

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

FILED IN DISTRICT COURT
OKLAHOMA COUNTY

MAR - 7 2013

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Oklahoma Department of Securities)
ex rel. Irving L. Faught,)
Administrator,)
)
Plaintiff,)
)
v.)
)
Trinity Fund, L.L.C. and)
Robert Arrowood,)
)
Defendants.)

Case No. CJ-2012-6164

DEPARTMENT'S RESPONSE TO
DEFENDANT ROBERT ARROWOOD'S
MOTION TO COMPEL

The Oklahoma Department of Securities ("Department") submits the following response to Defendant Robert Arrowood's *Motion to Compel and Brief in Support* ("Motion") and asks that the Court deny the Motion.

Background

On November 27, 2012, Defendant Arrowood served upon the Department certain *Interrogatories and Requests for Production of Documents*. In reply, the Department provided Defendant Arrowood with all requested documents other than those it considered privileged or otherwise exempted from discovery. The Department provided Defendant with a list of withheld documents, including a description of each document, its present custodian and the basis upon which each document was being withheld.

Defendant Arrowood now seeks to compel production of interview memoranda prepared by attorneys for the Department. Defendant also seeks to compel the production of documents prepared by a Department staff investigator acting under the direction of Department attorneys. Those documents consist of an analysis of activity occurring within the financial institution accounts of Defendant Arrowood.

**The Department's Interview Memoranda
are Privileged Work Product**

As Defendant points out, the burden of establishing the existence of a privilege is the responsibility of the party asserting the privilege. To that end, courts have made clear that both witness interview memoranda and documents prepared on behalf of, or at the direction of, an attorney for a party are categories of documents protected from discovery under the work-product doctrine. The work product doctrine as found in 12 O.S. §3226(B)(3) is intended to preserve an area of privacy allowing a lawyer to prepare and develop legal theories and strategy in anticipation of litigation, *U.S. v. Adlman*, 134 F.3d 1194,1196 (2nd Cir. 1998)(citing *Hickman v. Taylor*, 329 U.S. 495, 510-511, 67 S.Ct. 385, 91 L.Ed. 451 (1947)).

Numerous courts have specifically found that attorney-prepared notes and memoranda of witness interviews were protected work-product. *See, S.E.C. v. The Nir Group*, 283 F.R.D. 127, 133-134 (U.S. Dist Ct., E.D. New York 2012). In *The Nir Group*, the defendants sought production of interview memoranda prepared by or on behalf of an attorney for the U.S. Securities and Exchange Commission ("S.E.C."). The court noted the S.E.C.'s argument that the interviews that formed the basis for the memoranda "were conducted in order to provide the Commission with information so that it could determine whether or not to proceed with litigation

in this matter.” *Id.* The court held, “Documents of this nature are clearly protected by the privilege.” *Id.*

Likewise, in *S.E.C. v. Stanard*, 2007 WL 1834709, at *1-2 (S.D.N.Y. June 26, 2007), the court emphasized that witness interviews were conducted to provide the Commission with information used in determining whether to proceed with litigation against the subject of an investigation. *Id.* at *1. The court held that the interview memoranda prepared by S.E.C. attorneys relating to each interview were protected work-product. *Id.* at *2. The court stated: “This type of work, prepared in the anticipation of litigation, falls squarely within the protections of the work-product doctrine.” *Id.*(citing *S.E.C. v. Cavanaugh*, 1998 WL 132842 (S.D.N.Y. Mar. 23, 1998)).

In the case at bar, the interview memoranda relating to each person specified by the Department in its response to Defendant’s *Interrogatories and Requests for Production of Documents* were prepared by attorneys for the Department. As in *Stanard*, the interviews were conducted to provide the agency with information used in determining whether or not to proceed with litigation in this matter. The interview memoranda squarely fall within both the letter and spirit of the protections afforded by Section 3226(B)(3).

The Department’s Financial Analysis is Privileged Work Product

In addition to the interview memoranda, Defendant seeks production of material prepared by a Department staff investigator assigned to this matter and working at the direction and behest of a Department attorney. The documents consist of the staff investigator’s analysis of Defendant’s own financial institution account records.

The work-product privilege applies not only to documents prepared by an attorney but to documents prepared by staff working at an attorney's direction. *See S.E.C. v. Strauss*, 2009 WL 3459204 at *6 (S.D.N.Y. Oct. 28, 2009); *S.E.C. v. Nacchio*, 2007 WL 219966, at *10 (D.Colo. Jan. 25, 2007) and *U.S. v. Nobles*, 422 U.S. 225, 238 and 239, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975).

Directly on point, the court in *Nacchio* stated: "The work-product doctrine is no less applicable to materials prepared in anticipation of litigation by S.E.C. accountants working under the direction or at the behest of Commission attorneys." *Nacchio* at *10. The analysis prepared by the Department staff investigator at the direction of a Department attorney is clearly subject to work-product protection.

Should the Court consider the documents sought by Defendant to be protected by the work-product privilege, it may still order production of those documents upon a showing of "substantial need" and an inability, "without undue hardship" to obtain their substantial equivalent. 12 O.S. §3226(B)(3). Defendant can show no substantial need for the privileged documents. Defendant is free to conduct his own discovery by interviewing or deposing each person identified by the Department in its privilege log or any witness list submitted by the Department in the future. Defendant is likewise able to conduct his own analysis of his own bank account records. Not only are those records available to him from his own financial institution, those records were produced to him in the same format as produced to the Department by the financial institution.

Conclusion

The Department's attorney prepared interview memoranda and its financial analysis, prepared at the direction of its attorneys, are protected work-product. The Department respectfully requests that the Court deny Defendant's Motion.

OKLAHOMA DEPARTMENT OF SECURITIES



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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of March, 2013, the foregoing document was sent by email and first-class mail to the following:

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