privileged communications between his client and in-house counsel for defendant First Security, and if he is aware of the contents, he must describe for the court his efforts to meet his ethical obligations in the face of inconsistent testimony offered by his client;

(6) The defendants' motion as to the witness statement, memoranda of conversations with witnesses and memorandum regarding accident scene photographs and attached copies of the photographs is ALLOWED.

Patrick J. King

Justice of the Superior Court

Dated: July 18, 1997

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2 of 5 DOCUMENTS

Douglas Savidge et al. v. Transcanada Power Marketing, Ltd. et al.

Opinion No.: 104927, Docket Number: 06-2602

SUPERIOR COURT OF MASSACHUSETTS, AT WORCESTER

2008 Mass. Super. LEXIS 376

October 31, 2008, Decided

PRIOR HISTORY: *Savidge v. TransCanada Power Mktg., Ltd., 2007 Mass. Super. LEXIS 403 (Mass. Super. Ct., 2007)*

JUDGES: [*1] Bruce R. Henry, Associate Justice.

OPINION BY: Bruce R. Henry

OPINION

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS

By an order dated May 29, 2008, I indicated that the documents which the defendants were claiming were privileged were to be submitted for an *in camera* inspection. I have received a large stack of material in compliance with that order.

Some of those materials relate to an *Amended Redacted Privilege Log of TransCanada* with documents at Tabs 1-8, and the remainder, Document Nos. TC PRIV 001-210, relate to the *Second Amended Privilege Log of TransCanada.* Having reviewed those documents and the applicable case law regarding the asserted privilege and work product doctrine, the motion is ALLOWED IN PART and DENIED IN PART.

Applicable Law

The attorney-client privilege protects from the view of third parties all confidential communications between a client and its attorney undertaken for the purpose of obtaining legal advice. See, e.g., *Matter of John Doe Grand Jury, 408 Mass. 480, 481, 562 N.E.2d 69 (1990),* quoting *Hunt v. Blackburn, 128 U.S. 464, 470, 9 S. Ct. 125, 32 L. Ed. 488 (1888)* ("seal of secrecy" on confidential communications between client and counsel); *Foster v. Hall, 29 Mass. 89, 12 Pick. 89, 93 (1831)* [*2] ('the general rule [is] that [where] matters [are] communicated by a client to his attorney, in professional confidence, the attorney shall not be at any time afterwards called upon or permitted to disclose in testimony") . . . *Suffolk Const. Co., Inc. v. Division of Capital Asset Management, 449 Mass. 444, 448-49, 870 N.E.2d 33 (2007).* The attorney's confidential advice to the client is also protected. *Upjohn Co. v. United States, 449 U.S. 383, 390, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981).* The attorney's confidential privilege not only protects statements made by the client to the attorney in confidence for the purpose of obtaining legal advice in a particular matter, but also protects such statements made to or shared with necessary agents of the attorney or the client, including experts consulted for the purpose of facilitating the rendition of such advice. See, *Commonwealth v. Senior, 433 Mass. 453, 457, 744 N.E.2d 614 (1st Cir. 2002) Cavallaro v. United States, 284 F.3d 236, 247 (1st Cir. 2002).* Routine distribution of non-privileged information to in-house counsel does not render such information privileged. See, *F.C. Cycles, Int'l, Inc. v. Fila Sport, S.P.A., 184 F.R.D. 64, 71 (D.Md. 1998).* To the extent that documents constitute confidential [*3] drafts of operative documents by attorneys, they are privileged.

"The existence of the privilege and the applicability of any exception is a question of fact for the judge." *Matter Of Reorganization of Elec. Mut. Liability Ins. Co., Ltd. (Bermuda), 425 Mass. 419, 421, 681 N.E.2d 838 (1997).* The party asserting the privilege has the burden of proving that the attorney-client privilege applies. This burden extends not only to a showing of the existence of the attorney/client relationship but to all other elements involved in the determination of the existence of the privilege, including: (1) the communications were received from a client during the course of the client's

search for legal advice from the attorney in his or her capacity as such; (2) the communications were made in confidence; and (3) the privilege as to these communications has not been waived. *Id.*

The work product doctrine is designed to protect written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties. *Hickman v. Taylor, 329 U.S. 495, 510, 67 S. Ct. 385, 91 L. Ed. 451 (1947)*; see *Mass R.Civ.P. 26(b)(3)*. The work product doctrine also protects material prepared by agents for the [*4] lawyer. *United States v. Nobles, 422 U.S. 225, 238-39, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975)*. "The work-product rule is not a privilege but a qualified immunity protecting from discovery documents and tangible things prepared by a party or his representative in anticipation of litigation." *Admiral Insurance Co. v. U.S. District Court for the District of Arizona, 881 F.2d 1486, 1494*, citing *Fed.R.Civ.P. 26(b)(3)* (identical to *Mass.R.Civ.P. 26(b)(3)*). The mere fact that the party was involved in an incident or transaction that would possibly subject it to litigation is not dispositive of whether the memorandum was prepared in anticipation of litigation. See *City of Worcester v. HCA Management Co., 839 F. Supp. 86, 88 D.Mass. 1993)*: see also *In re Air Crash Disaster at Sioux City, Iowa on July 9, 1989, 133 F.RD. 515, 520 (N.D.Ill. 1990)* (whether a particular document is subject to the work product protection depends on whether the subject matter of the document concerns preparation or strategy, or the appraisal of the strengths or weaknesses of the company's case, or the activities of the attorneys in preparing their case, or is at least primarily concerned with legal assistance, and not simply underlying evidence).

With [*5] those legal principles in mind, I have reviewed the documents in question. Some of those documents are copied to people who I have assumed are employees or agents of TransCanada (Koprusak, Gooley, Tucker, Bramer, McCourt, Cole) and whose awareness of the contents of communications was necessary. If any of the documents which I am not ordering to be turned over to the plaintiffs were copied or sent to people who were not agents or employees of TransCanada whose knowledge of the contents of the particular communication was essential then TransCanada must turn over those documents.

ORDER

The defendants shall turn over to the plaintiffs the following numbered documents: 001, 094, 095, 096, 122, 123, 124, 178, 179, 186, 187, 188, TC 0092 (Tab 1), TC 0115 (Tab 3), TC 0118 (Tab 4), TC 0120 (Tab 5), and TC 0246 (Tab 8). With regard to documents 146-161 and 167-177 counsel has represented that these are documents seeking or reflecting legal advice. There is nothing to so indicate within the documents themselves. I will assume that counsel has made inquiry before making that representation and I will accept counsel's representation as an officer of the court that such is the case. If counsel learns [*6] that such is not the case, the documents should be turned over to the plaintiffs.

I view the other documents falling under either the attorney-client or the attorney work product doctrine and they need not be provided to the plaintiffs.

Dated: October 31, 2008

Bruce R. Henry

Associate Justice

COMMISSIONER OF REVENUE vs. COMCAST CORPORATION & another.(1)

DOCKET	SJC-10209
Dates:	November 4, 2008. - March 3, 2009.
Present	*Marshall, C.J., Ireland, Spina, Cowin, Cordy, & Botsford, JJ.*
County	*Suffolk.*
KEYWORDS	Attorney at Law, Attorney-client relationship, Work product. Privileged Communication. Evidence, Privileged communication. Accountant. Taxation, Commissioner of revenue. Practice, Civil, Reconsideration, Review of interlocutory action. Rules of Civil Procedure.

Civil action commenced in the Superior Court Department on May 26, 2005.

Motions to compel production of certain withheld documents and for reconsideration were heard by Frank M. Gaziano, J., and entry of final judgment was ordered by Thomas E. Connolly, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

William W. Porter, Assistant Attorney General, for the plaintiff.

David J. Nagle for the defendants.

John S. Brown, George P. Mair, Donald-Bruce Abrams, & Matthew D. Schnall, for The New England Cable & Telecommunications Association, Inc., amicus curiae, submitted a brief.

Shirley K. Sicilian & Sheldon H. Laskin, for Multistate Tax Commission, amicus curiae, submitted a brief.

MARSHALL, C.J. We transferred this appeal here on our own motion to consider whether the attorney-client privilege or the work-product doctrine protect from disclosure communications between an in-house corporate counsel and outside tax accountants consulted by him regarding the structuring of a sale of stock mandated by an antitrust consent judgment.

In connection with an audit examination by the Commissioner of Revenue (commissioner)(2) of Comcast Corporation's (Comcast's)(3) corporate excise tax returns for the tax period November 1, 1996, through December 31, 1997, the commissioner is investigating whether Comcast and its affiliates improperly failed to pay Massachusetts corporate excise taxes in connection with the forced liquidation of shares of stock that yielded approximately $500,000,000 in capital gains. The capital gains were reported on a Comcast affiliate's Federal tax return but were not reported on any Massachusetts corporate excise tax return. The

commissioner sought the production of documents through an administrative summons pursuant to G. L. c. 62C, § 70.(4) Comcast responded that some of the documents were protected by the attorney-client privilege and the work-product doctrine.(5) The commissioner then filed a complaint in the Superior Court seeking to compel production of the withheld documents. The commissioner's request was denied, the judge ruling that the documents at issue in this appeal were protected by the privilege and the work-product doctrine. The commissioner moved unsuccessfully for reconsideration. Pursuant to a joint motion of the parties, final judgment entered in the Superior Court. See Mass. R. Civ. P. 58 (a), as amended, 371 Mass. 908 (1977). The commissioner appealed. We conclude that the documents are protected from disclosure by the work-product doctrine. We affirm.(6)

1. Factual background. The audit examination of Comcast and its affiliates, see note 3, supra, by the Department of Revenue (department) was commenced in June, 2000, three years after the acquisition of Continental Cablevision, Inc. (Continental Cablevision), by U S West, Inc. (US West), a predecessor to Comcast. That acquisition gave rise to an antitrust challenge by the United States Department of Justice. We describe briefly the antitrust action and the related corporate transactions before turning to the documents at the center of this litigation. The facts are undisputed unless otherwise noted.

a. The stock sale. In February, 1996, Colorado-based US West announced plans to purchase Continental Cablevision, a Massachusetts cable television company with headquarters in Boston. Through a wholly owned subsidiary, Continental Teleport, Inc. (Continental Teleport), Continental Cablevision at the time owned 11.2% of the stock of Teleport Communications Group, Inc. (TCG), a company that, like US West, was a local telecommunications services provider.(7) Continental Teleport, like its parent Continental Cablevision, was a Massachusetts corporation. The acquisition of Continental Cablevision by US West was completed on November 15, 1996, and Continental Cablevision was immediately merged into MediaOne Group, Inc. (MediaOne), a wholly owned subsidiary of US West.

Meanwhile, on November 5, 1996, the Department Of Justice filed a civil antitrust action against US West and Continental Cablevision, see 15 U.S.C. §§ 18, 25, alleging that the acquisition would lessen competition in the market for dedicated telecommunications services. The Department of Justice, US West, and Continental Cablevision agreed to settle the antitrust claims, and on February 28, 1997, a final judgment entered whose terms required that, to preserve competition in the sale of dedicated communication services in certain markets, US West divest, on or before June 30, 1997, the portion of TCG stock necessary to reduce US West's ownership interest to less than ten per cent of the outstanding shares of TCG common stock, and to further divest all remaining interest in TCG on or before December 31, 1998.

US West retained the investment firm Lehman Brothers Inc. to assist it with the required sale of the TCG stock. Because the stock sale was anticipated to have significant tax consequences for US West, Thomas Kennedy, executive director of US West's tax department, turned to Attorney Andrew E. Ottinger, Jr., at the time serving in US West's Colorado-based law department, for advice regarding options for structuring the stock sale. Ottinger was an experienced tax litigator, but was unfamiliar with Massachusetts tax law. Concerned that the Massachusetts DOR would challenge, in Ottinger's words, "the appropriateness of the chosen vehicle" for US West's sale of the TCG stock, Ottinger sought the advice of two Massachusetts-based partners of Arthur Andersen LLP (Andersen), in circumstances we shall later describe in some detail.

After receiving advice from Andersen, US West caused the following transactions to occur. On February 11, 1997, a new entity, Continental Holding Company (Continental Holding), a Massachusetts corporate trust, G. L. c. 62, § 8, was established by US West. That same day, Continental Teleport was dissolved, and its assets, including its then remaining TCG shares,(8) were simultaneously transferred to Continental Holding. US West subsequently divested itself of the TCG shares in four separate transactions, culminating with the largest sale on November 30, 1997.(9)

Continental Holding reported a capital gain of $495,733,830 from the sale of the TCG shares on its December 31, 1997, Federal tax return. Claiming an exemption as a Massachusetts corporate trust under G. L. c. 62, § 8 (b), it did not file a Massachusetts corporate excise tax return for that same taxable period.(10),(11) Continental Holding was dissolved on February 12, 1999, two years after its creation, and its assets transferred to US West's successor.

b. Retention of Arthur Andersen LLP. Prior to US West's disposition of the TCG stock, its in-house tax counsel Ottinger retained Andersen for advice. Because the circumstances of that retention are central to the legal issues, we recite them in some detail.

Ottinger graduated from law school in 1977 and joined the tax department of US West in 1986. In 1987, he transferred to US West's law department, where he served as State and local tax counsel until 2000, except for a brief period as regulatory counsel in 1995-1996. Ottinger initially became involved with US West's acquisition of Continental Cablevision while he was serving as regulatory counsel, but it was in his position as State and local tax counsel that he sought Andersen's advice regarding the impending sale of TCG stock.

As State and local tax counsel, Ottinger was US West's attorney "chiefly responsible" for property tax, State income tax, and sales and use tax matters. He spent approximately forty per cent of his time working on tax-related litigation, handling one-half of those matters himself and retaining outside counsel for the remainder. In connection with his own cases, Ottinger regularly prepared assessments analyzing litigation risks for US West to evaluate the appropriateness of a tax determination. Because US West had, in Ottinger's words, a "sophisticated Tax Department," he rarely hired outside tax consultants to assist him, although he did so on occasion.

With respect to the particular matter at issue here -- the sale of the TCG stock compelled by the antitrust consent decree

-- Ottinger understood the transaction to have significant tax consequences for US West. Accordingly, he explained, he examined "planning opportunities" for the transaction himself, but turned to experienced "outside consultants" to help him "interpret Massachusetts law," because he himself lacked sufficient understanding of Massachusetts State tax law.(12) Specifically, Ottinger stated that he considered "various ways to set up the transaction, to determine the best, legitimate vehicle by which to deal with the tax consequences from the sale of [TCG] shares, and to assess the risks of litigation associated with the different vehicles." Ottinger ultimately retained Michael E. Porter, III, and Edward Gartland, two Massachusetts-based Andersen partners. Both had previously been employed by the department, Porter as a senior attorney at the department.(13) During January and February, 1997, Ottinger spoke with Porter and Gartland on several occasions, discussing the various options for US West to follow relating to the sale of TCG stock, and to assess the risks of and exposure to litigation for any "vehicle" considered. He asked the Andersen partners to prepare a memorandum discussing the "pros and cons of the various planning opportunities and the attendant litigation risks," which they did. The Andersen memoranda (various drafts of it) are the documents in contention here.

Ottinger stated that he considered all of his communications with the Andersen partners to be attorney-client communications and attorney work product, and, accordingly, "took all necessary precautions" to ensure that documents received from Andersen remained "confidential and privileged," including sending the documents to the segregated, locked files of US West's law department maintained for privileged documents.

c. The challenged documents. Six of the documents withheld by Comcast are at issue in this appeal.(14) The six documents are different drafts and the final memorandum prepared by the Andersen partners at the

request of Ottinger before the corporate reorganization took place.(15) The Andersen memoranda, each addressed "to file," and some sixteen pages long, single spaced, address the structuring of the required sale of TCG stock. The memoranda contain a detailed analysis of various corporate entities and address various options, and attendant litigation risks, for the TCG stock sale in light of applicable Massachusetts law.

2. Prior proceedings. a. Audit and administrative summons. The department commenced its audit in June, 2000. According to the commissioner, the issue relevant to this appeal is whether US West had what the commissioner terms "a legitimate business purpose" for reorganizing Continental Teleport as a Massachusetts corporate trust (i.e., as Continental Holding) at the time the sale of TCG stock that resulted in the substantial capital gains described above was being contemplated. The commissioner claims that, during the DOR's investigation, US West did not identify any independent economic or business purpose for the reorganization; she seeks disclosure of the Andersen memoranda contending that they will "reveal detailed information about why the transaction was structured as it was."(16)

During the first four years of the audit, the department issued three information document requests (IDRs), seeking information regarding Continental Teleport.(17) In response to these requests, Comcast produced certain records, which the commissioner deemed "insufficient." In May, 2004, the commissioner issued an administrative summons pursuant to G. L. c. 62C, § 70, seeking the production of records relating to the sale of TCG stock, including records dealing with the reorganization of Continental Teleport into Continental Holding. Comcast again produced responsive documents, but withheld others, including the Andersen memoranda, under claims of attorney-client privilege and work-product doctrine, all of which were listed in the privilege log prepared by Comcast. See note 5, supra.

b. Proceedings in the trial court. In May, 2005, five years after the commencement of the audit, the commissioner filed a complaint in the Superior Court seeking to compel production of all of the documents listed on the Comcast privilege log as well as unredacted versions of all redacted documents. After a nonevidentiary hearing and an in camera review of the documents, a judge in the Superior Court denied the commissioner's motion, holding, inter alia, that the Andersen memoranda were protected by the attorney-client privilege because they contained "a detailed analysis of Massachusetts tax law" and "provided in-house counsel with legal information critical to his ability to effectively represent his client." The judge also concluded that the Andersen memoranda were protected by the work-product doctrine as "prepared in anticipation of litigation." The judge later denied the commissioner's motion for reconsideration of so much of the order as related to the Andersen memoranda.

3. Discussion. We first address the standard of review of the judge's ruling on the commissioner's motion to compel.

The commissioner contends that our review is de novo where the scope of the attorney-client privilege and the work-product doctrine in a summons enforcement proceeding, as well as the interpretation of G. L. c. 62C, § 70, are questions of law. The commissioner also argues that because the evidence before the judge in the Superior Court comprised only affidavits and other documents, we may "assess the evidence anew," quoting Meschi v. Iverson, 60 Mass. App. Ct. 678, 681-682 n.7 (2004). Comcast responds that a more deferential standard of review is warranted. Citing Matter of the Reorganization of Elec. Mut. Liab. Ins. Co. Ltd. (Bermuda), 425 Mass. 419, 421 (1997) (EMLICO), Comcast argues that decisions regarding the attorney-client privilege and the work-product doctrine raise questions of fact reviewable for clear error. Id., citing Purcell v. District Attorney for the Suffolk Dist., 424 Mass. 109, 113 (1997) ("existence of the privilege and the applicability of any exception to the privilege is a question of fact for the judge").

In general, we uphold discovery rulings "unless the appellant can demonstrate an abuse of discretion that resulted in prejudicial error." Buster v. George W. Moore, Inc., 438 Mass. 635, 653 (2003), citing Solimene v. B. Grauel & Co., 399 Mass. 790, 799 (1987). Where the attorney-client privilege is concerned, however,

our review is more textured. On appeal from any decision on a privilege claim, we review the trial judge's rulings on questions of law de novo.(18) We generally review a judge's fact findings, at least after a bench trial, for clear error. See Mass. R. Civ. P. 52 (a), as amended, 423 Mass. 1402 (1996). Where, as here, we are dealing with a motion to compel and the motion judge's findings are based solely on documentary evidence, we do not accord them any special deference. Cf. Cavallaro v. United States, 284 F.3d 236, 245 (1st Cir. 2002) (under Federal law findings of motion judge on a documentary record reviewed for clear error). We review discretionary judgments for abuse of discretion. See Matter of a Grand Jury Investigation, 437 Mass. 340, 356 (2002) (evidentiary ruling where privilege at issue). Mixed questions of law and fact, such as whether there has been a waiver, generally receive de novo review. See 2 P.R. Rice, Attorney-Client Privilege in the United States § 11.36, at 234-236 & nn. 43-46 (2d ed. 1999) (surveying Federal jurisprudence and concluding that appellate courts generally review mixed questions of law and fact de novo).

We turn now to the merits, and consider first whether the Andersen memoranda are protected by the attorney-client privilege.

a. Attorney-client privilege. The classic formulation of the attorney-client privilege, which we indorse, is found in 8 J. Wigmore, Evidence § 2292 (McNaughton rev. ed. 1961): "(1) 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." See Suffolk Constr. Co. v. Division of Capital Asset Mgt., 449 Mass. 444, 448 (2007) (privilege protects "all confidential communications between a client and its attorney undertaken for the purpose of obtaining legal advice"). See generally Mass. G. Evid. § 502 (a) & (b), at 87-88 (2008-2009). The purpose of the privilege "is to enable clients to make full disclosure to legal counsel of all relevant facts . . . so that counsel may render fully informed legal advice," id. at 449, with the goal of "promot[ing] broader public interests in the observance of law and administration of justice." Id., quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). That important societal interest is, however, in tension "with society's need for full and complete disclosure" in adversary proceedings. Matter of a John Doe Grand Jury Investigation, 408 Mass. 480, 482 (1990), quoting In re Grand Jury Investigation, 723 F.2d 447, 451 (6th Cir. 1983), cert. denied, 467 U.S. 1246 (1984). In Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc., 449 Mass. 609, 615-616 (2007), quoting In re Grand Jury Investigation, supra, and Commonwealth v. Goldman, 395 Mass. 495, 502, cert. denied, 474 U.S. 906 (1985), we recently said:

"The attorney-client privilege is so highly valued that, while it may appear 'to frustrate the investigative or fact-finding process . . . [and] create[] an inherent tension with society's need for full and complete disclosure of all relevant evidence during implementation of the judicial process,'. . . it is acknowledged that the 'social good derived from the proper performance of the functions of lawyers acting for their clients . . . outweigh[s] the harm that may come from the suppression of the evidence.'"

While the tension is unquestionably resolved in favor of recognizing the privilege, we have consistently held that we construe the privilege narrowly, in part to protect the competing societal interest of the full disclosure of relevant evidence. See EMLICO, supra at 421 (attorney-client privilege "ordinarily strictly construed"); Judge Rotenberg Educ. Ctr., Inc. v. Commissioner of the Dep't of Mental Retardation (No. 1), 424 Mass. 430, 457 n.26 (1997) ("We must, however, construe the privilege narrowly"). A narrow construction of the privilege is particularly appropriate where, as here, information is being withheld from the government in a tax enforcement proceeding. Cf. Cavallaro v. United States, supra at 245, quoting United States v. Arthur Young & Co., 465 U.S. 805, 816 (1984) ("the doctrine of construing the privilege narrowly . . . has particular force in the context of IRS [Internal Revenue Service] investigations given the 'congressional policy choice in favor of disclosure of all information relevant to a legitimate IRS inquiry'").

As the party asserting the privilege, Comcast bears the burden of establishing that the attorney-client

privilege applies to the Andersen memoranda, a burden that "extends not only to a showing of the existence of the attorney-client relationship but to all other elements involved in the determination of the existence of the privilege, including: (1) the communications were received from a client during the course of the client's search for legal advice from the attorney in his or her capacity as such; (2) the communications were made in confidence; and (3) the privilege as to these communications has not been waived." EMLICO, supra at 421.

The commissioner argues that Comcast has not met its burden for three reasons. First, she claims, Comcast submitted no proof that the Andersen memoranda contain confidential communications from the client (US West) to Ottinger. Second, she asserts, the Andersen memoranda do not fall within the "derivative privilege" recognized in United States v. Kovel, 296 F.2d 918 (2d Cir. 1961) (Kovel). Last, she argues, the Superior Court judge improperly expanded the privilege where a narrow construction is required because Comcast is resisting a statutory demand for information.

As to the first point, the commissioner's argument appears to be based on an incorrect assertion that the privilege applies only where the underlying client information that is the subject of the communication is confidential in the sense that it is not public knowledge. Specifically, the commissioner argues that neither the requirement that US West sell Continental Cablevision's stake in TCG by the end of 1998 nor that US West was considering restructuring Continental Teleport were confidential. But information contained within a communication need not itself be confidential for the communication to be deemed privileged; rather the communication must be made in confidence -- that is, with the expectation that the communication will not be divulged. See 2 P.R. Rice, Attorney- Client Privilege in the United States § 6.2, at 9-11 (2d ed. 1999), and cases cited ("The confidentiality that must be expected by the client relates to the client's communication with an attorney. . . . It is not necessary that the information within the communication be confidential. The communication from the client to the attorney may contain nonconfidential information . . . . This is not relevant to the point of whether confidentiality can reasonably be expected in the communications that contain that information" [emphases in original]); Restatement (Third) of the Law Governing Lawyers § 71 (2000) ("A communication is in confidence . . . if, at the time and in the circumstances of the communication, the communicating person reasonably believes that no one will learn the contents of the communication except a privileged person . . . or another person with whom communications are protected under a similar privilege"); id. at comment b, at 544 ("The matter communicated need not itself be secret"). Here there is no question that Ottinger intended to keep the communications confidential, and he took steps to ensure that they were. In addition, as Comcast points out, in order to address appropriately the issues that Ottinger had identified, including exposure to litigation, Andersen received from counsel more than the publicly known fact that US West was required to dispose of the TCG stock.

Second, the commissioner challenges the judge's conclusion that the Andersen memoranda fall within the so-called derivative attorney-client privilege. Disclosing attorney-client communications to a third party, including an accountant, generally undermines the privilege. See United States v. Ackert, 169 F.3d 136, 139 (2d Cir. 1999) ("the attorney-client privilege generally applies only to communications between the attorney and the client"). There are exceptions. In Judge Friendly's landmark opinion, the United States Court of Appeals for the Second Circuit recognized that the privilege can shield communications of a third party employed to facilitate communication between the attorney and client and thereby assist the attorney in rendering legal advice to the client. Kovel, supra at 921-922. The exception can apply to accountants. Kovel, supra at 922 ("the presence of an accountant . . . while the client is relating a complicated tax story to the lawyer, ought not destroy the privilege" any more than would that of linguist who "translates" when client speaks language different from attorney). The reason, explained Judge Friendly, is because "the presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit." Id. The privilege does not apply unless the communication with the accountant is made "for the purpose of [the client] obtaining legal advice from the lawyer." Id. "If what is sought is not legal advice but only accounting service . . . or if the advice sought is the accountant's rather than the lawyer's, no privilege exists." Id. Now known as the Kovel doctrine or the derivative attorney-client privilege, see, e.g., 1 Epstein, The Attorney- Client Privilege and the Work-Product Doctrine 217-218 (5th ed. 2007), the doctrine has deep roots in Massachusetts jurisprudence. See Foster v.

Hall, 12 Pick. 89, 93 (1831) (privilege extends to communications with agents of attorney who are "necessary to secure and facilitate the communication between attorney and client"). See also Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc., 449 Mass. 609, 616 (2007) (privilege protects "statements made to or shared with necessary agents of the attorney or the client, including experts consulted for the purpose of facilitating the rendition of such advice").

The commissioner argues that Comcast has failed to carry its burden of establishing that the derivative privilege protects the Andersen memoranda for two reasons. First, she asserts, the derivative privilege applies only where the accountant's services are necessary to "translate" or "interpret" so that the attorney is able to understand the client's situation in order to provide the requested legal advice. Second, the commissioner argues, the derivative privilege does not apply because US West sought professional tax advice, not legal advice of an attorney, from Andersen. We agree that a derivative privilege does not apply to the Andersen memoranda.

If the accountant's presence is "necessary" for the "effective consultation" between client and attorney, the privilege attaches. Kovel, supra at 922. That was the logic of Kovel, and the weight of authority affirms its continuing vitality. See, e.g., United States v. Schwimmer, 892 F.2d 237, 243-244 (2d Cir. 1989) (privilege applies where attorney for criminal defendant charged with financial crimes retained accountant as necessary to analyze defendant's financial transactions); United States v. Judson, 322 F.2d 460, 462 (9th Cir. 1963) (Kovel exception applies where attorney advising client for assistance with IRS investigation hired accountant to prepare client's net worth statement). The "necessity" element means more than "just useful and convenient." Cavallaro v. United States, 284 F.3d 236, 249 (1st Cir. 2002), quoting 1 E.S. Epstein, supra at 187. "The involvement of the third party must be nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications." Cavallaro v. United States, supra. Thus courts have rejected claims that the derivative privilege applies where an attorney's ability to represent a client is improved, even substantially, by the assistance of an accountant. See United States v. Ackert, supra at 139 ("a 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"); In re G-I Holdings Inc., 218 F.R.D. 428, 434 (D.N.J. 2003) (Kovel "carefully limited the attorney-client privilege . . . to when the accountant functions as a 'translator' between the client and the attorney"); United States v. Chevron Texaco Corp., 241 F. Supp. 2d 1065, 1071 (N.D. Cal. 2002) ("The interpreter analogy and the statement that the accountant is needed to facilitate the client's consultation both strongly indicate that Kovel did not intend to extend the privilege beyond the situation in which an accountant was interpreting the client's otherwise privileged communications or data in order to enable the attorney to understand those communications or that client data" [emphasis in original]).(19) See also Black & Decker Corp. v. United States, 219 F.R.D. 87, 90 (D. Md. 2003) ("Cases decided after Kovel have narrowly interpreted this concept of derivative privilege"); Comment, Privileged Communications with Accountants: The Demise of United States v. Kovel, 86 Marq. L. Rev. 977, 978, 986 (2003) ("Over the past four decades, courts have repeatedly narrowed the holding in Kovel. As a result, there is very little protection left for communications with accountants"; communications from accountants that constitute "independent information and expertise for the attorney to use in representing his or her client" are not protected by attorney-client privilege).(20) We agree with the majority of courts that the Kovel doctrine applies only when the accountant's role is to clarify or facilitate communications between attorney and client.

It is apparent that the role of the Andersen partners was not necessary for effective communication between Ottinger and his client US West: Ottinger's affidavit and the Andersen memoranda demonstrate that Ottinger's purpose in consulting Andersen was to obtain advice about Massachusetts tax law, not to assist Ottinger with comprehending his client's information. Indeed Comcast is forthright in acknowledging that Andersen was retained "to provide [Ottinger] with information he needed to advise US West in its sale of the [TCG] stock." As Ottinger explained, he turned to the outside consultants who had experience in Massachusetts State tax issues "to help me interpret Massachusetts law." The Andersen memoranda reveal that an analysis of Massachusetts law is precisely what Ottinger received. We do not doubt, as the motion judge held, that the Andersen memoranda were "critical to [Ottinger's] ability to effectively represent his client." But we agree with those courts holding that the privilege does not apply where the accountant

provides "additional legal advice about complying with the tax code even where doing so would assist the attorney in advising the client." United States v. Chevron Texaco Corp., supra at 1072. See United States v. Ackert, supra at 139 ("a 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").

The decision in United States v. Ackert, supra, is instructive. In that case, the United States Court of Appeals for the Second Circuit held that conversations between a company's in-house counsel and an investment banker regarding the details of a transaction proposed by the investment banker, and the transaction's potential tax consequences, were not covered by the privilege, despite the assertion -- similar to the one made here by Comcast -- that "it was impossible for [counsel] to advise [the company] without these further contacts with [the investment banker]." Id. at 139. The communications were not privileged, even though the court assumed that counsel's communications with the investment banker "significantly assisted the attorney in giving his client legal advice about its tax situation." Id. Comcast argues that United States v. Ackert, supra, is distinguishable because in that case the investment banker proposed the transaction to the attorney, and "did not act as an advisor to legal counsel." While Comcast is correct that the investment banker initiated the discussions, see id. at 138, it misapprehends the nature of the communications that followed as counsel sought the advice of the investment banker to formulate his own legal views.

In In re G-I Holdings Inc., supra, the court reached a similar result on similar facts. There, as here, the company's attorneys retained an outside accountant "to explain tax concepts to in-house counsel so that in-house counsel could then render legal advice to [the company's] senior management." Id. at 435. The court rejected the argument that the attorney-client privilege should apply, despite the in-house attorney's assertion that the accountant's advice was "necessary in order for us to provide legal advice and counsel to the senior management." Id. In the court's view, neither the company nor its attorneys "needed [the accountant] to facilitate communications between them. They could communicate competently on their own." Id. at 436. We reach the same conclusion here.

The commissioner's second argument -- that US West sought tax advice, not legal advice from Andersen, and is therefore not privileged(21) -- relies in large part on United States v. Adlman, 68 F.3d 1495 (2d Cir. 1995) (Adlman I), S.C., 134 F.3d 1194 (2d Cir. 1998) (Adlman II). In Adlman I, in-house counsel asked an outside accountant to evaluate the "tax consequences" of a proposed corporate restructuring. Id. at 1497. The accountant produced a memorandum containing a "detailed legal analysis of likely IRS challenges" and "possible legal theories or strategies" that could be deployed in response. Adlman II, supra at 1195. Like Ottinger, the Adlman attorney claimed that the accountant's memorandum was prepared in order to assist him in rendering his advice to the company, and that he considered the memorandum "private and confidential." See Adlman I, supra at 1498. The court nevertheless determined that the Kovel doctrine did not shield the memorandum from disclosure. Id. at 1500. While the facts in Adlman I are somewhat different from the facts here -- as is inevitably the case -- we agree with and adopt the reasoning of the Adlman court in that case.(22)

We recognize the difficulty of drawing a line between "legal" advice and "tax or accounting" advice given to a client in order to resolve on which side of the line the Andersen advice to US West fell. Here, whether characterized as "accounting advice" or "legal analysis," it was advice provided by third parties in circumstances that we have determined is not covered by the privilege, derivative or otherwise, so we need not resolve the point. We reject Comcast's suggestion that our decision rejecting its claim of privilege for the Andersen memoranda will reduce the attorney-client privilege to a "meaningless protection." Colorado-based Ottinger was free to seek advice on Massachusetts tax law from a Massachusetts attorney, where the privilege would apply. Instead, he sought advice on Massachusetts tax law from Massachusetts accountants, where no privilege applies. If his actions left his client potentially at risk, that is "the inevitable consequence of having to reconcile the absence of a privilege for accountants and the effective operation of the privilege of client and lawyer under conditions where the lawyer needs outside help." Kovel, supra at 922.

b. Work product. Because the Andersen memoranda are not protected by the privilege, we now consider whether they are protected from disclosure by the work-product doctrine.

The work-product doctrine, drawn from Hickman v. Taylor, 329 U.S. 495 (1947), functions "to enhance the vitality of an adversary system of litigation by insulating counsel's work from intrusions, inferences, or borrowings by other parties." Ward v. Peabody, 380 Mass. 805, 817 (1980), citing Hickman v. Taylor, supra at 511, and Developments in the Law -- Discovery, 74 Harv. L. Rev. 940, 1028-1029 (1961). The purpose of the doctrine is to establish a "zone of privacy for strategic litigation planning . . . to prevent one party from piggybacking on the adversary's preparation." Adlman I, supra at 1501. While the attorney- client privilege shields communications between attorney and client (and in some circumstances third parties), the work-product doctrine protects an attorney's written materials and "mental impressions." Hickman v. Taylor, supra at 510.

The commissioner argues that the language of G. L. c. 62C, § 70, see note 4, supra, requires that we examine the applicability of the doctrine in this case under the rules of criminal procedure, specifically Mass. R. Crim. P. 14 (a) (5), as appearing in 442 Mass. 1518 (2004), rather than under the broader discovery rule pertaining to civil matters, Mass. R. Civ. P. 26 (b) (3), 365 Mass. 772 (1974). We decline to do so because the claim has been waived, as we now explain.

In the Superior Court, the commissioner did not make this argument in her motion to compel or at the hearing before the judge on the motion. She made the argument for the first time in a motion to reconsider the judge's order filed some fourteen months later. The motion judge ruled that the issue could have been raised in the motion to compel, and was waived. See Commonwealth v. Gilday, 409 Mass. 45, 46-47 n.3 (1991) (motion for reconsideration is not "the appropriate place to raise new arguments inspired by a loss before the motion judge"); Publishers Resource, Inc. v. Walker-Davis Publ., Inc., 762 F.2d 557, 561 (7th Cir. 1985) (motion for reconsideration should not serve as occasion to tender new legal theories for first time). It was well within the judge's discretion not to consider the commissioner's new argument on the motion for reconsideration. See Liberty Sq. Dev. Trust v. Worcester, 441 Mass. 605, 611 (2004) (where party filed "amended" motion and motion for "reconsideration" seven weeks after action on original motion, judge not required to entertain party's "belated efforts to improve on its original motion;" no error in the denial of motion that "merely seeks, as this one did, a 'second bite at the apple'"); Clamp-All Corp. v. Foresta, 53 Mass. App. Ct. 795, 807 (2002) (judge did not abuse discretion in denying motion for reconsideration where party was "a sophisticated litigant" and "failed to offer any substantial reason" why it had not filed affidavit "at the time it filed its original motion"); Anderson v. Cornejo, 199 F.R.D. 228, 252-253 (N.D. Ill. 2000), and cases cited. See also Int'l Strategies Group, Ltd. v. Greenberg Traurig, LLP, 482 F.3d 1, 6 (1st Cir. 2007) ("We review a district court's denial of a motion for reconsideration or relief from judgment for abuse of discretion").

The commissioner argues that here, unlike Commonwealth v. Gilday, supra, she sought reconsideration of an interlocutory order rather than a final judgment, and waiver therefore does not apply. We do not agree. The commissioner cites no authority supporting her claim. In any event, motions to reconsider an interlocutory order are themselves not "appropriate vehicles to advance . . . new legal theories not argued before the ruling." Zurich Capital Mkts. Inc. v. Coglianese, 383 F. Supp. 2d 1041, 1045 (N.D. Ill. 2005). Certainly a judge may exercise discretion and reconsider an interlocutory order when, for example, all parties and all issues will continue to be litigated. See Anderson v. Cornejo, supra at 253. But flexibility is not necessarily warranted here. The motion judge's order denying the commissioner's motion to compel was "interlocutory" only in the sense that it was not appealable until final judgment entered. The order, however, was a ruling on the only relief sought in the commissioner's complaint, production of withheld documents. The judge's order cannot be fairly characterized as an "order that relates to some intermediate matter in the case." Black's Law Dictionary 1130 (8th ed. 2004) (defining "interlocutory order").(23)

We therefore address Comcast's work-product claims under the rules applicable to civil proceedings, as did the motion judge. The Massachusetts work-product doctrine is codified in rule 26 (b) (3).(24) By its terms the rule protects a client's nonlawyer representatives, protecting from discovery documents prepared by a party's representative "in anticipation of litigation." The protection is qualified, and can be overcome if the party seeking discovery demonstrates "substantial need of the materials" and that it is "unable without undue hardship to obtain the substantial equivalent of the materials by other means." There is a further limitation: the court is 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." This so-called "opinion" work product is afforded greater protection than "fact" work product. See, e.g., In re Grand Jury Subpoena, 220 F.R.D. 130, 145 (D. Mass. 2004).

Courts have disagreed over whether the civil rule protection for opinion work product is "absolute" or merely "heightened." See id. (collecting cases). Even if not absolute, disclosure is appropriate only in rare or "extremely unusual" circumstances. See Reporters' Notes to Mass. R. Civ. P. 26 (b) (3), Mass. Ann. Laws, Rules of Civil Procedure, at 545 (LexisNexis 2008) ("discovery, except in extremely unusual circumstances, may not be had of an attorney's mental impressions and similar intellectual work-product. This protection applies also to 'other representative[s] of a party,' provided their work relates to litigation"); Adlman II, supra at 1204 ("at a minimum . . . a highly persuasive showing" is needed to overcome protection for opinion work product); In re Grand Jury Investigation, 599 F.2d 1224, 1231 (3d Cir. 1979) (interview memoranda "will be discoverable only in a 'rare situation'"). We need not decide here whether protection for opinion work product is absolute because we conclude that the commissioner has not made a "highly persuasive" showing that the circumstances in this case are so unusual that protection for opinion work product should be denied on a lower standard. See discussion, infra.

Comcast bears the burden of establishing that the Andersen memoranda were prepared in anticipation of litigation. See Colonial Gas Co. v. Aetna Cas. & Sur. Co., 144 F.R.D. 600, 605 (D. Mass. 1992). If that burden is met, the burden shifts to the commissioner to demonstrate a substantial need for the memoranda and that she cannot obtain the substantial equivalent of the memoranda without undue hardship. See United States v. Textron Inc. & Subsidiaries, 507 F. Supp. 2d 138, 149 (D.R.I. 2007), aff'd in part, F. 3d , [No. 07-2631] (1st Cir. 2009) ("The burden of establishing 'substantial need' rests on the party seeking to overcome the privilege"). Moreover, if the Andersen memoranda are "opinion" work product, the commissioner must make, at a minimum, a "far stronger showing of necessity and unavailability by other means." Upjohn Co. v. United States, 449 U.S. 383, 402 (1981).

The commissioner does not contest that the Andersen partners qualify as a "party's representative[s]" under rule 26 (b) (3). We therefore must determine the scope of the requirement of rule 26 (b) (3) that the Andersen memoranda be prepared "in anticipation of litigation" in order to qualify for work-product protection. Specifically, in this case we must determine whether work-product protection is applicable "to a litigation analysis prepared by a party or its representative in order to inform a business decision which turns on the party's assessment of the likely outcome of litigation expected to result from the transaction." Adlman II, supra at 1197.

In Adlman II, supra at 1198, the court noted that the phrase "in anticipation of litigation" has given rise to a range of views by courts and commentators, and that "two tests had developed" as to documents that, although prepared because of expected litigation, are intended to inform a business decision influenced by the prospects of the litigation. The court then engaged in a lengthy discussion of the two tests, viz., (1) whether the documents "are prepared 'primarily or exclusively to assist in litigation' -- a formulation that would potentially exclude documents containing analysis of expected litigation, if their primary, ultimate, or exclusive purpose is to assist in making the business decision" and (2) whether the documents "were prepared 'because of' existing or expected litigation -- a formulation that would include such documents, despite the fact that their purpose is not to 'assist in' litigation." Id. We need not repeat here the court's exploration of the contours of the two tests. It is sufficient to say that we agree with both the reasoning and the conclusion that the latter formulation ("because of" existing or expected litigation) is the correct test.(25)

That test is "consistent with both the literal terms [of the rule] and the purposes" of the work-product doctrine, id., both of which "suggest strongly that work-product protection should not be denied to a document that analyzes expected litigation merely because it is prepared to assist in a business decision." Id. at 1199. The "because of" test "appropriately focuses on both what should be eligible for the [r]ule's protection and what should not." Id. at 1203. Thus, a document is within the scope of the rule if, "in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared because of the prospect of litigation". Adlman II, supra at 1202, quoting 8 C.A. Wright, A.R. Miller, & R.L. Marcus, Federal Practice and Procedure § 2024, at 343 (1994) (Wright & Miller). (26) That test is consistent with our own jurisprudence. See Ward v. Peabody, 380 Mass. 805, 817 (1980) (preparation for litigation "includes litigation which, although not already on foot, is to be reasonably anticipated in the near future").(27)

We now apply the "because of" test to the facts in this case.(28) The commissioner argues that the Andersen memoranda do not meet that test because they were prepared to "avoid the prospect of litigation," citing In re Grand Jury Proceedings, No. M-11-189 (S.D.N.Y. Oct. 3, 2001),(29) and because, in her view, Ottinger's "conclusory assertions fall far short of demonstrating a specific prospect of litigation." We disagree with the commissioner on both points. As Adlman II, supra at 1197, makes clear, a litigation analysis prepared so that a party can make an informed business decision is afforded the protections of the work-product doctrine. In our own review of the circumstances of Andersen's retention, and on review of the Andersen memoranda, see Adlman II, supra at 1204, we conclude that the documents at issue "can fairly be said to have been prepared or obtained because of the prospect of litigation." Wright & Miller, supra. As Ottinger's affidavit makes clear, his concern focused on the reasonable possibility that the department would challenge any nonpayment of Massachusetts State taxes in light of the substantial capital gains realized by US West on the divestment of the TCG shares. Thus, Ottinger requested the Andersen partners to discuss "the pros and cons of the various planning opportunities and the attendant litigation risks." What the Andersen partners gave Ottinger was an analysis prepared "in order to inform a business decision which turns on the party's assessment of the likely outcome of litigation expected to result from the transaction." Adlman II, supra at 1197.(30)

We have little doubt that US West had "the prospect of litigation in mind when it directed the preparation of the memorandum." Id. at 1204. We agree with the motion judge who noted that the Andersen memoranda are "a detailed analysis of Massachusetts tax law," and an outline of the "feasibility of the potential restructuring in light of applicable Massachusetts law and the potential for [department] litigation." Stated differently, the Andersen memoranda or their substantial equivalent would not have been prepared "irrespective of the prospect of litigation." United States v. Textron Inc. & Subsidiaries, F.3d , , [No. 07-2631] (1st Cir. 2009) (work product protects tax accrual workpapers where "function of the documents was to analyze litigation"). They were created "because of" the reasonable possibility of litigation with the department. See Ward v. Peabody, 380 Mass. 805, 817 (1980). See also Long-Term Capital Holdings vs. United States, No. 3:01 CV 1290 (JBA) (D. Conn. Oct. 30, 2002) (concluding that work-product doctrine was applicable based on facts "remarkably similar" to those in Adlman II).

We also agree with the judge that the Andersen memoranda constitute opinion work product. The memoranda contain the "mental impressions, conclusions, opinions, or legal theories" of its authors, and the commissioner does not appear to contend otherwise. Mass. R. Civ. P. 26 (b) (3). Here, the commissioner has failed to meet her burden of demonstrating that these circumstances are so "extremely unusual" that they compel overcoming the greater protection afforded opinion work product. See Reporter's Notes, Mass. R. Civ. P. 26 (b) (3), Mass. Ann. Laws, Rules of Civil Procedure, at 545 (LexisNexis 2008). Although the commissioner asserts in conclusory fashion that substantially equivalent information is not available elsewhere, she has not demonstrated that information about the business reasons for the reorganization of Continental Teleport is not available from US West officials. This is not the "singular" instance in which disclosure of opinion work product is warranted. See Ward v. Peabody, supra at 818.

4. Conclusion. For all of these reasons we conclude that the Andersen memoranda are protected from

disclosure by the work- product doctrine.

Judgment affirmed.

footnotes

(1) Continental Teleport, Inc., also known as Continental Holding Company.

(2) Because the present Commissioner is a woman, we shall use the female pronoun.

(3) Through a series of mergers not relevant to this appeal, Comcast Corporation (Comcast) is the successor company to AT&T Broadband, which in turn was the successor company to MediaOne Group, Inc. (MediaOne), which in turn was the successor company to U S West, Inc. (US West). US West entered into the antitrust consent decree with the United States that is the genesis of the events that gave rise to the Massachusetts Department of Revenue's (department's) audit examination.

(4) General Laws c. 62C, § 70, provides: "The commissioner may take testimony and proofs under oath with reference to any matter within the official purview of the department of revenue, and in connection therewith may issue summonses and require the attendance and testimony of witnesses and the production of

books, papers, records, and other data. Such summonses shall be served in the same manner as summonses for witnesses in criminal cases issued on behalf of the commonwealth, and all provisions of law relative to summonses in such cases shall, so far as applicable, apply to summonses issued hereunder. Any justice of the supreme judicial court or of the superior court may, upon the application of the commissioner, compel the attendance of witnesses, the production of books, papers, records, and other data, and the giving of testimony before the commissioner in the same manner and to the same extent as before the said courts."

(5) Comcast claims that throughout the lengthy response process it informed the Commissioner of Revenue (commissioner) that some responsive documents were protected from production by the attorney-client privilege and the work-product doctrine, and it provided the commissioner with a privilege log of all of the withheld documents. Comcast later produced some of the documents as not privileged. Comcast also provided redacted versions of some documents on the ground that the redactions were of information not relevant to the audit examination or the summons. The redacted documents and some of the documents withheld as privileged are no longer at issue in this appeal. See note 14, infra.

(6) We acknowledge the amicus brief filed by the Multistate Tax Commission in support of the commissioner and by The New England Cable & Telecommunications Association, Inc., in support of Comcast.

(7) In addition to its business as a telecommunications service provider, US West owned multimedia, telecommunications, domestic directory, and communication businesses.

(8) A relatively small number of TCG shares had been sold by Continental Teleport prior to its reorganization into Continental Holding. See note 9, infra.

(9) The details of the TCG share transactions are as follows:

Date of Sale	No. of TCG Shares	Net Proceeds	Gain
1/31/97	75,000	2,354,625	1,154,625
2/21/97	4,000,000	117,000,000	76,712,926
6/12/97	2,000,000	57,750,000	37,606,463
9/15/97	1,840,000	67,850,000	49,317,946
11/30/97	9,945,592	432,265,698	332,095,997

(10) According to the commissioner, under G. L. c. 62, § 8 (a), as in effect in 1997, a Massachusetts corporate trust was treated as an individual rather than a corporation for income and capital gains purposes. See G. L. c. 62, § 8 (a), as amended through St. 1994, c. 195, §§ 25, 26. Pursuant to G. L. c. 62, § 8 (b), a corporate trust that qualified as a "holding company" was exempt from tax.

(11) The commissioner claims that Comcast owes the Commonwealth "an estimated $52 million" in corporate excise taxes. Comcast responds that the claim is unsubstantiated, ignores Continental Teleport's reorganization as a Massachusetts business trust, and does not take into account facts indicating that Continental Teleport's commercial domicil shifted to Colorado immediately on the November 15, 1996, merger of Continental Cablevision and US West. Resolution of this dispute is not part of this appeal.

(12) All of Ottinger's statements are taken from an affidavit filed in opposition to the commissioner's motion to compel.

(13) Although Michael E. Porter, III, was licensed to practice law, he was precluded from practicing law while employed by Andersen. See S.J.C. Rule 3:07, Canon 3, DR 3-103 (A), as appearing in 382 Mass. 777 (1981). He testified at a deposition taken by the department, as did Edward Gartland, that he provided tax and planning advice, and not legal advice, to Ottinger.

(14) The commissioner originally sought the production of all documents identified by Comcast on its privilege log. See note 5, supra. These included memoranda and letters from various

law firms and communications from US West's in-house counsel to other US West attorneys. The commissioner contests here only the judge's determination that the attorney-client privilege or work-product doctrine applied to the Andersen memoranda. As for these, there appears to be some confusion as to the number of copies of the Andersen memoranda sought by the commissioner. In her brief and at oral argument, the commissioner referred to four documents. As Comcast makes no claim that any of the Andersen memoranda should be treated differently from the others, our ruling applies to all copies of the memorandum and any drafts thereof.

(15) The six documents are identified as follows. One document (2CCI 768-784) is identified as the first draft of the Andersen memorandum. It is dated February 1, 1997, and attached to a facsimile transmission cover sheet dated February 12, 1997, and addressed from Ottinger to Jennifer Taub, whom Ottinger identifies as, "Executive Director of Tax at Continental Cablevision." Two documents (2CCI 436-450 and 2CCI 451-465), dated February 7, 1997, are identical to each other and appear to be the second draft of the memorandum. Two further documents (2CCI 001-14 and 2CCI 033-46) are identical to the second drafts of the memorandum, but each is missing its first page. These two documents are also dated February 7, 1997. The sixth document (2CCI 466-482) is the final version of the memorandum. It is dated February 7, 1997, and is attached to a cover letter dated May 14, 1997, from Andersen and directed to James A. Mohler, director of State and local taxes at US West. For convenience we shall refer to the six documents collectively as the Andersen memoranda.

(16) The commissioner asserts that, if there was no "legitimate business or economic purpose" for the transactions, she could invoke the "step transaction doctrine," a rule that, "for purposes of taxation, looks to the substance of a transaction over its form." General Mills, Inc. v. Commissioner of Revenue, 440 Mass. 154, 172 (2003). The step transaction doctrine "treats a series of formally separate 'steps' as a single transaction if such steps are in substance integrated, interdependent, and focused toward a particular result." Id., quoting Penrod v. Commissioner, 88 T.C. 1415, 1428 (1987). "If an intermediate step has no legitimate business purpose beyond tax avoidance, it may be collapsed for tax purposes under the step transaction doctrine." General Mills, Inc. v. Commissioner of Revenue, supra. In contrast, "if each such step demonstrates independent economic significance, is not subject to attack as a sham, and was undertaken for valid business purposes and not mere avoidance of taxes," the step transaction doctrine does not apply. Commissioner of Revenue v. Dupee, 423 Mass. 617, 624 (1996), quoting Rev. Rul. 79-250, 1979-2 C.B. 156. Accordingly, the commissioner contends, the absence of any legitimate business purpose for the reorganization of Continental Teleport into Continental Holding would be "highly relevant" to the commissioner's ability to invoke the step transaction doctrine to disregard the form of the transaction.

(17) The department issued the first request (IDR) on July 13, 2001; additional IDRs were issued on April 24, 2002, and August 12, 2003.

(18) Although we have not said so explicitly, we have in effect undertaken a de novo review of, for example, whether the crime- fraud exception to the attorney-client privilege applied in Massachusetts, see Purcell v. District Attorney for the Suffolk Dist., 424 Mass. 109, 112-113 (1997), whether the disclosure of a document by an anonymous source constituted a waiver of the privilege, see Matter of the Reorganization of Elec. Mut. Liab. Ins. Co. Ltd. (Bermuda), 425 Mass. 419, 422-423 (1997), or whether the common interest doctrine as an exception to waiver of the attorney-client privilege should be recognized in Massachusetts, see Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc., 449 Mass. 609, 612-617 (2007).

(19) See Allied Irish Banks v. Bank of Am., N.A., 240 F.R.D. 96, 104-105 (S.D.N.Y. 2007), citing United States v. Kovel, 296 F.2d 918 (2d Cir. 1961) (Kovel). (Kovel doctrine does not apply where third party was

not acting as translator or interpreter of client communications).

(20) A few courts have applied the Kovel doctrine with less rigidity, see, e.g., In re Grand Jury Subpoenas, 265 F. Supp. 2d 321, 331 (S.D.N.Y. 2003) (privilege protects confidential communications between attorneys and public relations consultants hired by attorneys to assist in dealing with media when communications were directed at handling client's legal problems); Aull v. Calvacade Pension Plan, 185 F.R.D. 618, 629 (D. Colo. 1998) (communications among accountant, client, and attorney are protected if they are "reasonably related" to purpose of client obtaining confidential legal advice from

attorney), but they are in the minority.

(21) The commissioner points in part to the deposition testimony of Porter and Gartland, the authors of the Andersen memoranda, that they gave tax -- not legal -- advice to Ottinger, see note 13, supra, as well as to Andersen's invoices to US West, that described the services provided as "professional tax services rendered in connection with . . . [r]esearch and state income tax planning related to Massachusetts Trust" and "[r] esearch, consultation, and memorandum regarding state tax issues involved in formation of Massachusetts corporate trust . . . ."

(22) In United States v. Adlman, 68 F.3d 1495, 1500 (2d Cir. 1995) (Adlman I), S.C., 134 F.3d 1194 (2d Cir. 1998) (Adlman II) the court noted that the accounting firm in that case "sent a summary of its recommendations and conclusions directly to" the corporation's management, and that the firm was "regularly employed" by the corporation to furnish, among other things, auditing services. There is similar evidence in this record. The Andersen memoranda was sent directly from Andersen to James A. Mohler, the director of State and local taxes at US West, see note 15, supra; and Andersen was the independent auditor for US West for the 1996 and 1997 tax years.

(23) Our ruling is buttressed by the observation that the commissioner was not diligent in her pursuit of this claim. The judge's order denying the commissioner's motion to compel entered on August 29, 2005. That order granted the commissioner leave to submit a supplemental filing addressing her "substantial need" for the memoranda and her inability to obtain substantially equivalent information "without undue hardship," the burden- shifting terms contained in Mass. R. Civ. P. 26 (b) (3), 365 Mass. 772 (1974). There was no filing by the commissioner. Some nine months later, on June 9, 2006, Comcast's motion to dismiss the complaint for failure of the commissioner to respond was denied, and the commissioner was granted sixty additional days to respond. When the commissioner belatedly moved, on August 4, 2006, for reconsideration of the judge's original ruling, her motion did not conform to the Superior Court Rules. On October 25, 2006, nearly fourteen months after the judge ruled that the Andersen memoranda were protected from disclosure by the work- product doctrine, the commissioner moved for reconsideration, raising for the first time her claim that the criminal rules apply. Reconsideration by the motion judge was not warranted in these circumstances. See Liberty Sq. Dev. Trust v. Worcester, 441 Mass. 605, 610-611 (2004) (motions filed seven weeks after action on original motion were "untimely"); Anderson v. Cornejo, 199 F.R.D. 228, 253 (N.D. Ill. 2000) ("four-month delay in bringing the reconsideration motion goes against considering new arguments").

As to the appeal, on October 30, 2008, five days before oral argument was scheduled before this court, the commissioner submitted a letter purporting to apprise the court of "pertinent and significant authorities" related to her claim that the criminal rule should apply. See Mass. R. A. P. 16 (l), as appearing in 386 Mass. 1247 (1982). The cited authorities were all available at the time the commissioner filed her brief and reply brief; it was an attempt at "reargument in the disguise of a supplementary citation" that rule 16 (l) "does not authorize." Commonwealth v. Siano, 52 Mass. App. Ct. 912, 913 n.1 (2001), quoting Reporters' Notes to Mass. R. A. P. 16 (1), Mass. Ann. Laws, Rules of Appellate Procedure, at 64 (Lexis 2000). We do not consider those arguments.

(24) Rule 26 (b) (3) provides in relevant part that "a party may obtain discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

(25) The analysis in United States v. Adlman, 134 F.3d 1194, (1998) (2d Cir. 1998) (Adlman II), is based on Fed. R. Civ. P. 26 (b) (3) and Federal cases construing that Federal rule. See Aldman II, supra. Rule 26 (b) (3) of the Massachusetts Rules of Civil Procedure is identical in all material respects to the Federal rule. It is therefore appropriate to look for guidance to Federal interpretations of our rule. See Rollins Envtl. Servs., Inc. v. Superior Court, 368 Mass. 174, 179-180 (1975) ("This court having adopted comprehensive rules of civil procedure in substantially the same form as the earlier Federal Rules of Civil Procedure, the adjudged construction theretofore given to the Federal rules is to be given to our rules, absent compelling reasons to the contrary or significant differences in content").

(26) Prior to Adlman II, supra, five other Circuit Courts of the United States Court of Appeals had cited this formulation, id. at 1202, citing 8 C.A. Wright, A.R. Miller, and R.L. Marcus, Federal Practice and Procedure § 2024, at 343 (1994) (Wright & Miller), and the First Circuit has since adopted it. See State v. United States Dep't of the Interior, 298 F.3d 60, 68 (1st Cir. 2002).

(27) The commissioner does not dispute, and indeed assumes, that the test under the Massachusetts Rules of Civil Procedure should be the "because of" standard.

(28) The judge in the Superior Court appears to have employed a test less favorable to Comcast. In his discussion of the requirement that a document be prepared in "anticipation of litigation," the judge, citing Meszar vs. Horan, Worcester Superior Court Civ. Action No. 99-0788 B (Nov. 16, 1999), stated that the document must be "actually prepared in anticipation of some specific litigation," and that "the determinative question is whether the prospect of litigation was the primary motivating purpose behind the creation of the document." This closely mirrors the first test discussed in Adlman II, supra at 1198- 1202, the "primarily to assist in litigation" test, that we have rejected. Because we are in as good a position as the motion judge to assess the evidence, which is entirely documentary, under the correct "because of" formulation, we need not remand the case to the Superior Court. Cf. Adlman II, supra at 1203- 1204, quoting Wright & Miller, supra at 343 (remanding case to trial court "to reconsider the issue under the Wright & Miller test of whether 'the document can fairly be said to have been prepared . . . because of the prospect of litigation'").

(29) The commissioner's reliance on In re Grand Jury Proceedings, No. M-11-189 (S.D.N.Y. Oct. 3, 2001), is misplaced. That case relied in turn on In re Derienzo, No. 5-96-01186 (Bankr. M.D. Pa. April 28, 1988), where the court rejected a "blanket assertion" that work-product protection should extend to "all the actions taken" to comply with the law. There has been no blanket assertion here. In addition, contrary to the commissioner's position here, the Derienzo court then distinguished and protected documents containing "legal analysis going to the heart of rendering legal opinions and advice to a client" under the attorney-client privilege, including "some of the documents authored by a non-attorney."

(30) The commissioner's "avoidance of litigation" test is unpersuasive for another reason: "there is no rule that bars application of work product protection to documents created prior to the event giving rise to litigation." Adlman I, supra at 1501.

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