

SECOND CIRCUIT REVIEW

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Compelling an Attorney's Testimony in a Grand Jury Proceeding

THE UNITED STATES Court of Appeals for the Second Circuit recently issued a significant decision that explored the circumstances under which an attorney can be compelled to testify before a grand jury regarding statements made by the attorney's former client to government officials in the presence of the attorney.

In *In re Grand Jury Subpoena Dated October 22, 2001*,¹ the Second Circuit, in an opinion written by Judge Pierre N. Leval and joined by Judge Guido Calabresi and Judge Sidney H. Stein (United States District Court for the Southern District of New York, sitting by designation), reversed the district court's denial of a motion to quash a subpoena that directed an attorney to testify before a grand jury and ordered the district court to grant the motion to quash. In reversing the district court's denial of the motion, the Second Circuit held that, under certain circumstances, the work-product doctrine bars the compulsion of an attorney's testimony regarding a former client's statements to government officials made in the presence of the attorney. The court suggested, however, that there may be an exception to this rule where the attorney's testimony would be used by the government solely to show that the client committed a crime in the presence of the attorney.

The Work-Product Doctrine

The work product doctrine provides a qualified protection from discovery for otherwise discoverable material prepared in anticipation of litigation by an attorney or the attorney's agent.² The doctrine is



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codified in Fed. R. Civ. P. 26(b)(3), which provides, in pertinent part, that "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." The work product doctrine is not absolute, however, and may be overcome by a showing of substantial need and undue hardship.³

In 1997, two Internal Revenue Service agents interviewed the general counsel of a company. At this interview, the general counsel was accompanied by a partner and an associate of the ABC law firm (a fictitious name used to preserve the secrecy of the grand jury proceedings). At the time of the interview, the ABC law firm represented the company, its general counsel and other company employees. The ABC law firm dropped the company as a client after the interview, but continued to represent one of its principals. Subsequent to the 1997 interview, one of the IRS agents passed away and the associate left the ABC law firm to work at another law firm.

The United States Attorney for the Southern District of New York currently is investigating the company. As part of that investigation, the government caused a subpoena to be issued to the former ABC law firm associate to compel her testimony before the grand jury regarding the 1997 interview. Specifically, the government informed the associate that "the questioning would be limited to a factual report of what

her client [the company's general counsel] said in her presence to [the IRS agents] during the course of the 1997 interview."⁴

The general counsel, the ABC law firm and the associate moved to quash the subpoena. They argued that the government's attempt to compel the associate's testimony regarding her recollection of her client's statements during the course of her representation of her client would violate the work product doctrine, as outlined in *Hickman v. Taylor*⁵ and Fed. R. Civ. P. 26(b)(3). The government opposed the motion, arguing that the work product doctrine does not cover a client's statements made in the presence of government agents and, alternatively, that the government demonstrated "substantial need" for the associate's testimony. The government's brief to the district court asserted that the associate's testimony would be used solely to support a charge that, during the 1997 interview, the general counsel committed criminal offenses by making false statements to government officials.

The district court held that the work product doctrine did not apply to the associate's testimony and denied the motion to quash the subpoena. The Second Circuit noted that, based on the government's presentation to the district court, the district court "would have reasonably believed it was ruling on whether the work product privilege could be used to bar an attorney's testimony, limited to her observation of her client's commission of the crime of making false statements."⁶ The Second Circuit suggested that the district court's rationale in denying the motion presumably was based on the concept that the work product doctrine does not operate to bar access to an attorney's observation of her client's commission of a criminal act.⁷

The Second Circuit's Decision

The Second Circuit observed that the

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government's briefs on appeal offered a different view of how the government intended to use the associate's testimony. In its appellate briefs, the government suggested that the general counsel was a participant in the fraud allegedly perpetrated by the company — the same fraud that is the focus of the grand jury investigation and that was the precise subject of the 1997 interview. At oral argument, the government admitted that it intended to use the associate's testimony not only to support a charge that the general counsel made false statements to government officials in the associate's presence, but also to support charges that the general counsel was an active participant in the fraud committed by the company.

The Second Circuit concluded that the work product doctrine applied differently depending on the government's proposed use of the testimony. The court noted: "It is one thing for a client to recognize that if he commits a crime in his attorney's presence, the attorney may be compelled to testify to the criminal acts she witnessed. It seems to us quite different for the client to accept that if he hires an attorney to represent him with respect to his past commission of a crime, the attorney may be compelled to testify against him as to admissions (or denials) he made in his attorney's presence that tend to prove his guilt with respect to that past crime."⁸

The court held that the work product doctrine clearly barred the compulsion of the attorney's testimony to the extent that it would be used to prove the client's alleged guilt with respect to the past crime. It found that such a use falls squarely within the black letter definition of work product. The court also found that, as a matter of policy, to allow the compulsion of such testimony would infringe on the "zone of privacy" of an attorney's representation of a client in anticipation of litigation. The court stated: "For the attorney to be subpoenaed to testify to the observations made in the course of [the attorney's] preparation [to represent a client in anticipation of litigation] in order to help the putative adversary prove the offense as to which the attorney was providing representation would do substantial injury to the values that justify the work product doctrine." As such, the court ordered the district court to grant the motion to quash the subpoena.

'Passing Observations'

The court noted, however, that it was not ruling on the question of whether the government could issue a new subpoena to compel the associate to appear in front of a different grand jury — one that was not investigating the general counsel's alleged fraudulent activity — to determine whether the general counsel made false statements in the 1997 interview in violation of federal law. Although not ruling on this issue, the court, however, made some "passing observations." First, the court took issue with the district court's view that the work product doctrine did not apply to facts, as opposed to opinions and strategies, finding such a statement to be overbroad. It noted, for example, that the work product doctrine applies to preparation by parties other than lawyers, including investigators seeking factual information. The work product doctrine, thus, would bar the government from issuing a subpoena to compel the investigator from appearing before a grand jury to testify as to the facts he discovered in his investigation. The court cautioned that "analysis should proceed cautiously, case by case."⁹

Further, the court found problematic the government's argument that it demonstrated "substantial need" for the associate's testimony. The government argued that, because one of the two IRS agents that had interviewed the general counsel had subsequently passed away, a trial of the general counsel on charges that he made false statements to government officials would amount to a swearing contest between the surviving IRS agent and the general counsel as to what the general counsel said or did not say in the 1997 interview. The government contended that the associate's testimony could corroborate the agent's testimony.

The court noted that, regardless of the merits of this argument, the government's argument was not relevant to the grand jury proceeding because the government was not required to prevail in a swearing contest at the grand jury proceeding. Rather, the government need only show probable cause in such proceedings. The court found that probable cause could be easily established under these circumstances by the testimony

of the IRS agent alone. The court speculated that perhaps the government's "substantial need" is based on its need to call the associate to testify at trial to break the swearing contest between the IRS agent and the defendant-general counsel and, therefore, its need to preview the associate's testimony by first calling her to testify in front of the grand jury. The court, however, declined to express a view on whether such an argument would qualify as a "substantial need."

The Second Circuit's suggestion that the protection afforded by the work product doctrine may depend on the government's proposed use of the testimony seems to be a departure from a traditional work product analysis — which turns on the nature of the material sought. Here, the associate was present at the 1997 interview in her capacity as representative of her then-client. Thus, her memory of her client's statements at the interview (presumably aided by her notes of the interview) may well be intertwined with her mental impressions, conclusions and opinions of those statements, which would appear to be covered by the work product doctrine. In such a case, it is difficult to imagine that the attorney — approximately five years after the interview — could provide an accurate recollection of her former client's statements without a risk of disclosing material covered by the work product doctrine. The court's decision appears to add a new element to the analysis of whether such testimony can be compelled — i.e., the proposed purpose for the testimony. It will be interesting to see whether district courts in the Circuit adopt the court's new approach to applying the work product doctrine.

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 (1) Nos. 01-6250, 01-6251, 01-6252, 2002 WL 253828 (2d Cir. Feb. 21, 2002).

(2) *Hickman v. Taylor*, 329 U.S. 495 (1947).

(3) *United States v. Nobles*, 422 U.S. 225 (1975).

(4) 2002 WL 253828, at *1.

(5) 329 U.S. 495 (1947).

(6) 2002 WL 253828, at *2.

(7) *In re Grand Jury Subpoena Dated January 4, 1984*, 750 F.2d 223, 224 (2d Cir. 1984) ("Actual observation of criminal activity is not subject to a claim of privilege.")

(8) 2002 WL 253828, at *3.

(9) 2002 WL 253828, at *4.