II. ARGUMENT

The work product doctrine is "an intensely practical one, grounded in the realities of litigation in our adversary system." United States v. Nobles, 422 U.S. 225, 238 (1975). Relying on Sporck v. Peil, 759 F.2d 312 (3d Cir. 1985), and its progeny, Plaintiff contends that the compilation of non-privileged documents by attorneys is "opinion work product," and seemingly asserts that the documents themselves, and not just the compilation, can be kept from the defense. These sweeping claims, belied as they are by the record in this case, should be rejected.

A. The Supposedly Unassailable Sporck

Plaintiff's *Memorandum* makes it appear as though the principle announced in Sporck has been accepted as gospel throughout the federal court system. Nothing could be further from the truth. Not only was Sporck a 2-1 decision with a strong dissent, later cases and commentators have criticized its expansion of the work product doctrine.

In Sporck, a civil securities fraud case, the attorney for the plaintiff deposed a defendant and requested the "identification and production" of documents that the defendant's attorney had used to prepare the defendant for the deposition. 759 F.2d at 313-14. The documents in question, which were not themselves protected from disclosure, had "previously been produced" to the plaintiff. Id. at 314-15. The defendant's attorney refused to comply with the request, and sought mandamus relief on work product grounds when the district court ordered disclosure and production. A divided panel of the Third Circuit granted the petition, holding that the district court

"should not have ordered the identification of the documents selected by [defense] counsel." Id. at 315 (emphasis added). See also id. (agreeing with the defendant that "the identification of the documents as a group must be prevented to protect defense counsel's work product") (emphasis added). The majority ruled that the "selection and compilation of documents by counsel in this case in preparation for pretrial discovery falls within the highly-protected category of opinion work product," explaining that without such work product protection an attorney might "forego[ ] a sifting of the documents." Id. at 316, 317.

Judge Seitz dissented. He was "convinced that [the majority's] ruling [was] an impermissible expansion of the work product doctrine at the expense of legitimate discovery." Id. at 319. He pointed out that the documents in question were not themselves covered by the doctrine and "had already been produced by the defendants." Id. Attacking the majority's belief that the litigation strategy of the defendant's attorney would be revealed by identification of the documents used to prepare for the deposition, Judge Seitz explained:

> The problem with [this] theory is that it assumes that one can extrapolate backwards from the results of a selection process to determine the reason a document was selected for review by the deponent. There are many reasons for showing a document or selected portions of a document to a witness. The most that can be said from the fact that a witness looked at a document is that someone thought that the document, or some portion of the

document, might be useful for the preparation of the witness for his deposition. This is a far cry from the disclosure of the lawyer's opinion work product.

Id. at 319. See also id. at 320 ("Certainly an attorney cannot cloak a document under the mantle of work product by simply reviewing it."). Finally, Judge Seitz criticized the majority's characterization of the compilation as opinion work product, saying that at most it would be fact work product.

Sporck has not, contrary to Plaintiff's implication, been universally accepted.[1] In In re Search Warrant for Law Offices, 153 F.R.D. 55 (S.D.N.Y. 1994), a case presenting facts very similar to those here, a district court in New York refused to follow Sporck. The government in that case executed a search warrant at a law firm's offices to obtain evidence concerning one of the firm's corporate clients and its two principals. The materials taken during the search were provided to a taint prosecutor who was not involved in the underlying grand jury investigation. Id. at 56-57. The firm and its client filed a motion for return of the documents on work product and attorney-client privilege grounds. In support of the motion, one of the firm's attorney's submitted an affidavit (which the district court accepted as true) explaining that 14 of the cartons taken had been "'segregated by [him] as part of a confidential, attorney-directed investigation into

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[1] Even one of the appellate decisions adopting Sporck involved a divided panel. See In re Allen, 106 F.3d 582 (4th Cir. 1997) (2-1 decision).

possible illegal activity within and against [the corporate client]." Id. at 57. The investigation was begun "in preparation for litigation, including possible civil claims against . . . former employees and contractors of the corporate client, as well as defending against governmental claims and any federal criminal investigation of the corporate client." Id. The district court refused to extend the work product doctrine to the compilation of non-privileged materials:

> This court declines to extend the concept of work product so far as to protect otherwise non-privileged corporate documents, simply because the lawyer has separated and arranged them in a manner convenient to his intended study for one or more legal problems and which reflects his analysis and thoughts concerning the matter which he was investigating.
>
> The argument on its face is slightly frivolous because it assumes that this lawyer investigating these documents could detect or perceive something in them or perceived the need to examine them, which was not readily apparent to a skilled special agent.

Id. at 58. Moreover, the court explained, "the policy consequences of permitting a client to insulate incriminating corporate documents which otherwise would have to be produced, by handing them over to an attorney who arranges them in some logical or illogical fashion, is simply too drastic to accept." Id. The court therefore ordered that documents which were not themselves privileged or protected be "turned over to the [prosecutor] in charge of the prosecution of the matter." Id.

Under the holding of Law Offices, the Court in this case should order that the documents in question be turned over to the defense. Like all other privileges against forced disclosure, the work product doctrine should not be "expansively construed" because it is in "derogation of the search for truth." United States [redacted]. Nixon, 418 U.S.

683, 710 (1974).

Law Offices is not the only case to cast doubt on Sporck. See generally P. Grady, Discovery of Computer System Stored Documents and Computer Based Litigation Support Systems: Why Give Up More Than Necessary, 14 John Marshall J. of Comp. & Inf. Law 523, 551 (1996) (noting that "other courts have not accepted the Third Circuit's position" in Sporck). Even those courts which have found some basis for agreement with Sporck have rejected its broad expansion of the work product doctrine.

For example, the First Circuit, in a complex case involving a hotel fire, permitted the pretrial disclosure of lists identifying exhibits to be used in depositions. In re San Juan Dupont Plaza Hotel Fire Litigation, 859 F.2d 1007, 1017 (1st Cir. 1988). Although the panel held that the lists constituted fact work product, it criticized Sporck and refused to characterize the lists as opinion work product: "Th[e] [Sporck] reasoning, we suggest, is flawed because it assumes that the revelatory nature of the sought-after information is, in itself, sufficient to cloak the information with the heightened protection of opinion work product. That is simply not the case; much depends on whether the fruits of the screening would soon be revealed in any event." Id. at 1018.[2] Thus, at most, the compilation of documents by Plaintiff's counsel is fact work product which can be obtained by showing substantial need and undue hardship. Id. at 1015.

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[2] Several district courts have opted to follow Dupont Plaza instead of Sporck. See, e.g., Castano [redacted]. American Tobacco Co., 896 F.Supp. 590, 596 (E.D. La. 1995); Resolution Trust Corp. [redacted]. Heiserman, 151 F.R.D. 367, 375 (D. Colo. 1993); Bohannon [redacted]. Honda Motor Co., 127 F.R.D. 536, 539 (D. Kan. 1989); In re Shell Oil Refinery, 125 F.R.D. 132, 133-34 (E.D. La. 1989).

Similarly, in Gould Inc. v. Mitsui Mining & Smelting Co., 825 F.2d 676, 680 (2d Cir. 1987), the Second Circuit declined to embrace Sporck, explaining that the application of the Sporck principle "depends on the existence of a real rather than speculative concern that the thought processes of . . . counsel in relation to pending or anticipated litigation would be exposed." In this case, given the number of documents involved, it is difficult to see how there can be a "real" danger that the thought processes of Plaintiff's attorneys will be revealed. See also In re Joint Eastern & Southern District Asbestos Litigation, 119 F.R.D. 4, 5-6 (E.D.N.Y. & S.D.N.Y. 1988) (book of photographs, compiled by plaintiff's attorney, showing various forms of asbestos to which plaintiff had been exposed, was discoverable as a fact compilation because it did not reveal attorney's strategy); American Floral Services, Inc. v. Florists' Transworld Delivery Ass'n, 107 F.R.D. 258, 260-61 (N.D. Ill. 1985) (plaintiff required to reveal identity of two of defendant's employees whom it had interviewed and who apparently had knowledge concerning plaintiff's claim). Cf. In re Grand Jury Subpoenas, 959 F.2d 1158, 1167 (2d Cir. 1992) ("With the advent of inexpensive photocopying, it seems likely that most sets of copied documents maintained by law firms will be sufficiently voluminous to minimize disclosure of the attorney's identification of some occasional wheat among the chaff."); In re Shell Oil, 125 F.R.D. at 134 ("it is highly unlikely that Shell will be able to discern the PLC's 'theory of the case' or thought processes simply by knowing which 65,000 out of 660,000 documents have been selected for copying").

Criticism of Sporck has not been limited to the judiciary. Commentators have also

expressed their disagreement with the case. See K. Waits, Opinion Work Product: A Critical Analysis of Current Law and a New Analytical Framework, 73 Oregon L. Rev. 385, 450 (1994) ("Sporck is wrongly decided[.] Contrary to the assertions in Sporck, . . . the adversary system is not threatened by the revelation of materials that only indirectly reveal an attorney's thinking."); L. Orland, Observations on the Work Product Rule, 29 Gonzaga L. Rev. 281, 298 (1993-94) ("No opinion has been found that explains why the [Sporck] selection and compilation exception . . . should be carved out for preferential treatment.").

For the reasons set forth in Judge Seitz's dissent and the decision in Law Offices, this Court should reject Sporck as an unwarranted expansion of the work product doctrine. After all, "pre-existing documents which could have been obtained by court process from the client when he was in possession may also be obtained from the attorney by similar process following transfer by the client in order to obtain more informed legal advice." Fisher [redacted]. United States, 425 U.S. 391, 403-04 (1976) (addressing attorney-client privilege). Accord Shelton [redacted]. American Motors Corp., 805 F.2d 1323, 1328 (8th Cir. 1986) ("AMC does not contend that the documents themselves, prepared by other departments for the purpose of analyzing AMC vehicles, are protected as work product simply because those documents now may be in the possession of AMC's litigation department.").

B. The Limitations on Sporck

Sporck does not, in any event, go as far as Plaintiff needs it to in order to shield the

documents at issue from the taint team. Although Plaintiff says that Sporck controls, it fails to acknowledge significant factual differences between this matter and Sporck.

First, in Sporck, unlike here, the party seeking the list of certain documents already had the documents themselves in its possession because they had previously been produced. 759 F.2d at 314, 319. Indeed, the sine qua non of Sporck and its progeny is the protection of the list or index of the selected documents because the documents themselves are already in the hands of the opposition or can be obtained by normal legal channels. See Waits, Opinion Work Product, 73 Oregon L. Rev. at 450 n. 229 ("by definition in document selection cases like Sporck the opponent already possesses the documents").[3]

When the Court reviews the documents in camera, it will see that they include original documents which must be turned over to the government. See Law Offices, 153 F.R.D. at 59 (lawyer cannot secure work product protection by highlighting an original corporate document that is not otherwise privileged). Thus, at least with respect to those original documents, the defendant does not have possession of them. The necessary predicate does not exist, and Sporck is not triggered. See Gould, 825 F.2d at 680 ("the equities may not favor the application of the Sporck exception if the files from which the documents had been culled . . . were not otherwise available . . . or were beyond

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[3] Plaintiff's own cases recognize that the compiled documents must be in the possession of, or available to, the opposing party. See, e.g., In re Allen, 106 F.3d at 608 (adoption of Sporck "does not protect [the] personnel records from disclosure, just [the attorney's] selection and arrangement of them"); James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 144 (D. Del. 1982) ("Julian does not object to the defendants obtaining the documents contained in the binder[.]").

reasonable access"). And, as noted above, the compilation of documents is at most fact work product which can be obtained upon a showing of substantial need and undue hardship. The defendant can and will make that showing at the evidentiary hearing if and when Plaintiff meets its initial work product burden.

C. Plaintiff's Burden and the Need for an Evidentiary Hearing

Plaintiff, as the party asserting the protection of the work product doctrine, has the burden of establishing its elements. See, e.g., Hodges, Grant & Kaufmann v. U.S. Government, Dept. of the Treasury, 768 F.2d 719, 721 (5th Cir. 1985). Plaintiff has provided a general privilege log and an affidavit, but those submissions, under the circumstances, are insufficient to establish the applicability of the work product doctrine. The log describes only broad categories of documents, and the supporting affidavit completely fails to explain which attorneys compiled which documents. For reasons explained below, those particular facts are critical to the work product analysis in this case. Without those facts, the defendant cannot intelligently determine which of Plaintiff's claims have merit. "'Without identification of the documents, the party against whom the privilege is claimed is completely unable to challenge the validity of th[e] claim.'" Smith v. Logansport Community School Corp., 139 F.R.D. 637, 648 (N.D. Ind. 1991) (citation omitted). Plaintiff simply has not carried its burden of establishing its entitlement to work product protection. Cf. Rabushka v. Crane Co., 122 F.3d 559, 565 (8th Cir. 1997) ("Crane met its burden of providing a factual basis for asserting the [attorney-client and work product] privileges when it produced a detailed privilege log

stating the basis of the claim privilege for each document in question, together with an accompanying explanatory affidavit of its general counsel.") (emphasis added).

The Court "must require [Plaintiff] to assert [work product] with a document-by-document explanation as to why the [doctrine] shields the document from the [warrant's] reach. The [Court] must then determine the validity of each assertion -- either by conducting a hearing or inspecting the documents in camera." In re Grand Jury Subpoena, 831 F.2d 225, 228 (11th Cir. 1987) (attorney-client privilege case). Whatever process the Court chooses, it must permit the defendant to participate and meaningfully litigate the applicability of the work product doctrine.

In this vein, we point out that, even if Sporck is followed, Plaintiff's work product theory flounders with respect to at least certain of the categories of documents set forth in the privilege log.

Contrary to Plaintiff's suggestion, even the most generous interpretations of the work product doctrine do not protect the selection of materials by a client; the doctrine protects *attorney* work product. See, e.g., Bloss [redacted]. Ford Motor Co., 126 A.D.2d 804, 805, 510 N.Y.S.2d 304 (N.Y.App.Div. 1987) (documents which could have been prepared by a layman not entitled to work product protection). In any event, Plaintiff has no standing to assert any work product protection on behalf of an unidentified third party or his/her unidentified counsel. See, e.g., Bohannon, 127 F.R.D. at 539-40 ("work product status does not apply to documents submitted to or received from a third party").

The fact that computer printouts -- routine printouts available from the Plaintiff's

D. Plaintiff's Failure to Establish Confidentiality and Lack of Waiver

"[W]hen an attorney freely and voluntarily discloses the contents of otherwise protected work product to someone with interests adverse to his or those of his client, knowingly increasing the possibility that an opponent will obtain and use the material, he may be deemed to have waived work product protection." In re Doe, 662 F.2d 1073, 1081 (4th Cir. 1981).

Under the circumstances, any claim of privilege or work product cannot be accepted without further evidentiary substantiation. See United States [redacted]. Aramony, 88 F.3d 1369, 1392 (4th Cir. 1996) (where the allegations against one party could not subject another to civil or criminal liability, joint defense privilege is inapplicable), cert. denied, 117 S. Ct. 1842 (1997); Sheet Metal Workers International Association [redacted]. Sweeney, 29 F.3d 120, 124-25 (4th Cir. 1994) (any privilege arising from engaging in joint defense requires, as a threshold matter, a legitimate common interest about a legal matter); In re Bevill, Bresler & Schulman Asset Management Corp., 805 F.2d 120, 126 (3d Cir. 1986) (proponent bears burden of producing evidence establishing privilege). If Plaintiff is going to use the purported joint defense agreement as a weapon in its arsenal, it must be produced to the defendant so that its breadth and applicability can be fairly litigated.

database that are routinely produced in the course of operating Plaintiff's business -- were made available to and used by attorneys does not protect them from disclosure or turn them into work product. See Santiago [redacted] Miles, 121 F.R.D. 636, 642 (W.D.N.Y. 1988) (no work product protection where, although computer reports may have been prepared with pending litigation in mind, the primary motivation behind the creation of such reports was for use in the normal course of business); Colorado ex rel. Woodard [redacted] Schmidt-Tiago Construction Co., 108 F.R.D. 731, 734-35 (D. Colo. 1985) (absent additional evidence, no work product protection for readouts from computer program established for use in regular course of business); Fauteck [redacted] Montgomery Ward & Co., 91 F.R.D. 393, 398-99 (N.D. Ill. 1980) (ordering disclosure of personnel records from computer database where counsel merely raised conclusory claim that the database formulation "entail[ed] numerous strategic legal decisions").

Plaintiff must of course meet its burden with respect to each of the categories of documents it claims are work product. Yet several of the categories it claims are work product have been denied such status. This is the case with training and attendance sheets, see, e.g., Burton [redacted] R.J. Reynolds Tobacco Co., 170 F.R.D. 481, 486 (D.Kan. 1997) (document evidencing attendance of two company employees at meeting not work product under Kansas law), and with Congressional subcommittee testimony, see, e.g., LaMorte [redacted] Mansfield, 438 F.2d 448, 451-52 (2d Cir. 1971) (any privilege which may exist for testimony given at non-public SEC hearing belongs to SEC, and argument that transcripts were work product was meritless).

seeks declaratory relief pursuant to state or federal law.

8. The Clerk is directed to send a copy of this Amended Order to the Clerk of the Judicial Panel on Multidistrict Litigation.

9. The Final Judgment previously issued in the Aurelius Action, *see* Case No.: 10–CV–20236, **[DE 53]** (S.D. Fla. May 28, 2010), is hereby VACATED.

EL–AD RESIDENCES AT MIRAMAR CONDOMINIUM ASSOCIATION, INC., a Florida not-for-profit corporation, Plaintiff,

v.

MT. HAWLEY INSURANCE COMPANY, a foreign corporation, and Westchester Surplus Lines Insurance Company, a foreign corporation, Defendants.

Case No. 09–60723–CIV.

United States District Court,
S.D. Florida.

June 2, 2010.

Background: Condominium association brought action against insurers, stemming from coverage dispute over hurricane damage. Association's former attorneys moved to intervene and for ancillary proceeding.

Holdings: The District Court, Chris McAliley, United States Magistrate Judge, held that:

(1) intervention as of right was warranted, and

(2) ancillary proceeding to sanction former co-counsel was not warranted.

Motions granted in part and denied in part.

1. Federal Civil Procedure ⇐331

Condominium association's former attorneys had right to intervene in association's present action against insurers, stemming from coverage dispute over hurricane damage, for limited purpose of protecting privileged communications; disclosure of attorneys' privileged communications with former co-counsel would have harmed attorneys in ongoing litigation. Fed.Rules Civ.Proc.Rule 24(a), 28 U.S.C.App.(2006 Ed.).

2. Federal Courts ⇐21

Ancillary proceeding to sanction former attorneys' former co-counsel was not warranted in action brought by condominium association against insurers, stemming from coverage dispute over hurricane damage, since court already had all necessary claims before it to resolve sanctioning issue, and had ability to manage its proceedings, vindicate its authority, and effectuate its decrees without extending its jurisdiction.

Keith Jeffrey Lambdin, Katzman Garfinkel Rosenbaum, John David Mallah, Maitland, FL, for Plaintiff.

Bradley Ryan Weiss, Benson Mucci & Associates LLP, Thomas E. Tookey, Coral Springs, FL, Brian E. Sims, Michael D. Prough, William C. Morison, Morison Holden Derewetzky & Prough LLP, Walnut Creek, CA, Cortland C. Putbrese, Morison Holden Derewetzky & Prough, LLP, Richmond, VA, Daniel Howard Coultoff, Latham, Shuker, Barker, Eden & Beaudine,

LLP, Orlando, FL, Scott Michael Janowitz, William S. Berk, Melissa M. Sims, Berk Merchant & Sims PLC, Coral Gables, FL, for Defendants.

OMNIBUS ORDER

CHRIS McALILEY, United States Magistrate Judge.

Pending before the Court are the following related motions: (1) Request for Judicial Inquiry [DE 103]; (2) Motion for Protective Order [DE 122]; (3) Motion to Intervene [DE 125]; (4) Motion to Convene Ancillary Proceedings [DE 130]; and (5) Motion for Hearing on Motion to Convene Ancillary Proceedings [DE 132].[1] The Honorable Adalberto Jordan has referred the motions to me for resolution, and for the reasons stated below the Motion to Intervene is granted, and the other motions are denied.

I. BACKGROUND

This and a related case arise from an insurance dispute over damage allegedly caused by Hurricane Wilma to two condominium complexes. The Plaintiff in this case, El–Ad Residences at Miramar Condominium Association ("Residences"), retained the law firm of Katzman Garfinkel Rosenbaum LLP ("KGR") to represent it in its claim against its primary property casualty insurer, Mt. Hawley Insurance Company ("Mt. Hawley") and its excess insurer, Westchester Surplus Lines Insurance Company ("Westchester") (collectively, "Defendants"). The other condominium complex, El–Ad Enclave at Miramar Condominium Association ("Enclave"), also retained KGR to bring suit against Mt. Hawley and a different excess insurer, General Star Indemnity Company.[2] In March of this year, while this litigation was on-going, the law firm of KGR broke up, with some of its attorneys, led by Daniel S. Rosenbaum, forming the firm Rosenbaum Mollengarden Janssen & Sircusa ("RMJS"), and others, principally Alan Garfinkel and Leigh Katzman, forming Katzman Garfinkel & Berger ("KGB"). The break-up of KGR has been acrimonious and has led to litigation between the former law partners. The motions now before this Court arise, in large measure, from heated disputes between Rosenbaum on the one hand, and Garfinkel and Katzman on the other.

Immediately following the breakup of KGR, Rosenbaum's law firm, RMJS, entered appearances on behalf of both Residences and Enclave. Thereafter, on April 8, 2010, RMJS filed a Request for Judicial Inquiry in this, the Residences case,[3] that can be summarized as follows. Before the formation of KGR, Garfinkel had a law firm called the Garfinkel Trial Group ("GTG"), which hired a consulting firm, Hunter R Contracting LLC ("Hunter R") and TSSA Storm Safe Inc. ("TSSA"), to perform insurance estimates. Kenneth Romain was a member of Hunter R. After several years of this consulting relationship, GTG terminated Hunter R and TSSA, which led to litigation between them over monies owed. These disputes spilled over into a number of ongoing law-

1. Defendant, Westchester Surplus Lines Insurance Company, filed a Motion for Extension of Time to Respond to Motion to Convene Ancillary Proceedings [DE 146]. Because the Court denies the Motion to Convene Ancillary Proceedings is denied, Westchester's Motion is moot.

2. The "Enclave case" is filed with this Court as Case No. 09–60726–CIV–JORDAN/MCALILEY.

3. The motion is fully titled Request for Judicial Inquiry into Perjury, and Potential Subornation of Perjury and Witness Tampering. [DE 103].

suits filed in state and federal courts, between condominium associations represented by GTG and or the consultants, and the various insurers they had sued. Romain was deposed in a number of those lawsuits and testified that Garfinkel, GTG and the consultants had engaged in a scheme to generate falsely high insurance claims, that Garfinkel had received kickbacks from the consultants, and that Garfinkel, through others, had an improper ownership interest in Hunter R. At a March 30, 2010 deposition taken in several cases, including this case and the Enclave case, Romain recanted these claims of wrongdoing. RMJS asserts that Romain's conflicting sworn testimony demonstrates that Romain has committed perjury, either at his earlier depositions, or at the March 30th deposition, and in its Request RMJS asks this Court to conduct an inquiry into this perjury as well as possible fraud and unethical conduct by Romain, Garfinkel, and possibly others.

Several days after RMJS filed the Request for Judicial Inquiry, Residences again changed counsel: Garfinkel's and Katzman's new firm, KGB, filed a notice of appearance on Residence's behalf, and Rosenbaum's firm, RMJS, withdrew as counsel. RMJS continues to represent Enclave, in Case No. 09–60726–CIV–JORDAN.

The Motion for Judicial Inquiry was filed a few days before a discovery conference I had scheduled for April 16, 2010. I took the opportunity, at the start of that hearing, to ask Rosenbaum to answer some questions I had about his Request for Judicial Inquiry, which he did.[4] Rosenbaum basically restated what is summarized above, and was more clear about his concern that his former partners may have paid Romain to change his testimony.[5] Rosenbaum also disclosed that he had brought his concerns to the U.S. Attorneys Office. As for the inquiry he wants this Court to undertake, Rosenbaum suggested that the Court hold hearings and take testimony from everyone involved: the various attorneys and consultants and possibly the Plaintiffs themselves. He believes that a fraud has been worked upon this and many courts and that this Court should look beyond the issues in this case and inquire into improper conduct in similar cases filed in other divisions of this Court and in various state courts. In the end, Rosenbaum would have this Court determine whether Garfinkel and Katzman and the consultants engaged in improper conduct before this or other courts, although he was not clear what remedies this Court might order. Having heard from Rosenbaum, I asked the other parties to file written responses to the Request, and offer their opinions whether a judicial inquiry is appropriate and necessary.

The Defendants in both the Residences and Enclave case filed a memorandum in support of this Court convening a broad judicial inquiry. [DE 121]. In that document Defendants provide considerable detail about evidence collected, in a number of cases, of an unethical relationship between Garfinkel and Hunter R and Ro-

4. The transcript of that discovery conference has been filed at DE 119.

5. Rosenbaum included the following information he gave the Court. At a time when difficulties had arisen between Rosenbaum and his partners Garfinkel and Katzman, and they were discussing disassociating from one another, Katzman allegedly said: " 'You don't have to worry about Ken Romain if this is an issue because we can pay him off and he will recant his testimony,' and at that point maybe there is 18, 20 people in the room and I said, 'That's outrageous. There would be no way that you could ever do that or that we could ever permit that.' " [DE 119, pp. 14–15].

main, which Defendants maintain is directly relevant to their defense that the insurance policies have been voided by Plaintiffs' fraud. Defendants acknowledge that there are procedural mechanisms in place that allow this Court to address these issues in this case as needed, but nevertheless argue that a broad inquiry that cuts across case lines is warranted, because Garfinkel and others have "created a fraud upon the judicial process" throughout this District. [DE 121, p. 12]. Defendants identify twelve witnesses who should testify, and ask the Court to subpoena years worth of bank and accounting records from Garfinkel and a list of people associated with him.

Residences, by that time represented by Garfinkel's and Katzman's new law firm, filed a response in opposition to the Request. [DE 127].[6] It argues that it would be improper for this Court to take on an investigative role and suggests that a broad judicial inquiry would open "an evidentiary Pandora's box." [DE 127, p. 9]. Notably, they assert that "[n]othing has transpired before this Court that would implicate any inherent authority the Court might have to punish or order further action taken with respect to misconduct it observes." [*Id.*, p. 7]. It urges that the issues raised by the Request, and at the April 16 hearing, can be addressed as needed in the normal course of this litigation.

Shortly after the April 16 hearing, Residences filed a Motion for Protective Order Enjoining Daniel Rosenbaum from Further Violating Attorney–Client Privilege to Advance His Own Interests. [DE 122]. While the Motion is filed in the name of Residences, it mostly sets forth a series of accusations that are personal to Garfinkel. The Motion recounts the disputes between GTG and its former consultants Hunter R and Romain, characterizes Romain's accusations against Garfinkel as false, and claims the defendant insurers have unfairly seized upon these allegations to try to defeat the plaintiffs' legitimate claims and have engaged in a campaign to smear Garfinkel's reputation. The Motion calls Rosenbaum a liar [DE 122, p. 17] and makes a series of disparaging accusations against him about matters that bear on the personal dispute between the former law partners, starting with Rosenbaum's "financial misconduct" when he allegedly diverted $700,000 from the KGR bank account into a personal account. Within that context, the Motion charges that Rosenbaum filed the Request for Judicial Inquiry, and spoke in support of that Request at the April 16th hearing, not for any legitimate purpose, but only to gain an advantage in his on-going dispute with Garfinkel and Katzman over the division of their fees and clients.

According to the Motion, Rosenbaum served as counsel not only for Residences, but was also counsel to Garfinkel and was part of a Joint Defense Team ("JDT") comprised of an unnamed list of "persons sued and/or affected by" the claims brought by Hunter R, Romain, and TSSA. [DE 122, p. 7]. The Motion charges that in the Request for Judicial Inquiry and at the April 16th hearing, Rosenbaum disclosed privileged information gained as part of those representations, and did so without his clients' authorizations. The Motion also accuses Rosenbaum of giving the Court this information in a manner adverse to his former client Residences.

Resting on these accusations, the Motion asks this Court to use its inherent authority to enter a "protective order" that

6. Many of the assertions in that response have been repeated in other pleadings they have filed, and which are summarized elsewhere in this Order.

enjoins Rosenbaum from further disclosures of privileged communications. Remarkably, it goes much further and asks this Court to enjoin Rosenbaum from "appearing in any case or taking any action adverse to Alan Garfinkel or any of his former clients in any case where the allegations of Ken Romain are, directly or indirectly, at issue." [DE 122, pp. 17–18]. Such broad injunctive relief—on its face—is excessive, as it surely would bar Rosenbaum from participating in the judicial dissolution proceedings with his former partners.

The Defendant insurance companies filed oppositions to the Motion for Protective Order. [*See* DE 129, 133]. In those papers the Defendants point out, *inter alia*, that Rosenbaum is neither a party to this lawsuit, nor an attorney of record, that discovery is closed and, in any event, no discovery is pending involving Rosenberg. Although styled a motion for protective order, Defendants rightfully point out that it is better understood as a motion for injunctive relief against someone who is not a party to this lawsuit. Defendants also raise a number of good arguments that question whether information Rosenbaum disclosed was in fact protected by privilege. They also specifically deny that Rosenbaum has given them "any information pertaining to his representation of [Plaintiffs] or other former or current clients." [DE 133, p. 3].

Perhaps recognizing the procedural flaws inherent in Residences' Motion for Protective Order, a few days after they filed that Motion, Garfinkel and Katzman filed their Motion to Intervene to Ensure Preservation of Privilege. [DE 125]. They ask to intervene in this case, individually, to protect their personal interests, including what they claim were privileged communications with Rosenbaum. They add that Rosenbaum has cross-noticed Garfinkel's deposition in this and another case, and predict he will use the deposition to "gain leverage in the partnership dissolution and to harass Garfinkel." [DE 125, p. 2].

A few days later, Garfinkel and Katzman filed yet another motion: Motion to Convene Sealed Ancillary Proceedings for Injunctive Relief, Sanctions, and Potential Attorney Disqualification [DE 130].[7] They repeat their accusations about Rosenbaum, and again charge that in the Request for Judicial Inquiry, and at the April 16th hearing, he disclosed privileged information, and made statements adverse to his former client Residences in violation of Florida Bar Rule of Professionalism 4–1.6, 4–1.9(b)–(c), and they again ask this Court to invoke its inherent power to discipline Rosenbaum. What's new is the way in which Garfinkel and Katzman ask the Court to accomplish this: they would have this Court convene an ancillary proceeding that would be conducted entirely under seal, the sole focus of which would be Rosenbaum's alleged misconduct, that would adjudicate whether Rosenbaum violated the Florida Bar Rules of Professional Conduct, and in the process they would have the Court bar Rosenbaum from filing a response to the Motion. In the end, Garfinkel would have this Court discipline Rosenbaum for breach of his ethical obligations, enjoin him from further misconduct, and disqualify defense counsel from representing their clients in this case, because they have received (unidentified) information protected by the attorney-client privilege and work product doctrine.

II. ANALYSIS

A. Motion to Intervene

[1] Both Garfinkel and Katzman assert their right, pursuant to Rule 24(a), F.R.

7. They request a hearing on that Motion. [DE 132].

Civ. P., to intervene in this action "for the limited purpose of protecting the various privileges, and to respond to the personal attacks made upon them individually by Rosenbaum." [DE 125, p. 2]. Garfinkel and Katzman will be permitted to intervene for the former purpose, but not the latter.

According to the Motion to Intervene, Rosenbaum served as counsel for Garfinkel "in the matter which Romain filed against Garfinkel[,]" and their communications in this respect were protected by the attorney client privilege. *Id.* The Motion further asserts that Rosenbaum, as part of the Joint Defense Team represented his former law firm, KGR, and by association its partner, Katzman, and that disclosure of their privileged communications would harm Garfinkel and Katzman in on-going litigation. [DE 125, p. 3].[8]

Rule 24(a) reads as follows:

> (a) Intervention as of Right. Upon timely application anyone shall be permitted to intervene in an action:
>
> (2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The law in this Circuit, and others, is clear, that this Court must allow intervention by a client "in the first instance ... as soon as the [attorney-client] privilege issued is raised." *In re Grand Jury Matter (ABC Corp.),* 735 F.2d 1330, 1331 (11th Cir.1984), (quoting *In re Grand Jury Proceedings (Freeman),* 708 F.2d 1571, 1575 (11th Cir. 1983)); *see also In re Grand Jury Subpoena (Newparent, Inc.),* 274 F.3d 563, 570 (1st Cir.2001) ("Colorable claims of attorney-client and work product privilege [are] ... a textbook example of an entitlement to intervention as of right."); *United States v. AT & T Co.,* 642 F.2d 1285, 1292 (D.C.Cir.1980); *Sackman v. Liggett Group, Inc.,* 167 F.R.D. 6, 20–21 (E.D.N.Y. 1996).

In allowing intervention, this Court notes that Garfinkel and Katzman have not demonstrated that Rosenbaum in fact served as their lawyer, or that he has or will disclose any of their privileged communications. While they have complained mightily that Rosenbaum has already made unauthorized disclosures, Garfinkel and Katzman have not identified for this Court which of Rosenbaum's statements in the Request for Judicial Inquiry, or at the April 16 hearing, they claim are privileged. Moreover, Katzman's assertion of privilege is particularly attenuated: he claims that Rosenbaum, as part of the JDT, represented their former law firm, and that as a partner in the firm Katzman personally claims a privilege as to his statements to Rosenbaum. Further, to the extent Katzman contends that the statement Rosenbaum attributed to him, and repeated at the April 16 hearing ("You don't have to worry about Ken Romain if this is an issue because we can pay him off and he will recant his testimony") was a privileged communication, it would appear to fall squarely within the crime-fraud exception to that privilege. In this and other circuits, Garfinkel and Katzman need not set forth this proof before they intervene. *See In re Grand Jury Proceedings (Freeman),* 708 F.2d at 1575 (intervention should have been allowed "once the claim of attorney-client privilege ... surfaced."); *In re Grand Jury Matter (ABC Corp.),* 735 F.2d at 1331 (the extent of the attorney-client privilege, and the possibility of unautho-

8. The Motion does not specifically identify what on-going litigation it refers to.

rized disclosure must be addressed after intervention); *United States* [redacted]. *AT & T Co.*, 642 F.2d at 1291 ("determination of the merits of [the] claim [of privilege] is not appropriate at this threshold stage ... we must accept a party's well-pleaded allegations as valid.")

Upon intervention, Garfinkel and Katzman will have to meet their burden to establish that they were in fact represented by Rosenbaum, and that they had privileged communications in the course of that attorney-client relationship that have been, or are at risk of, unauthorized disclosure.[9]

Rule 24(a) permits intervention only "upon timely application." As already noted, Rosenbaum no long represents Plaintiff in this action and he, of course, is not a party. The Court will have to hear from him however, as it considers Garfinkel's and Katzman's claims of privilege. The Court will therefore entertain a concise motion by Rosenbaum, pursuant to Rule 24(a) to intervene in this proceeding, for the same limited purpose of participating in this Court's consideration of Garfinkel's and Katzman's claims of privilege.

As for Garfinkel's and Katzman's request to intervene to "respond to the personal attacks made upon them individually by Rosenbaum," they may not do so. [DE 125, p. 2]. As one court has noted, to intervene "the interest must be a legal interest as distinguished from interests of a general or indefinite character." *United States* [redacted]. *AT & T Co.*, 642 F.2d at 1292 (citations and quotation marks omitted).[10] This Court does not need to provide Garfinkel and Katzman a forum to respond to Rosenbaum's "personal attacks." In the numerous pleadings they have filed since Rosenbaum's Request for Judicial Inquiry, Garfinkel and Katzman have already repeatedly answered Rosenbaum's assertions and have done so in a vitriolic manner. Rosenbaum no longer represents Residences, thus he no longer has a voice in this lawsuit to make additional claims about his former law partners. There are other forums in which the former law partners can air their grievances against one another: they are already embroiled in judicial dissolution proceedings, and if complaints have not already been filed with the Florida Bar, they are likely to be.[11] Rule 24(a) does not require intervention by Garfinkel and Katzman to protect themselves from Rosenbaum's complaints against them.

9. In this diversity action, claims of privilege are governed by Florida law. F.R. Evd. 501. The burden of establishing that communications were protected from disclosure by the attorney-client privilege falls upon the party asserting the privilege. *Southern Bell Tel. & Tel. Co.* [redacted]. *Deason*, 632 So.2d 1377, 1383 (Fla.1994); *Cone* [redacted]. *Culverhouse*, 687 So.2d 888, 892 (Fla. 2d DCA 1997) ("The privilege will not apply unless the party asserting it proves that the communications at issue come within its confines."); *Wal–Mart Stores, Inc.* [redacted]. *Weeks*, 696 So.2d 855, 856 (Fla. 2d DCA 1997) (same rule applies to work product doctrine). In meeting this burden, each element of the privilege must be affirmatively demonstrated, and the party claiming privilege must provide the court with evidence that demonstrates the existence of the privilege, which often is accomplished by affidavit. *See CSX Transp., Inc.* [redacted]. *Admiral Ins. Co.*, 1995 WL 855421 at *1–2, 1995 U.S. Dist. LEXIS 22359 at *4–5 (M.D.Fla. July 20, 1995). In Florida, corporate claims of privilege are subject to a heightened level of scrutiny, and the Florida Supreme Court has established five criteria to establish a corporate claim of attorney-client privilege. *Deason, id.*, at 1383.

10. While the Second Circuit has recognized that injury to reputation is one that might be served by Rule 24(a), the parties have not cited any similar authority in this Circuit, and this Court is aware of none.

11. For that matter, evidence of criminal fraud, witness tampering or bribery, is best referred to law enforcement authorities.

B. Motion for Ancillary Proceeding

[2] Garfinkel and Katzman have also asked this Court to convene an extraordinary ancillary proceeding: it would be held under seal,[12] its sole purpose would be to sanction Rosenbaum for his alleged unauthorized disclosures of his clients' privileged information in his Request for Judicial Action and at the April 16 hearing, enjoin Rosenbaum from future similar conduct, determine whether Rosenbaum violated Florida Bar Rules of Professional Conduct 4–1.6, 4–1.9(b)–(c), and to disqualify Defendants' counsel because Rosenbaum has given them Garfinkel's and Katzman's privileged information. Remarkably, they suggest Rosenbaum should have a limited opportunity to defend himself in such an action ("Rosenbaum should be ordered not to disclose any information or file any response, unless permitted by Court order.") [DE 130, p. 2].

The Supreme Court, in *Kokkonen* [redacted] *Guardian Life Insur. Co. of Amer.*, 511 U.S. 375, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994), wrote the following about ancillary jurisdiction.

> Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.
>
> * * *
>
> The doctrine of ancillary jurisdiction ... recognizes federal courts' jurisdiction over some matters (otherwise beyond their competence) that are incidental to other matters properly before them.
>
> * * *
>
> Generally speaking, we have asserted ancillary jurisdiction ... for two separate, though sometimes related purposes: (1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent, and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees.

Id. at 377–380, 114 S.Ct. 1673 (citations omitted). Garfinkel and Katzman have not carried their burden to demonstrate that their proposed ancillary proceeding would satisfy either purpose. As for the first purpose, this Court clearly has all claims before it necessary to resolve this matter. As for the second purpose, this Court can "manage its proceedings, vindicate its authority, and effectuate its decrees" without extending its jurisdiction. Specifically, it can: (1) resolve any disputes about privileges and issue appropriate orders; (2) if it needs to pass on ethics breaches by counsel, it has the power to do so;[13] and (3) it can, and will, use its authority to insist that counsel conduct themselves with a degree of restraint and professionalism that has been lacking in many of the pleadings now before this Court. In sum, this

12. While the Court can make *in camera* review of possible privileged materials, it will not engage in wholesale closed dockets. Proceedings may be sealed only upon a showing of exceptional circumstances, and harm to reputation is not sufficient to overcome the strong presumption in favor of public access to the courts. *Brown* [redacted] *Advantage Engineering, Inc.*, 960 F.2d 1013, 1016 (11th Cir. 1992); *Wilson* [redacted] *American Motors Corp.*, 759 F.2d 1568 (11th Cir.1985).

13. The Florida Bar is uniquely suited to address compliance with its Rules of Professional Conduct and, at this juncture, this Court defers to the Florida Bar to do just that.

Court will not expand its jurisdiction to engage in an investigation of Rosenbaum.[14]

C. Motion for Protective Order

Residences' Motion for Protective Order is also denied. Residences has not provided this Court with information to support its claim that Rosenbaum has disclosed its confidential attorney-client communications. The Motion can only be understood as Garfinkel's and Katzman's personal complaints about Rosenbaum, and to the extent they ask this Court to enjoin Rosenbaum, a non-party, from prospective violations of the attorney-client privilege, that motion is denied.[15] The Court will address Garfinkel's and Katzman's claims of privilege consistent with its ruling on the Motion to Intervene.

D. Request for Judicial Action

Rosenbaum, and the Defendant insurers, would both like this Court to step beyond the four corners of this lawsuit and investigate various possibilities of fraud upon this and other Courts. The proposed areas of inquiry include: (1) Romain's apparent perjury, either at the March 30 deposition, or earlier depositions; (2) whether Garfinkel or Katzman improperly persuaded Romain to recant his sworn accusations against them; (3) whether Garfinkel, Katzman or their consultants engaged in fraud by helping their clients to submit false insurance claims. This alleged misconduct is serious, and this Order should not be misconstrued to suggest otherwise.

This Court nevertheless declines to engage in a free-ranging inquiry into matters pending before other courts, as those courts are best suited to manage their own proceedings. Allegations of inflated insurance claims, kickbacks and improper business relationships between lawyers and consultants have been raised in the course of similar litigation before other courts, where they have been addressed in the context of those proceedings without having to embark on a sweeping investigation. The only new information here is Romain's March 30 deposition testimony in which he recanted his earlier accusations of misconduct by Garfinkel and others, and Rosenbaum's disclosure, at the April 16 hearing, of Katzman's alleged suggestion that Romain could be paid to recant that testimony. These developments, without doubt, are extraordinary. They do not require this Court, however, to broadly investigate matters before other courts and issue rulings that may limit how other courts deal with this evidence, if at all, in the cases before them.

As for this case, this Court can address evidence of fraud, perjury and other misconduct as necessary to resolve the issues here. For example, whether Residences submitted inflated damage claims is relevant to Defendants' defense that the policy is void. Exactly what evidence bears on this defense and may be submitted to a jury, can be decided with pre-trial motions and at trial. As already noted, to the extent misconduct exceeds the bounds of this litigation there are other forums and authorities to address them.

The point is that this Court has procedural mechanisms in place that allow it to

14. If the Court felt that such an inquiry were appropriate, it would not limit the inquiry to Rosenbaum's alleged transgressions, but would include within its scope the serious allegations of misconduct by Garfinkel and Katzman.

15. The Court strongly rejects the request that this Court enjoin Rosenbaum from "appearing in any case or taking any action adverse to Alan Garfinkel or any of his former clients in any case where allegations of Ken Romain are, directly or indirectly at issue," as a misuse of its power. [*See* DE 122, pp. 17–18].

consider these issues, as necessary to bring this case to a just conclusion. Given those mechanisms, this Court will not exercise its discretion to make an extraordinary and unnecessary use of its power.

III. CONCLUSION

For the foregoing reasons, it is hereby ORDERED that:

1. Residences' Request for Judicial Inquiry [DE 103] is DENIED.

2. The Defendants' Joint Statement Requesting a Broad Judicial Inquiry [DE 121] is DENIED.

3. Residences' Motion for Protective Order [DE 122] is DENIED.

4. Garfinkel's and Katzman's Motion to Intervene [DE 125] is GRANTED.

5. Garfinkel's and Katzman's Motion to Convene A Sealed and Limited Ancillary Proceeding [DE 130] is DENIED.

6. Garfinkel's and Katzman's Motion for Hearing [DE 132] is DENIED.

7. Westchester's Motion for Extension of Time to Respond [DE 146] is DENIED as moot.

Donna Katz MAPLES, Plaintiff,

v.

UHS OF GEORGIA, INC., UHS of Georgia Holdings, Inc., and UHS of Peachford, L.P., doing business as Peachford BHS of Atlanta, Defendants.

Civil Action No. 1:09–CV–01964–WEJ.

United States District Court,
N.D. Georgia,
Atlanta Division.

May 3, 2010.

Background: Former employee brought action against her former employer, alleging employer eliminated her part-time nurse position in violation of Age Discrimination in Employment Act (ADEA). Employer moved for summary judgment.

Holdings: The District Court, Walter E. Johnson, United States Magistrate Judge, held that:

(1) employee failed to establish prima facie case of disparate treatment, and

(2) employee failed to demonstrate pretext.

Motion granted.

1. Civil Rights ⇐1210

To establish a disparate-treatment claim under the ADEA, an employee must prove that age was the but-for cause of the employer's adverse decision. Age Discrimination in Employment Act of 1967, § 4(a)(1), 29 U.S.C.A. § 623(a)(1).

2. Civil Rights ⇐1572

The ADEA does not permit a separate recovery of compensatory damages for pain and suffering or emotional distress. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

3. Civil Rights ⇐1539

Where there is no direct or statistical evidence of age discrimination, the court applies the burden-shifting framework established in *McDonnell Douglas* to evaluate an ADEA claim based upon circumstantial evidence. Age Discrimination in Employment Act of 1967, § 4(a)(1), 29 U.S.C.A. § 623(a)(1).

4. Civil Rights ⇐1539

Under the *McDonnell Douglas* burden-shifting framework, if an employee is

previous order, courts are restrained by a careful statutory analysis for each item of a bill of costs. While *United States* [redacted] *Kolesar* is helpful in deciding whether the costs of a stenographic transcript should be awarded under 28 U.S.C. § 1920(2), it is not applicable to the decision whether photocopying expense is reimbursable under 28 U.S.C. § 1920(4). The following statement is a clear explanation of the necessity required for copies under subsection (4):

> Photocopying charges attributable to discovery and the court's copies of pleadings, motions, and memoranda are "reasonable necessary for use in the case" and can be awarded. Extra copies of filed papers and correspondence, and copies of cases, however, are not necessary but are for the convenience of the attorneys and therefore not taxable.

Independence Tube Corp. [redacted] *Copperweld Corp.*, 543 F.Supp. 706, 722 (N.D.Ill.1982).

B. Disallowance of Reimbursement for Costs of Depositions Not Adequately Identified as Necessary for Motion for Summary Judgment

[8] In the previous order, this court awarded the costs of two depositions which were tendered into evidence at the trial. The court's allowance of the costs of those two depositions does not mean, as suggested in the defendant's motion for reconsideration, that this court would not award the costs of depositions used in supporting a successful motion for summary judgment. Such an award is appropriate when the attorneys can point to the use of the depositions with some particularity. Considering, however, the strong policy of the American system against the shifting of litigation expenses, a general statement by the attorneys that the parties and the court relied on five depositions for an order granting summary judgment is not sufficient; the party seeking reimbursement must show how the depositions were necessary for the court's disposition of the motion. This court's ruling, therefore, was consistent with *Jeffries* [redacted] *Georgia Residential Finance Authority*, 90 F.R.D. 62 (N.D.Ga.1981), and reconsideration is unnecessary.

In summary, the defendant's motion for reconsideration is hereby DENIED, and the court hereby ALLOWS $137.25 for photocopying expense under 28 U.S.C. § 1920(4). This court's review of the bill of costs is now complete and the items, as allowed in this order and the previous order, may now be included in the judgment.

Claire NELSON, Plaintiff,

[redacted]

Samuel N. GREENSPOON, and Eaton, Van Winkle and Greenspoon, a partnership, Defendants.

No. 83 Civ. 7952 (SWK).

United States District Court, S.D. New York.

Sept. 11, 1984.

An action was filed involving a dispute between a corporation's former president and her attorney. The corporation sought to intervene to preserve its claims to a purported attorney-client privilege surrounding documents generated by the attorney. The District Court, Kram, J., held that: (1) the corporation could intervene, and (2) the corporation failed to carry its burden of showing that the documents were privileged.

Motion to intervene granted and motion for suppression and return of documents denied.

1. Federal Civil Procedure ⇐321

Corporation's motion seeking return of allegedly privileged documents in its former president's possession and suppression of those documents already produced in

litigation could be treated as motion to intervene, even though moving papers did not explicitly seek leave to intervene. Fed. Rules Civ.Proc.Rules 24, 24(a, c), 28 U.S.C.A.

2. Federal Civil Procedure ⇐335

Although corporation which sought to intervene in order to protect allegedly privileged documents did not meet with formalities required by intervention rule, that did not preclude granting intervention in that denial of motion would exalt form over substance. Fed.Rules Civ.Proc.Rules 24, 24(a, c), 28 U.S.C.A.

3. Federal Courts ⇐23

If corporation's intervention to preserve its claims to purported attorney-client privilege surrounding various documents involved in litigation was as of right, district court could hear case irrespective of corporation's citizenship under doctrine of ancillary jurisdiction. Fed.Rules Civ.Proc. Rules 24, 24(a, c), 28 U.S.C.A.

4. Federal Civil Procedure ⇐335

Corporation could intervene in action between corporation's former president and her attorney concerning attorney's representation of president in order to assert its claim of attorney-client privilege surrounding documents generated by attorney, who also represented corporation, where attorney was not actively protecting that privilege. Fed.Rules Civ.Proc.Rule 24(a), (a)(2), 28 U.S.C.A.; Fed.Rules Evid.Rule 501, 28 U.S.C.A.; N.Y.McKinney's CPLR 4503.

5. Witnesses ⇐198(1)

Existence of attorney-client privilege is based upon policy of encouraging openness and full disclosure between client and his or her attorney. N.Y.McKinney's CPLR 4503.

6. Witnesses ⇐198(1)

In order to minimize intrusion of attorney-client privilege upon ascertainment of truth, scope of privilege must be, and is, confined to narrowest possible ambit which will still achieve purpose of full disclosure between client and his or her attorney. N.Y.McKinney's CPLR 4503.

7. Witnesses ⇐222

Burden of establishing existence of attorney-client privilege is upon party claiming privilege. N.Y.McKinney's CPLR 4503.

8. Witnesses ⇐204(2)

Former president of corporation, which claimed that corporate documents were protected by attorney-client privilege, was properly in possession of those documents where documents discussed former president's personal matters. N.Y.McKinney's CPLR 4503.

9. Witnesses ⇐205

Corporate documents which involved communications to or from third parties, which contained information obtained from third parties or which referred to on-going communications with third party were not confidential and, therefore, were not protected by corporation's attorney-client privilege. N.Y.McKinney's CPLR 4503.

10. Witnesses ⇐204(2)

Corporation could not use its claim of attorney-client privilege with respect to documents to regain possession of purportedly privileged documents in possession of corporation's former president. N.Y. McKinney's CPLR 4503.

Morris Pottish, New York City, for plaintiff.

Olnick, Boxer, Blumberg, Lane & Troy by Andrew N. Krinsky, New York City, for defendant Samuel N. Greenspoon.

Richenthal, Abrams & Moss by Arthur Richenthal, New York City, for proposed intervenor Hosiery Corp. of America.

MEMORANDUM OPINION AND ORDER

KRAM, District Judge.

The above-captioned action is before this Court in an unusual posture: a corporation, Hosiery Corporation of America ("HCA"), seeks to intervene in this dispute between its erstwhile president, Claire Nelson, and

her attorney, Samuel N. Greenspoon, concerning Greenspoon's representation of Nelson, in order to preserve its claims to a purported attorney-client privilege surrounding various documents generated by Greenspoon, also HCA's attorney, copies of which were sent to Nelson during her tenure with HCA and remain in her possession to date. HCA seeks an order directing Nelson to turn over all of the documents, and any copies thereof, and prohibiting her from producing or disseminating those documents in any way. For the reasons stated below, HCA is granted leave to intervene, but its motion to restrain plaintiff and replevy the documents is denied.

—BACKGROUND—

HCA is a closely-held Delaware corporation with its principal place of business in Pennsylvania. HCA is primarily engaged in selling hosiery through the mails.

Plaintiff Claire Nelson, along with her late husband Jules, had been the sole and joint owners of the outstanding shares of HCA. Claire Nelson also was President, or executive officer in charge of operations, of HCA for several years prior to the end of 1980. On December 2, 1980, Claire and Jules Nelson entered into a separation agreement. On the same date, Claire entered into an agreement with HCA whereby HCA would pay Claire $1,250,000, over the course of ten years, in redemption of her interest in the corporation.

Claire was represented in the preparation of these agreements by defendant Greenspoon. Greenspoon is a member of the bar of the State of New York. He had, before and after the preparation of these agreements, represented Claire in personal matters. Additionally, Greenspoon had at times represented Jules in personal matters. He also has been HCA's general counsel since 1977. Greenspoon was the only attorney involved in the preparation of these agreements.

In or about March, 1981, Claire Nelson's employment by HCA was terminated. She has not been affiliated with HCA since that time.

In or about December, 1981, Jules Nelson instituted an action against Claire in New York State Supreme Court. The substance and merits of that action are irrelevant for purposes of this motion. Claire counterclaimed in that action to set aside the agreements. On November 19, 1983, Jules Nelson died, slowing the progress of the Supreme Court action. That action is still pending.

Jules Nelson's will was filed for probate in Surrogate's Court, New York County. Greenspoon and Helen Gioulis (not a party herein) were appointed preliminary executors. The eligibility of Greenspoon for permanent letters testamentary is being contested in Surrogate's Court.

In November, 1983, Claire instituted this action against Greenspoon alleging malpractice and conversion. Discovery in this action had been proceeding apace. Then, in the course of discovery, Claire produced copies of letters written by Greenspoon. Greenspoon maintained that the documents were privileged as between HCA and its attorney, but responded to questions concerning them.

HCA [1] then brought on the instant motion by Order to Show Cause dated May 11, 1984. In support of its motion, HCA submitted an affidavit by Arthur Richenthal, dated May 7, 1984 ("Richenthal Aff."). Attached as exhibits to the affidavit were copies of several documents which Claire Nelson has produced during discovery herein as to which HCA claims an attorney-client privilege applies. By this motion, HCA seeks the return of all privileged documents (and any copies thereof) in Claire's possession and the suppression of those privileged documents already produced by Nelson in this action.

1. HCA is represented here by the attorney who represents Greenspoon in the Surrogate's Court proceeding.

—DISCUSSION—

[1] Plaintiff raises several procedural arguments in opposition to HCA's motion which must be dealt with first. Initially, plaintiff claims that HCA is a non-party with no standing to move in this action. Admittedly, HCA's moving papers do not explicitly seek leave to intervene, but rather indicate that HCA appears "for [a] specific and limited purpose." Richenthal Aff., ¶ 2. However, on June 7, 1984, HCA addressed a letter to the Court requesting that the Court construe the motion as including a request to intervene. The Court will, therefore, construe this motion as one to intervene.

[2] Plaintiff next argues that HCA's papers are insufficient to support a motion to intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure. Rule 24(c) provides in relevant part, that "[a] person desiring to intervene shall serve a motion to intervene ... [which] shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." HCA has not met the formalities required by Rule 24(c); however, denying its motion on that ground would exalt form over substance. *See Belgian American Mercantile Corp. v. De Groeve-Marcotte & Fils*, 433 F.Supp. 1098, 1101 (S.D.N.Y.1977). In *Belgian American*, as in this case, the movant, a non-party, had acted by Order to Show Cause for some relief and had not specifically styled its request a petition to intervene. In that case, as in this one, the relief sought was clearly spelled out in the Order to Show Cause, albeit not in the form of a pleading. Noting that the "Second Circuit has held that in the face of strong circumstances the formal requirements of Rule 24 need not be insisted on" (*citing Kupferman v. Consolidated Research & Mfg. Corp.*, 459 F.2d 1072, 1074 n. 1 (2d Cir.1972)), the court held that "noncompliance with the strict requirements of Rule 24(c)" would not preclude intervention and a determination of the intervenor's motion on the merits. 433 F.Supp. at 1101. This Court feels that that is the proper course to take in this instance as well.

[3] Plaintiff also argues that the Court would be divested of subject matter jurisdiction if HCA were permitted to intervene because HCA is not of citizenship diverse from that of plaintiff. If HCA's intervention is as of right, pursuant to Fed.R.Civ.P. 24(a), then this Court is empowered to hear this case irrespective of HCA's citizenship under the doctrine of ancillary jurisdiction. *See Formulabs, Inc. v. Hartley Pen Co.*, 318 F.2d 485 (9th Cir.1963).

Rule 24(a) provides, in relevant party, as follows:

> Upon timely application anyone shall be permitted to intervene in an action:
>
> * * * * * *
>
> (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

[4] HCA seeks to intervene here to assert its purported attorney-client privilege to documents being made a subject of this action. This Court finds that the provisions of Rule 24(a)(2) do apply to this situation: to wit, the client claims an interest, an attorney-client privilege, in documents which are the subject of the action,[2] and the existing party, the attorney, is not actively protecting that privilege. *See In re Katz*, 623 F.2d 122 (2d Cir.1980).

HCA claims that various documents in Claire Nelson's possession are HCA documents, subject to the attorney-client privilege, and that she should not be permitted to produce, or otherwise use, such privileged documents in this lawsuit. The pa-

2. If these documents relate solely to Greenspoon's representation of HCA, as HCA contends, this Court is at a loss to understand how they are relevant to, or the subject of, this action. Be that as it may, Nelson has produced them, and questioned Greenspoon about them; therefore, plaintiff has essentially made them the subject of this action at this stage.

rameters of the claimed privilege in this diversity action are defined by state law. Fed.R.Evid. 501. The attorney-client privilege in New York is governed by section 4503 of the New York Civil Practice Law and Rules ("CPLR"); however, it is deeply rooted in common law. *See People* [redacted] *O'Connor*, 85 A.D.2d 92, 94, 447 N.Y.S.2d 553, 556 (4th Dep't 1982).

[5, 6] The existence of such a privilege is based upon a policy of encouraging openness and full disclosure between a client and his or her attorney. *See Upjohn Co.* [redacted] *United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981); *Priest* [redacted] *Hennessy*, 51 N.Y.2d 62, 67–68, 431 N.Y.S.2d 511, 513–514, 409 N.E.2d 983, 985–986 (1980). Nonetheless, the application of the privilege serves to exclude reliable evidence and, often, to block the truth-determining processes of the courts. *Priest*, 51 N.Y.2d at 68, 431 N.Y.S.2d at 514, 409 N.E.2d at 986; *In re Jacqueline F.*, 47 N.Y.2d 215, 219, 417 N.Y.S.2d 884, 886–87, 391 N.E.2d 967, 969–70 (1979). In order to minimize the intrusion of the privilege upon the ascertainment of truth, the scope of the privilege must be, and is, confined to the narrowest possible ambit which will still achieve the purpose of full disclosure. *Priest*, 51 N.Y.2d at 68, 431 N.Y.2d at 514, 409 N.E.2d at 986; *see also In re Bekins Storage Co.*, 118 Misc.2d 173, 177, 460 N.Y.S.2d 684, 690 (Sup.Ct.N.Y.Co.1983).

[7] The specific formulation of the privilege, as set out in section 4503 of the CPLR, provides, in relevant part, as follows:

> Unless the client waives the privilege, ... any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney ... and the client in the course of professional employment, shall not ... be allowed to disclose such communication.

N.Y.Civ.Prac.Law § 4503 (McKinney 1963) (Supplementary Pamphlet 1964 to 1983). Whether or not that privilege covers the communications here at issue must be resolved by this Court, but the burden of establishing the existence of an attorney-client privilege applicable to these particular circumstances is upon HCA, the party claiming the privilege. *See Priest*, 51 N.Y.2d at 69, 431 N.Y.S.2d at 514, 409 N.E.2d at 986; *see also Katz*, 623 F.2d at 125; *United States* [redacted] *Demauro*, 581 F.2d 50, 55 (2d Cir.1978).

HCA argues initially that these communications were made during the course of an attorney-client relationship, and there appears to be no dispute about this.[3] HCA further argues that these corporate communications are confidential, urging baldly that "[c]onfidentiality exists where the communications sought to be protected were made for the purposes of either receiving or giving legal advice." HCA's Memorandum in Support of Motion, p. 4. HCA also argues baldly that it has not waived its privilege, and that Nelson possessed these documents without HCA's knowledge. These last three contentions are hotly disputed.

Treating the last argument first, it is beyond peradventure that HCA "knew" Nelson obtained these documents,[4] since she is named on the documents (or at least most of them) as an addressee, either of the original or of a copy. Nelson argues, therefore, that section 4503, by its terms, is inapplicable. HCA argues in response that Nelson received these documents solely in her capacity as corporate officer. As such, HCA argues, Nelson's receipt was the equivalent of HCA's receipt, so the documents remained privileged (to the same extent that they were privileged to begin with). HCA argues further that it did not "know" that she retained the documents after she left her employ there, and that such retention was wrongful and did not divest HCA of its claimed privilege. Nelson, on the other hand, responds that these documents were addressed to her personally, not as corporate officer, and/or that

3. Although, as discussed below, it is not always clear who the client was.

4. At least insofar as a corporation can "know" anything.

HCA knew she retained them, at least because Jules (the sole remaining shareholder, chief officer, and director of HCA) shipped them to her and knew she had them. HCA argues that Jules' knowledge of, or even complicity in, Nelson's retention of the documents is irrelevant because he did not have the authority to waive HCA's privilege.[5]

The Court has attempted to parse these bickering thrusts and parries in an effort to determine the applicability of section 4503. It is essential that the general nature of the relationship among the four parties involved—Claire, Jules, HCA and Greenspoon—be understood. HCA is, or was a very closely held corporation. Claire and Jules were the sole shareholders, and were the principal officers, of the corporation. HCA was, in sum, very much a "Mom and Pop" operation—the alter ego of Claire and Jules. Greenspoon, was the attorney for all three. He handled the Nelsons' personal affairs as well as their business affairs. The distinctions that HCA makes now, between Claire Nelson, as corporate officer, and Claire Nelson, as individual, and between Claire Nelson and HCA, were not so neatly defined in fact.[6]

[8] A perusal of the documents as to which HCA claims its privilege[7] indicates that Greenspoon quite simply did not always distinguish between Claire, the individual, and HCA. In other words, several of the documents were addressed to personal matters as well as corporate ones. For example, document D 220 discusses property owned by Jules and Claire Nelson in the context of a broader discussion of corporate matters. Likewise, document D 241 refers to life insurance (presumably personal) amidst corporate matters. Document D 394 refers to Claire's potential criminal exposure from HCA's activities. These are but examples of the *personal* information discussed in what seem to be predominantly corporate documents. Since these documents discuss Claire's personal matters, I find that she is properly in possession of them.

[9] Moreover, the Court finds that some of these documents are not confidential, and therefore are not privileged. HCA's bald assertion that a document is automatically confidential if legal advice is sought or provided in the document is not a correct statement of the law. *See Herbert v. Lando*, 73 F.R.D. 387, 399 (S.D.N.Y.), *remanded on other grounds*, 568 F.2d 974 (2d Cir.1977), *rev'd and remanded on other grounds*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979). There, the court stated, "[n]or is privileged status automatically conferred by the fact that the memorandum may express an opinion of counsel; opinions are privileged only to the extent that they are based upon, and consequently reveal, information furnished by the client *in confidence.*" *Id.* (emphasis added). A communication is not confidential if it involves third parties. *See, e.g., People v. Belge*, 59 A.D.2d 307, 308, 399 N.Y.S.2d 539, 540 (4th Dept.1977) (*quoting United States v. United Shoe Mach. Corp.*, 89 F.Supp. 357, 358–59 (D.Mass.1950) ("without the presence of strangers")); *Randy Int'l Ltd. v. Automatic Compactor Corp.*, 97 Misc.2d 977, 412 N.Y.S.2d 995 (Civ.Ct. Queens Co. 1979). Thus, documentary communications to or from third parties are not confidential. Likewise, documenta-

5. HCA makes this argument through the affidavit of its attorney without any citation or support in case law or in corporate records. The Court, however, need not address this contention here.

6. The other courts involved in these tripartite proceedings have apparently held to the same effect with respect to the blurred distinction between Jules and HCA.

7. The Court notes that HCA has not shown the same vigor with which it *argues* its desire to keep these documents privileged and confidential in the way it actually *treats* those documents. HCA submitted copies of the very documents it claims are privileged to this Court as exhibits in the publicly filed order to show cause. HCA did not make any effort to have those documents sealed from public access. Since I find that the documents are not privileged, I need not determine whether HCA unwittingly waived its privilege by filing these documents in this manner.

ry communications are not confidential if copies thereof are sent to third parties. Furthermore, information obtained from third parties is not privileged. *See Bekins Storage Co.*, 118 Misc.2d at 179, 460 N.Y.S.2d at 691. Document D 220 as to which HCA claims a privilege, was addressed to Mr. Terry Arch of Touche, Ross & Co., and therefore is not privileged. A copy of document D 271 was sent to Ms. Dolores Geraghty and therefore is not privileged.[8] Plaintiff's Exhibits 37 and 38 (part of Exhibit 6 to the Order to Show Cause herein) contain information obtained from Mr. Arch, and refer to ongoing communications with Mr. Arch regarding the subject of the documents; therefore, these are not confidential. *See J.P. Foley & Co., Inc.* [redacted] *Vanderbilt*, 65 F.R.D. 523, 526 (S.D.N.Y.1974). These are but examples of the several documents that are not confidential, and therefore not privileged for this reason as well.

[10] Finally, HCA has not cited a single example of the attorney-client privilege being used to regain possession of purportedly privileged documents. Given the need to *limit* the scope of the privilege, this Court will not countenance HCA's attempt to create new affirmative applications for the privilege. *Cf., Liberty Mut. Ins. Co.* [redacted] *Engels*, 41 Misc.2d 49, 51, 244 N.Y.S.2d 983, 986 (Sup.Ct. Kings Co.1963) (privilege is a shield, not a sword), *aff'd*, 21 A.D.2d 808, 250 N.Y.S.2d 851 (2d Dep't 1964).

In sum, HCA has failed to carry its burden of showing that these documents are privileged. They appear to properly be in Claire Nelson's possession, and shall remain so. HCA's motion to intervene is GRANTED and its motion for suppression and return of the documents is DENIED. Preparation for trial is to continue apace.

SO ORDERED.

8. The Court does not know the nature of the relationship between Ms. Geraghty and HCA. Ms. Geraghty may be a corporate insider such that the communication remained confidential; however, HCA certainly did not sustain its burden of establishing that fact, if it is the case. The same is true of documents addressed to Mr. Uri Shoham, except in the case of those documents, since they were addressed to Mr. Shoham at HCA's address, the Court was willing to assume the insider status of Mr. Shoham in spite of HCA's failure of proof.

GOLDEN EAGLE DISTRIBUTING CORPORATION, Plaintiff,

[redacted]

BURROUGHS CORPORATION, Defendant.

No. C-84-0523-WWS.

United States District Court, N.D. California.

Sept. 19, 1984.

Action was brought to recover damages arising out of allegedly defective computer system sold to corporation. After removal from state court to federal court in Minnesota on basis of diversity, followed by transfer to the Northern District of California, seller moved to dismiss claims as time barred. Following denial of motion, counsel for defendant was directed to submit memorandum explaining why sanctions should not be imposed in connection with the motion. The District Court, Schwarzer, J., held that: (1) legal argument purporting to reflect existing law but instead being predicated upon, and not merely arguing for, an extension of the existing law violates rule relating to attorney's certification of pleadings, motions, and other papers by his signature thereon, regardless of whether purpose is to cause unnecessary delay or needless expense or whether counsel acted in good faith, and (2) failure to cite authority adverse to movant's position or to make reasonable inquiry to determine whether motion to dismiss is warranted by existing law also violates rule, warranting sanctions.

Sanctions ordered.

1. Attorney and Client ⇐32(14)

Local counsel associated in case with out-of-state counsel for party to the action

Westlaw

Federal Rules of Civil Procedure Rule 24

United States Code Annotated Currentness
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title IV. Parties
Rule 24. Intervention

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) Permissive Intervention.

(1) ***In General.*** On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) ***By a Government Officer or Agency.*** On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) ***Delay or Prejudice.*** In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) Notice and Pleading Required. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

(Amended December 27, 1946, effective March 19, 1948; December 29, 1948, effective October 20, 1949; Januai 1963, effective July 1, 1963; February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; 30, 1991, effective December 1, 1991; April 12, 2006, effective December 1, 2006; April 30, 2007, effe December 1, 2007.)

Amendments received to 7-15-11

END OF DOCUMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE No. 08-80736-CIV-MARRA/JOHNSON

JANE DOE 1 and JANE DOE 2,

Plaintiffs,

[redacted]

UNITED STATES OF AMERICA,

Defendant.
_____/

MOTION FOR LIMITED INTERVENTION OF JEFFREY EPSTEIN

This is a motion by Jeffrey Epstein pursuant to Federal Rules of Civil Procedure 24(a) and 24(b) to intervene for the limited purpose of seeking a protective order and responding to the motions of Jane Doe 1 and Jane Doe 2 for disclosure, evidentiary use, and widespread dissemination of the plea negotiation letters and emails between his lawyers and federal prosecutors. Those letters and emails were written in furtherance of plea negotiations, encouraged by the broad protections of Federal Rule of Evidence 410, Federal Rule of Criminal Procedure 11(f), and the constitutional right to effective assistance of counsel. They are privileged, confidential, not discoverable, and inadmissible as evidence at any proceeding in this case.

I. MANDATORY AND DISCRETIONARY INTERVENTION ARE PROPER

Intervention is proper as a matter of right under Federal Rule of Civil Procedure 24(a) because Mr. Epstein has an interest in protecting his privileged and confidential plea negotiations, and "disposing of the action may as a practical matter impair or impede [his] ability to protect [his] interest . . . ." FED. R. CIV. P. 24(a). Unless allowed to intervene, Mr. Epstein could suffer the injustice of having his privilege and confidentiality claims erased without ever having been heard.

See El-Ad Residences at Miramar Condo. Ass'n, Inc. v. Mt. Hawley Ins. Co., 716 F. Supp. 2d 1257, 1262 (S.D. Fla. 2010), *quoting In re Grand Jury Subpoena (Newparent Inc.)*, 274 F.3d 563, 570 (1st Cir. 2001) (in the context of the attorney-client privilege, ruling that colorable claims of privilege are a textbook example of the right to intervene as of right); *Appeal of Hughes*, 633 F.2d 282, 286 (3d Cir. 1980) ("The governing rule in these circumstances is that the possessor of the claimed privilege or right may intervene to assert it").

Discretionary intervention is also proper under Rule 24(b) because Mr. Epstein's interests in protecting his plea negotiations "share with the main action a common question of law or fact." FED. R. CIV. P. 24(b). That common question of law involves the privileged and confidential nature of Mr. Epstein's plea negotiations, and the unprecedented request of Jane Doe 1 and Jane Doe 2 to use those negotiations as evidence to vacate the product of Mr. Epstein's plea bargain. This is plainly prohibited by Rule 410, and for good reason. The "central feature" of Rule 410 is that "the accused is encouraged candidly to discuss his or her situation in order to explore the possibility of disposing of the case through a consensual arrangement." *United States v. Herman*, 544 F.2d 791, 797 (5th Cir. 1977). To allow Jane Doe 1 and Jane Doe 2 to now "introduce statements uttered in reliance on the rule would be to use the rule as a sword rather than a shield." *Id.*

II. THE OBJECTION OF JANE DOE 1 AND JANE DOE 2

As required by Local Rule 7.1, we asked counsel for Jane Doe 1 and Jane Doe 2 whether they objected to Mr. Epstein's limited intervention. Counsel responded that they "oppose the motion on timeliness and other grounds." Mr. Epstein's motion is timely for the reasons set forth below. As to the "other grounds" that Jane Doe 1 and Jane Doe 2 may advance, counsel for both plaintiffs previously admitted that Mr. Epstein has a right to intervene.

First, they argued in their opposition to the intervention of attorneys Black, Weinberg, and Lefkowitz that Mr. Epstein "is the real party in interest" and that "harm from the release of the materials (if any) could be only to Jeffrey Epstein." *Jane Doe 1 and Jane Doe 2's Response To Motion To Intervene of Roy Black, Martin Weinberg, and Jay Lefkowitz* [DE 78] at 6.

Second, also in opposing the intervention of attorneys Black, Weinberg, and Lefkowtiz, the plaintiffs argued that "[o]nly Epstein has an interest in the validity of the non-prosecution agreement . . . ." *Jane Doe 1 and Jane Doe 2's Response To Motion To Intervene of Roy Black, Martin Weinberg, and Jay Lefkowitz* [DE 78] at 4.

And third, in their *"Motion to Use Correspondence To Prove Violations of The Crime Victim's Rights Act And To Have Unredacted Pleadings Unsealed,"* filed five months ago, Jane Doe 1 and Jane Doe 2 expressly state that they do not object to Mr. Epstein's timely intervention:

> The victims have no objection to Epstein intervening in this case – at this time. If, however, Epstein delays intervention until after a reasonable period of time, the victims will argue that his motion to intervene is untimely.

[DE 51 at 8].

III. Mr. Epstein's Motion To Intervene Is Timely

We address at the outset what has *not* yet happened in this litigation:

There has been no trial or adjudication on the merits of the claims and defenses, and this motion to intervene is not made on the eve of such trial.

There is no final judgment that would be undone or affected by Mr. Epstein's intervention. Nor is a final judgment imminent given the discussions about discovery and related matters addressed during the August 12, 2011 hearing.

There are no discovery cut off dates, and the motion to intervene is therefore not filed on the eve of such deadlines or after they have passed.

> There have been no evidentiary hearings or factual findings by the Court that would be undone by the motion to intervene. Rather than impede the litigation, Mr. Epstein's participation will aid the Court in ruling on the sensitive and novel legal issues concerning plea negotiations.
>
> Finally, time is not of the essence to Jane Doe 1 and Jane Doe 2 – after all, they ignored this litigation *for a year and a half* while they pursued money damages against Mr. Epstein. The Court's order dismissing this case for lack of prosecution, which is dated September 8, 2010, noted that there had been no activity in the case since April 2009. [DE 38].

A motion to intervene must be timely. But "[t]imeliness is not a word of exactitude or of precise measurable dimensions . . . [T]imeliness is not limited to chronological considerations but 'is to be determined from all the circumstances.'" *Stallworth v. Monsanto Co.*, 558 F.2d 257, 263-64 (5th Cir. 1977). Those circumstances are considered in light of four factors:

> 1. The length of time during which the would-be intervenor actually knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene.
>
> 2. The extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case.
>
> 3. The extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied.
>
> 4. The existence of unusual circumstances militating either for or against a determination that the application is timely.

Id.

1. The length of time during which the would-be intervenor actually knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene:

Mr. Epstein's interests arose during the August 12, 2011 hearing, when the plaintiffs argued for the first time that their rights under the CVRA were violated not only by the government, but also by Mr. Epstein. Even though Mr. Epstein has no legal duties to the plaintiffs under the CVRA, the

plaintiffs argued at the hearing that Mr. Epstein was somehow responsible for the government's communications with each Jane Doe and that Mr. Epstein, a private citizen, caused the government to violate its obligations under the Act. According to the plaintiffs, Mr. Epstein "engineered" and "orchestrated" the claimed CVRA violations, and he "insisted that the rights of these victims" be violated. [Trans. August 12, 2011 at 33-34, 61]. The plaintiffs argued that because of this supposed conspiracy between Mr. Epstein and the government, the plaintiffs are entitled to copies of all the plea negotiation letters and emails, to use them as evidence in these proceedings seeking invalidation of the Non-Prosecution Agreement. *Id.* at 33-34, 61, 107-09.

When the plaintiffs articulated a supposed conspiracy directed by Mr. Epstein to use Assistant United States Attorneys to deny the plaintiffs their rights, it became clear that the plaintiffs' purpose in seeking the plea negotiations is to offer them as evidence against Mr. Epstein, in violation of Federal Rule of Evidence 410. This showed that Mr. Epstein's interests were being implicated in the ongoing litigation between the government and the Jane Does and that limited intervention was timely and warranted.

2. The extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case:

Jane Doe 1 and Jane Doe 2 will suffer no prejudice if Mr. Epstein is allowed to intervene. As noted earlier, Jane Doe 1 and Jane Doe 2 ignored this case for a year and a half while they pursued claims for money damages against Mr. Epstein. They obviously do not view time as being of the essence and were in no hurry to litigate their claims, despite their knowledge that as of June 30, 2008 Mr. Epstein was in a county jail, and that as of the summer of 2009 he was serving a term of community control, which did not end until July of 2010.

Additionally, during the time period when the plaintiffs demonstrated no urgency and sought no expedited relief, Mr. Epstein, pursuant to his obligation under the Non-Prosecution Agreement, paid an attorney representative, Robert Josefsberg, substantial legal fees to represent many of the witnesses against him and settled many civil cases brought by the attorney representative. Mr. Epstein settled those cases in large part because one of the conditions of the Non-Prosecution Agreement was that Mr. Epstein waive certain defenses in civil litigation if certain identified plaintiffs sued him exclusively under the provisions of 18 U.S.C. § 2255. In short, Mr. Epstein met every condition of his Non-Prosecution Agreement with the U.S. Attorney's Office between June 30, 2008 and the Summer 2010, during which time there was inaction by the plaintiffs.

Counsel for the plaintiffs are aware that the provisions of 18 U.S.C. § 3771(d)(3) & (5)(B) require that CVRA claims be raised and resolved on an exigent basis, and that litigation, including appeals from adverse rulings, be expedited in order to avoid the current circumstance, where a plaintiff seeks to invalidate an agreement after a citizen has fully served his sentence and has been subjected to a myriad of collateral and adverse consequences, none of which can be reversed.

There is also no prejudice to the plaintiffs because there has been no trial or adjudication of the merits of the claims or defenses raised by the existing parties, depositions have not been taken, there have been no evidentiary hearings or factual findings by the Court, and there is no final judgment or decree that would be undone or affected by Mr. Epstein's intervention.

In their *"Motion to Use Correspondence To Prove Violations of The Crime Victim's Rights Act And To Have Unredacted Pleadings Unsealed,"* Jane Doe 1 and Jane Doe 2 argue that any motion to intervene by Mr. Epstein would be untimely if filed "after the date on which the government must respond to the victims' motion for a finding of violation of the CVRA," because

"that is when the victims must begin drafting a reply pleading." *Id.* This argument of inconvenience does not go far because many of the issues raised by Mr. Epstein parallel the issues raised by attorneys Black, Weinberg, and Lefkowitz as well as those raised during the August 12, 2011 hearing, and Jane Doe 1 and Jane Doe 2 do not have to file their responsive pleadings addressing those issues for one more month.[1] Thus, by the time Jane Doe 1 and Jane Doe 2 would have to respond to the merits of Mr. Epstein's motion for a protective order, they will have already done most if not all of the work involved in addressing the common legal issues. Allowing Mr. Epstein to intervene will bring the plaintiffs no undue prejudice.

3. The extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied:

The issues concerning Mr. Epstein's plea negotiations are significant. As both sides expressed to the Court during the hearing on August 12, 2011, there are no reported cases that address these precise facts. As far as we know, in our combined decades of experience as criminal defense attorneys, there has been no case where third parties in a civil case have sought to discover, much less use, plea negotiations as evidence to vacate the product of the client's plea bargain *years after the client has served a prison sentence, served a year of community control, completed his entire sentence, and paid enormous sums of money to the attorney representing persons bringing or threatening to bring lawsuits against him for money damages.* To adjudicate these issues without Mr. Epstein's intervention would bring him irreparable harm, especially because if his plea negotiations are disclosed, Mr. Epstein will forever lose the benefit of their confidentiality and

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[1] The government has two weeks to respond to the supplemental brief to be filed by attorneys Black, Weinberg, and Lefkowitz, and Jane Doe 1 and Jane Doe 2 then have two weeks after that to file their response. [DE 91 & 92].

privilege.

4. The existence of unusual circumstances militating either for or against a determination that the application is timely:

At least two unusual circumstances militate for a determination that the motion to intervene is timely and should be granted. First, the plaintiffs ignored this case for a year and a half, waiting until this Court dismissed it for lack of prosecution to pay it any attention. Their main concern during all that time was their claims for money against Mr. Epstein. They can now hardly complain that Mr. Epstein's motion to intervene is untimely.

Second, the Court's ruling on the issues concerning Mr. Epstein's plea negotiations will reach far beyond the parties in this case and will impact every criminal investigation and prosecution in this and other Districts. Releasing the plea negotiation letters and emails and using them as evidence to invalidate the bargain itself, as Jane Doe 1 and Jane Doe 2 request, will chill the ability of lawyers and clients to engage in candid plea discussions with the government. This will ultimately crowd the dockets of the district courts, where judges rely on plea negotiations to dispose of 96.1% of all criminal cases.[2] The ruling urged by Jane Doe 1 and Jane Doe 2 will also shift the ethical and constitutional obligations of all criminal defense attorneys, because few criminal defense lawyers would consider entering into plea discussions and making candid written statements during plea negotiations if those statements are later discoverable and could be used against the client in a yet-unfiled lawsuit by yet-unknown plaintiffs at some unknown time in the future. No lawyer would agree to have open discussions with a prosecutor about resolving a criminal matter or to make

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[2] The Bureau of Justice Statistics of the Department of Justice reports that as of 2005, only 3.9% of all federal criminal cases proceed to trial. These statistics are reported at www.ojp.usdoj.gov/bjs/pub/html/fjsst/2005/fjs05st.htm.

written submissions of their positions and views of the evidence and law, if plea negotiations could be used to damage a client in a future civil case. With these additional serious interests at stake, the motion to intervene should not be denied as untimely.

IV. Conclusion

Mr. Epstein's motion for a limited intervention is timely and should be granted as of right under Rule 24(a) or, alternatively, as a matter within the Court's discretion under Rule 24(b).

If allowed to intervene, Mr. Epstein would file the attached motion for a protective order in response to the motion of Jane Doe 1 and Jane Doe 2 for disclosure of the defense plea negotiation letters and emails [DE 50 at 5], their motion to use these letters and emails as substantive evidence in their quest to invalidate the Non-Prosecution Agreement [DE 51], and their motion to disseminate the letters and emails to the media [DE 51 at 7].

We certify that on September 2, 2011, the foregoing document was filed electronically with the Clerk of the Court using the CM/ECF system.

Respectfully submitted,

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By /S/
ROY BLACK, ESQ.
Florida Bar No. 126088
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Florida Bar No. 0042201
On Behalf of Jeffrey Epstein

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE No. 08-80736-CIV-MARRA/JOHNSON

JANE DOE 1 and JANE DOE 2,

Plaintiffs,

EXHIBIT A

UNITED STATES OF AMERICA,

Defendant.
_____/

INTERVENOR JEFFREY EPSTEIN'S MOTION FOR A PROTECTIVE ORDER AND OPPOSITION TO MOTIONS OF JANE DOE 1 AND JANE DOE 2 FOR PRODUCTION, USE, AND DISCLOSURE OF PLEA NEGOTIATIONS

Pursuant to Federal Rules of Evidence 410 and 501, Federal Rule of Criminal Procedure 11, and the Constitutional right to effective assistance of counsel, Jeffrey Epstein opposes the motion of Jane Doe 1 and Jane Doe 2 for disclosure of all the plea negotiation letters and emails between his lawyers and federal prosecutors during the criminal investigation [DE 50 at 5]. Mr. Epstein also opposes the motion of Jane Doe 1 and Jane Doe 2 to use these plea negotiations as substantive evidence in their quest to invalidate the Non-Prosecution Agreement [DE 51], as well as their motion to disseminate the plea negotiations to the media [DE 51 at 7].

Established case law as well as sound and substantial policy considerations prohibit disclosure of the letters and emails prepared by Mr. Epstein's lawyers during plea negotiations with the government, and require that the letters and emails that Jane Doe 1 and Jane Doe 2 already have remain confidential. Mr. Epstein adopts all the arguments advanced by proposed intervenors Black, Weinberg, and Lefkowitz in their motion to intervene and attached motion for a protective order [DE 56], as well as during the August 12, 2011 hearing.

In further support of his position, Mr. Epstein submits this motion and memorandum of law. Part I shows that the Court should deny disclosure and use of the plea negotiations by simple reference to Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(f), without having to reach the other issues raised by the parties and the proposed intervenors. This is because during the hearing on August 12, 2011, Jane Doe 1 and Jane Doe 2 admitted that they intend to use the plea negotiation letters and emails as substantive evidence at a "remedies hearing" where they will seek invalidation of Mr. Epstein's Non-Prosecution Agreement. Using this correspondence as evidence against Mr. Epstein is plainly prohibited by Evidence Rule 410 and Criminal Rule 11.

Part II of this memorandum shows that Jane Doe 1 and Jane Doe 2 are not entitled to discovery or use of the plea negotiations not only because of the reach of Rules 410 and 11, but also because plea negotiations enjoy an evidentiary privilege as recognized by the Supreme Court in *United States v. Mezzanatto,* 513 U.S. 196, 204 (1995) ("Rules 410 and 11(e)(6) 'creat[e], in effect, a privilege of the defendant,' and, like other evidentiary privileges, this one may be waived or varied at the defendant's request"). Additionally, because plea negotiations are "rooted in the imperative need for confidence and trust," and because their confidentiality serves significant public and private ends, they are properly subject to a common law privilege under Federal Rule of Evidence 501. Similar privileges, which are "rooted in the imperative need for confidence and trust" and which serve significant public and private ends, have been recognized by Judge Marcus in the case of *In Re Air Crash Near Cali, Colombia*, 959 F. Supp. 1529 (S.D. Fla. 1997); by Chief Judge Vinson of the Northern District of Florida in *Reichhold Chemicals, Inc. v. Textron, Inc.*, 157 F.R.D. 522 (N.D. Fla. 1994); and by a number of district courts recognizing a mediation privilege which shields from disclosure and use mediation documents, letters, and communications.

Finally, in response to the Court's question during the August 12, 2011 hearing, Part III establishes that Mr. Epstein has standing under Federal Rule of Criminal Procedure 6(e) to object to disclosure of matters occurring before the grand jury.

PART I

A.
PLEA NEGOTIATIONS MAY NOT BE USED AGAINST MR. EPSTEIN UNDER THE PLAIN LANGUAGE OF THE FEDERAL RULES

The Court should deny disclosure and use of the plea negotiations by simple reference to Rule of Evidence 410 and Rule of Criminal Procedure 11(f), without having to reach the other issues raised by the parties and the proposed intervenors. During the August 12, 2011 hearing, the plaintiffs admitted that they seek the defense letters and emails to offer them as evidence to support their request that the Court invalidate Mr. Epstein's Non-Prosecution Agreement. According to the plaintiffs, the plea negotiations will show that Mr. Epstein supposedly "engineered" and "orchestrated" the claimed Crime Victims' Rights Acts violations and that therefore the plaintiffs are entitled to negate Mr. Epstein's interest in the protections and finality of the Non-Prosecution Agreement. [August 12, 2011 Trans. at 33-34, 61, 107-09].

The letters and emails exchanged between the government and defense counsel during plea negotiations are classic settlement discussions, written with the intention that they remain confidential. As such, they are protected by the constitutional right to effective assistance of counsel and the express language of Rule 410 and Federal Rule of Criminal Procedure 11(f). FED. R. EVID. 410 (discussions made during plea negotiations are "not, in any civil or criminal proceeding, admissible against the defendant who . . . was a participant in the plea discussions"); FED. R. CRIM. P. 11(f) ("the admissibility or inadmissibility of . . . a plea discussion and any related statement is

governed by Federal Rule of Evidence 410").

Obviously, the plaintiffs intend to use the plea negotiation letters "against" Mr. Epstein. They protested during the August 12 hearing that the letters would be offered "against the government" and "not against Mr. Epstein," but this is disingenuous given their emphatic and categorical representations to the contrary. [Compare Trans. at 29-30 with Trans. at 33-34, 61, 107-09]. The plaintiffs' arguments and accusations throughout this litigation, including the various conspiracy allegations leveled against Mr. Epstein during the August 12 hearing, establish that the plaintiffs' true purpose is to use the plea negotiations against Mr. Epstein in the current proceeding.

The prohibition on admission of plea negotiation communications clearly extends to the current proceeding, whether it is denominated a quasi-criminal or a civil proceeding. The committee notes to former Rule 11(e)(6), which read almost identical to Rule 410, specifically state that the words "*not . . . admissible against the defendant*" refer to "***the purpose*** for which [the evidence] is offered" and not "to the kind of proceeding in which the evidence is offered." FED. R. CRIM. PRO. 11 advisory committee note 1979 amendment (emphasis added). Rule 11 was amended in 1979 specifically to avoid confusion or misunderstanding regarding this phrase, and to emphasize that "against the defendant" means "the purpose" for which the evidence is being used:

> The phrase "in any civil or criminal proceeding" has been moved from its present position, following the word "against," for purposes of clarity. An ambiguity presently exists because the word "against" may be read as referring either to the kind of proceeding in which the evidence is offered or ***the purpose for which is offered***. The change makes it clear that the latter construction is correct.

Committee on Rules of Practice And Procedure of The Judicial Conference of The United States, Standing Committee On Rules of Practice And Procedure, 77 F.R.D. 507, 538 (February 1978) (emphasis added).

Even though the plaintiffs claim that they would technically offer the plea negotiation letters against the government because the government is its opponent, their real and express purpose is to offer the plea negotiations against Mr. Epstein to prove his supposed culpability in encouraging the government to breach what the plaintiffs contend is their statutory right to consultation, and to then seek the unprecedented and unconstitutional remedy of invalidation of the Non-Prosecution Agreement despite the fact that Mr. Epstein has already suffered all of its penal and adverse collateral consequences: jail, community custody, payment of substantial legal fees to an attorney representative for his accusers, payment of substantial civil settlements driven by waivers negotiated by the government to facilitate its witnesses bringing successful civil lawsuits, and registration requirements.

Rules 410 and 11 plainly prohibit admission of the plea communications.

B.

BECAUSE PLEA NEGOTIATIONS ARE INADMISSIBLE, THE PLAINTIFFS BEAR THE BURDEN OF PARTICULARIZING A PROPER BASIS FOR DISCOVERY

When a discovery request seeks "information subject to exclusion under the Federal Rules of Evidence, *such as settlement information, . . .* many courts shift the burden to the requesting party, requiring them to make a particularized showing that the inadmissible evidence is likely to lead to admissible evidence." *Reist* [redacted]. *Source Interlink Co.*, 2010 WL 4940096 at *2 (M.D. Fla. Nov. 29, 2010); *Bottaro* [redacted]. *Hatton Assocs.*, 96 F.R.D. 158, 159-60 (E.D.N.Y. 1982) ("the object of the inquiry must have some evidentiary value before an order to compel disclosure of otherwise inadmissible material will issue"). Such a burden-shifting analysis is particularly important where the discovery is protected by a rule of inadmissibility, where the plaintiffs have not identified any principled basis for discovery other than to seek to admit the plea communications in evidence, and where the

policies behind the rule of inadmissibility would be compromised by any disclosure, regardless of whether the communications are later excluded as evidence in proceedings in this case.

The plaintiffs in *Bottaro* sued a number of defendants for securities fraud. One defendant settled and was dismissed from the lawsuit. The remaining defendants later moved to compel disclosure of the settlement agreement. In denying the motion to compel, the Court recognized the strong public policy favoring settlements, and the need to encourage settlements by ensuring against "unnecessary intrusion" into "the bargaining table." *Id.* at 160. For this reason, the Court held, parties seeking discovery of inadmissible settlement negotiations must first make a "particularized showing of a likelihood that admissible evidence will be generated" by their discovery request:

> Given the strong public policy of favoring settlements and the congressional intent to further that policy by insulating the bargaining table from unnecessary intrusions, we think the better rule is to require some particularized showing of a likelihood that admissible evidence will be generated by the dissemination of the terms of a settlement agreement. Since the terms of settlement do not appear to be reasonably calculated to lead to discovery of admissible evidence and the defendants have not made any showing to the contrary, this justification for [discovery] must fail.

Id.; accord Reist, 2010 WL 4940096 at *2 (recognizing the "chilling effect" that discovery can have on the willingness of parties to enter into settlement negotiations).

Other than their conclusory statement during the August 12 hearing that the plea negotiations would be used against the government and not Mr. Epstein, the plaintiffs have not made any particularized showing to convince this Court that any admissible evidence would result from their discovery of the plea negotiations. Accordingly, their request for discovery of clearly inadmissible evidence should be denied.

C.
THE PLEA NEGOTIATIONS ARE IRRELEVANT BECAUSE THE PLAINTIFFS ARE NOT ENTITLED TO INVALIDATE THE NON-PROSECUTION AGREEMENT

Additionally, the purpose for which the plaintiffs seek the plea negotiation letters – to set aside the Non-Prosecution Agreement – is a remedy that, if granted, would violate the Constitution and the statutory rights of *both* the government and Mr. Epstein. It would also be extraordinarily inequitable given that while the plaintiffs failed to urge that this Court resolve their Complaint as an exigent or emergency matter, Mr. Epstein served the entirety of a prison sentence that resulted from obligations imposed upon him by the Non-Prosecution Agreement. He also served the entire community control consecutive sentence, and pursuant to the Non-Prosecution Agreement, he made payments of huge sums of money to the attorney representative of certain claimants. Finally, Mr. Epstein settled cases because of waivers within the Non-Prosecution Agreement.

Under the Crime Victims' Rights Act, neither Jane Doe 1 nor Jane Doe 2 can invalidate the Non-Prosecution Agreement. The Act expressly prohibits it: "Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." 18 U.S.C. § 3771(d)(6).

The Act codifies the long-standing principle that "[t]he Attorney General and United States Attorneys retain broad discretion to enforce the Nation's criminal laws." *United States v. Armstrong*, 517 U.S. 456, 464 (1996). This is due in large part to the separation of powers doctrine. *Id.*; U.S. CONST. art. II, § 3. Whether to investigate possible criminal conduct, grant immunity, negotiate a plea, or dismiss charges, are all central to the prosecutor's executive function. *United States v. Smith*, 231 F.3d 800, 807 (11th Cir. 2000). "The judiciary cannot interfere with a prosecutor's charging discretion, except in narrow circumstances where it is necessary to do so in order to

discharge the judicial function of interpreting the Constitution." *Id.* And this Court has not been called upon to interpret the Constitution.

Even in the case of *In re Dean*, 527 F.3d 391 (5th Cir. 2008), upon which the plaintiffs rely, the district court, after remand from the Fifth Circuit, *denied* the motion of the victims to invalidate the defendant's plea agreement as a remedy for the claimed violation of the Crime Victims' Rights Act. The court found that "[t]he purpose of the conferral right is not to give the victims a right to approve or disapprove a proposed plea in advance or to participate in plea negotiations." *In re Dean* on remand as *United States v. BP Products North America, Inc.*, 610 F. Supp. 2d 655, 727 (S.D. Tex. 2009). Instead, "[t]he purpose of the reasonable right to confer is for victims to provide information to the government, obtain information from the government, and to form and express their views to the government and court." *Id.* The district court concluded that the violations alleged by the victims did not provide a basis for rejecting the plea agreement. *Id.* at 726-27; *see In re Acker*, 596 F.3d 370, 373 (6th Cir. 2010) (denying mandamus where petitioners sought to vacate plea agreement which made no provision for restitution in deference to pending civil litigation); *United States v. Aguirre-Gonzalez*, 597 F.3d 46 (1st Cir. 2010) (relying on the "strong interest in the finality of criminal sentences" to reject mandamus under the Act where a defendant had pleaded guilty and had been sentenced more than two years earlier); *see also United States v. Bedonie*, 413 F.3d 1126, 1129-30 (10th Cir. 2005) (district court had no authority under mandatory restitution act to reopen restitution proceedings after sentencing).

More recently in the case of *In re Peterson*, No. 2:10-CV-298, 2010 WL 5108692 (N.D. Ind. Dec. 8, 2010), the district court denied relief under the Crime Victims' Rights Act before any charges were filed. The court recognized that the Act "guarantees crime victims a range of substantive and

participatory rights," but that "[w]hether charges might be filed and proceedings initiated in the future is a matter of prosecutorial discretion, and the [Act] expressly provides that '[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any office under his direction.'" *Id.* at *2 (quoting 18 U.S.C. § 3771(d)(6)).

For these reasons, the Court should deny the motion of Jane Doe 1 and Jane Doe 2 to discover and use the plea negotiation letters as evidence.

PART II

MR. EPSTEIN'S PLEA NEGOTIATIONS ARE PRIVILEGED AND NOT DISCOVERABLE UNDER RULE 501

Jane Doe 1 and Jane Doe 2 are also not entitled to discovery or use of the plea negotiations because plea negotiations enjoy an evidentiary privilege, as recognized by the Supreme Court in *United States* [redacted]. *Mezzanatto*, 513 U.S. 196 (1995). Additionally, because plea negotiations are "rooted in the imperative need for confidence and trust," and because their confidentiality serves significant public and private ends, they are properly subject to a common law privilege under Federal Rule of Evidence 501. That Rule provides, in relevant part:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

FED. R. EVID. 501. This Court "has the power to recognize new privileges, consistent with Rule 501 of the Federal Rules of Evidence, in cases arising under federal law." *In Re Air Crash Near Cali, Colombia*, 959 F. Supp. 1529, 1533 (S.D. FL. Feb. 7, 1997).

A.
"REASON AND EXPERIENCE" ARE THE TOUCHSTONES FOR ACCEPTING A COMMON LAW PRIVILEGE FOR PLEA NEGOTIATIONS

Jaffee v. Redmond, 518 U.S. 1 (1996), is perhaps the leading case addressing Rule 501 and the common-law principles underlying the recognition of testimonial privileges. The case involved a police officer and the extensive counseling she received after a traumatic incident in which she shot and killed a man. She was sued by the man's estate, which demanded discovery of the notes taken by the clinical social worker who provided therapy. *Id.* at 5-6. The officer and the therapist objected and asserted that their sessions were privileged, but the district court disagreed.

The Seventh Circuit reversed and concluded that "reason and experience," which are "the touchstone for acceptance of a privilege under Federal Rule of Evidence 501," compelled recognition of a privilege between patient and psychotherapist. *Id.* "Reason tells us that psychotherapists and patients share a unique relationship, in which the ability to communicate freely without fear of public disclosure is the key to successful treatment." *Id.* The Seventh Circuit also observed that even though a number of older federal decisions had previously rejected the privilege, things had changed in the intervening years and the "need and demand for counseling" had "skyrocketed during the past several years." *Id.*

The Supreme Court accepted certiorari to resolve a conflict among the Circuits, and affirmed the finding of a privilege. The Court's analysis was grounded "in the light of reason and experience," which showed that a therapist's ability to help a patient "is completely dependent" upon the patient's "willingness and ability to talk freely." *Id.* at 10, quoting Advisory Committee's Notes to Proposed Rules, 56 F.R.D. 183, 242 (1972). The Court found that the psychotherapist-patient privilege is "rooted in the imperative need for confidence and trust" and that "the mere possibility

of disclosure may impede the development of the confidential relationship necessary for successful treatment." *Id.* at 10.

Following *Jaffee*, three important sets of decisions have recognized privileges under Rule 501 to protect information that is exchanged in an environment that encourages candid disclosures, and that depends on this open exchange of information to promote significant private and public interests. They are:

> the decision of Judge Marcus, before he was appointed to the Eleventh Circuit, denying discovery and recognizing a privilege for airline pilots who report incidents and violations, *In Re Air Crash Near Cali, Colombia*, 959 F. Supp. 1529 (S.D. Fla. 1997);
>
> the decision of Judge Vinson, now the Chief Judge in the Northern District of Florida, denying discovery and recognizing a privilege for a corporation that reports contamination and other environmental hazards and violations to the Florida Department of Environmental Regulation, *Reichhold Chemicals, Inc.* [redacted] *Textron, Inc.*, 157 F.R.D. 522 (N.D. Fla. 1994); and
>
> a number of district court decisions denying discovery and recognizing a mediation privilege where litigants can "rely on the confidential treatment of everything that transpires during mediation . . . ." *Lake Utopia Paper Ltd.* [redacted] *Connelly Containers, Inc.*, 608 F.2d 928 (2d Cir.1979); *Folb* [redacted] *Motion Picture Ind. Pension & Health Plans,* 16 F. Supp. 2d 1164, 1173 (C.D.Ca. 1998); *Sheldone* [redacted] *Pennsylvania Turnpike Comm'n,* 104 F. Supp. 2d 511, (W.D. Pa. 2000); *Microsoft Corporation* [redacted] *Suncrest Enterprise*, 2006 WL 929257 (N.D. Cal. Jan. 6, 2006).

1. Judge Marcus and The Common Law Privilege Of Pilots Reporting Incidents And Violations, *In Re Air Crash Near Cali, Colombia*, 959 F. Supp. 1529 (S.D. Fla. 1997)

In re Air Crash Near Cali, Colombia involved the crash of an American Airlines plane as it arrived in Cali just before Christmas, 1995. The crash killed 159 passengers and crew members. One hundred and thirty lawsuits were consolidated before Judge Marcus, and a steering committee

was created to represent the plaintiffs. 959 F. Supp. at 1530.

During discovery, American Airlines refused to produce a number of responsive documents, asserting that they were privileged because they were prepared pursuant to the American Airlines Safety Action Partnership Program, known as the ASAP program. The program was an initiative by the FAA, the Allied Pilots Association, and American Airlines. It was a "voluntary pilot self-reporting program designed to encourage pilots to report incidents and violations." *Id.* at 1531. The objectives of the ASAP program were "to identify and to reduce or eliminate possible flight safety concerns, as well as to minimize deviations from Federal Aviation Regulations." *Id.*

Judge Marcus agreed that American Airlines had made "a compelling argument for recognition of a limited common law privilege for the ASAP materials." *Id.* at 1533. Relying on *Jaffee*, Judge Marcus found that he had the ability "to recognize new privileges, consistent with Rule 501 of the Federal Rules of Evidence, in cases arising under federal law." *Id.* He addressed the following four factors:

First, the "private interests" involved – "in other words, whether dissemination of the information will chill the 'frank and complete disclosure of facts' shared in an 'atmosphere of confidence and trust.'" *Id.* at 1533. Judge Marcus found that American Airlines, the pilots, and the FAA had an interest in air safety and in encouraging the flow of safety information. The FAA, as the regulatory body, also had an interest in being made aware of violations. *Id.* at 1534.

Second, Judge Marcus considered the "public interests" furthered by the proposed privilege and found that there was a compelling public interest in improving the safety of commercial flights.

Third, the "likely evidentiary benefit that would result from the denial of the privilege." *Id.* Judge Marcus did not find a benefit from denying the privilege. On the contrary, he agreed that

violations would be "kept secret if the pilots believed that their reports might be used in litigation or otherwise disseminated to the public." *Id.* Judge Marcus also agreed that failure to recognize the privilege would "reduce the willingness of pilots to report incidents" and would "seriously damage and probably terminate a uniquely successful safety program . . . [which] relies on an assumption of strict confidentiality." Id. at 1534. He concluded that "without a privilege, pilots might be hesitant to come forward with candid information about in-flight occurrences, and airlines would be reluctant, if not altogether unwilling, to investigate and document the kind of incidental violations and general flight safety concerns whose disclosure is safeguarded by the ASAP program." *Id.* Finally, Judge Marcus warned that absent a privilege, "the prospect of ASAP reports being used by adverse parties in the course of litigation undoubtedly will affect the content, timeliness and candor of the reports submitted by its pilots." *Id.*

Fourth, whether the privilege had been recognized by the states. *Id.* The Court was not aware of any state or federal court that had recognized the privilege claimed by American Airlines, but that did not dissuade him from finding that a privilege existed.

With all these considerations in mind, Judge Marcus ruled that "[t]here is a genuine risk of a meaningful and irreparable chill from the compelled disclosure of ASAP materials in connection with the pending litigation." *Id.* at 1534. Likewise in Mr. Epstein's case, there is a genuine risk of a meaningful and irreparable chill from the compelled disclosure of plea negotiations in connection with the pending litigation.

Significant private interests support a plea negotiations privilege. It cannot be denied that defendants, prosecutors, the court system, victims, and law enforcement agencies all have a legitimate interest that criminal cases or investigations resolve by pleas. Plea negotiations benefit

defendants by limiting their exposure to jail or other punishment; they benefit all the parties in the system by avoiding the many expenses associated with jury trials; they benefit the court by keeping the flow of its dockets and making judges available to handle matters that are proceeding to trial or that are contested; and they benefit prosecutors and law enforcement not only by freeing their time so that they can focus on contested matters, but also by allowing them to debrief defendants and gather information about criminal activity.

The public interests in criminal cases resolving by way of plea negotiations also cannot be denied. The public has an interest in the finality of plea negotiations, in ensuring that the courts, prosecutors, and law enforcement agencies are available to dedicate their time to contested matters, and in information that may be provided by defendants that will help curb criminal activity in their communities. The public, as well as private victims and government entities, all have an interest in restitution.

There are significant evidentiary consequences if the Court denies a privilege to plea negotiations. As with air safety violations that would be "kept secret if pilots believed their reports might be used in litigation," defendants and people under criminal investigation would not engage in plea negotiations and waive their Fifth Amendment rights if they believed that statements made during those negotiations could be used against them later in litigation with third parties. Candid discussions simply cannot take place if defendants fear that statements made during negotiations can be divulged to third parties in other proceedings and used to harm them, send them to prison, or invalidate their bargains years after they have served prison sentences and suffered all the consequences of their deals. Just as the work-product privilege is created, in part, to encourage lawyers to keep notes without fear of disclosure, a privilege for plea communications is necessary

to encourage lawyers to communicate, in writing, without fear that their proposals, submissions, arguments, analysis of the facts, or legal arguments will become the grist of later civil litigation to the potential detriment to the client.

Few if any lawyers would engage in candid and open discussions with a prosecutor if their statements could later be used against their clients. The ethical and constitutional obligations we now have to initiate and engage in plea negotiations would be terribly at odds with any rule that made those negotiations public and admissible in evidence to be used as ammunition to harm our clients.

2. Chief Judge Vinson and the Common Law Privilege Of Reporting Environmental Hazards and Violations, *Reichhold Chemicals, Inc.* [redacted] *Textron, Inc.*, 157 F.R.D. 522 (N.D. Fla. 1994)

Reichhold Chemicals involved a Consent Order between Reichhold and the Florida Department of Environmental Regulation. The Order obligated Reichhold "to investigate and remediate the contamination of groundwater on and under, and storm water runoff from, an industrial plant site it owns in Pensacola, Florida." 157 F.R.D. 523-24.

Reichhold brought an action against former owners of the plant site, to recover some of the cost of remediating the land. The defendants sought reports that Reichhold had prepared describing possible environmental violations. Reichhold asserted that these documents were protected by "the privilege of self-critical analysis." *Id.* at 524. This privilege, "also known as the self-evaluative privilege," had been adopted in other jurisdictions, but at the time, it presented an issue of first impression to Chief Judge Vinson. He ruled in favor of Reichhold and found that the privilege allows individuals and companies to candidly assess their compliance with legal requirements without creating evidence to be later used against them by their adversaries:

> The self-critical analysis privilege has been recognized as a qualified privilege which protects from discovery certain critical self-appraisals. It allows individuals or businesses to candidly assess their compliance witn regulatory and legal requirements without creating evidence that may be used against them by their opponents in future litigation. The rationale for the doctrine is that such critical self-evaluation fosters the compelling public interest in observance of the law.

Id. at 524. Judge Vinson agreed with Reichhold that the privilege was necessary to protect an organization or individual from the Hobson's choice of either undertaking an aggressive investigation and correcting dangerous conditions, "thereby creating a self-incriminating record that may be evidence of liability," or "deliberately avoiding making a record on the subject (and possibly leaving the public exposed to danger) in order to lessen the risk of civil liability." *Id.*

In recognizing the privilege, Judge Vinson relied on *Bredice* [redacted]. *Doctor's Hospital, Inc.*, 50 F.R.D. 249 (D.D.C.1970), the first case to find a common law self-evaluation privilege. There, the hospital held staff meetings where the professional staff evaluated the treatment provided to patients. In a medical malpractice action, the estate of Bredice sought the minutes of the hospital's staff meetings where Bredice's treatment or death were discussed. The court denied the discovery, noting that "review of the effectiveness and results of treatments were valuable in improving the quality of health care available to the general public," and that "physicians would be unwilling to candidly critique the actions of their colleagues if such evaluations were subject to discovery and use as evidence in a subsequent malpractice action." *Id.* at 525.

3. The Common Law Mediation Privilege

As is true in the case of plea negotiations, it seems self-evident that no system of mediation can function if parties fear that statements made and documents submitted in furtherance of mediation create a trail of incrimination that can later be used against them. "[C]ounsel, of necessity,

[would] feel constrained to conduct themselves in a cautious, tight-lipped, noncommittal manner more suitable to poker players in a high-stakes game than adversaries attempting to arrive at a just solution of a civil dispute." *Lake Utopia Paper Ltd. v. Connelly Containers, Inc.*, 608 F.2d 928 (2d Cir.1979).

Lake Utopia involved the Second Circuit's Civil Appeals Management Plan, which called for parties to engage in a conference before oral argument, to hopefully settle their dispute. The Circuit adopted this mediation program to encourage the parties to settle, and to expedite the processing of civil appeals. *Id.* at 929.

Counsel for the parties in *Lake Utopia* met pursuant to the program in an attempt to settle. The appellee later disclosed to the Court certain admissions made during the conference which showed that the appeal was frivolous. Rather than embrace this information, the Court chastised the appellee for disclosing it, holding that the purpose of the conference program was to encourage the parties to settle, and that the program would not function if statements made during the conference were later used against the parties. "It is essential to the proper functioning of the Civil Appeals Management Plan that all matters discussed at these conferences remain confidential. The guarantee of confidentiality permits and encourages counsel to discuss matters in an uninhibited fashion often leading to settlement . . . ." *Id.* at 930.

Ten years later, in *Folb v. Motion Picture Ind. Pension & Health Plans*, 16 F. Supp. 2d 1164, (C.D.Ca. 1998), the district court in California became the first federal court to adopt the mediation privilege as federal common law under Rule 501. Relying on *Lake Utopia Paper* as well as a number of other decisions addressing the confidentiality of settlement negotiations, *Folb* held that "the need for confidentiality and trust between participants in a mediation proceeding is sufficiently

imperative to necessitate the creation of some form of privilege." *Id.* at 1175. The court emphasized that the mediation privilege is particularly important because federal courts rely on mediation to manage their dockets: "This conclusion takes on added significance when considered in conjunction with the fact that many federal district courts rely on the success of ADR proceedings to minimize the size of their dockets." *Id.*

More recently in *Sheldone v. Pennsylvania Turnpike Comm'n*, 104 F. Supp. 2d 511, (W.D. Pa. 2000), the court relied on *Jaffee* and on Judge Marcus' decision in *In re Air Crash Near Cali, Colombia* to hold that all mediation documents and mediation communications are privileged and not subject to discovery. Mediation "afford[s] to litigants an opportunity to articulate their position[s] and to hear, first hand, both their opponent's version of the matters in dispute and a neutral assessment of the relative strengths of the opposing positions." *Id.* at 513. Without a mediation privilege, "parties and their counsel would be reluctant to lay their cards on the table so that a neutral assessment of the relative strengths and weaknesses of their opposing positions could be made." *Id.* This, of course, assumes that parties "would even agree to participate in the mediation process absent confidentiality." *Id.* Confidentiality is therefore "essential to the mediation process," and it is "beyond doubt that the mediation privilege is rooted in the imperative need for confidence and trust." *Id.* at 514.

No real distinction exists between the need to keep mediation confidential and the need to keep plea negotiations confidential. Both processes, and the goals they serve, are essentially identical. Both processes aim at encouraging settlement and compromise. Both processes depend on parties speaking candidly about the strengths and weaknesses of their positions. And in both processes, it would be manifestly unfair to require that parties attempt to settle their disputes in this

fashion, only to later allow third parties to use their words as a weapon against them.

B.

THE COURT SHOULD RECOGNIZE A PLEA NEGOTIATIONS PRIVILEGE

The "central feature" of Rule 410 "is that the accused is encouraged candidly to discuss his or her situation in order to explore the possibility of disposing of the case through a consensual arrangement." *United States v. Herman*, 544 F.2d 791, 797 (5th Cir. 1977). The Rule is derived from "the inescapable truth that for plea bargaining to work effectively and fairly, a defendant must be free to negotiate without fear that his statements will later be used against him." *Id.* at 796. The legislative history, too, "shows that the purpose of Fed.R.Ev. 410 and Fed.R.Crim.P. 11(e)(6) is to permit the unrestrained candor which produces effective plea discussions between the . . . government and the . . . defendant." *Committee on Rules of Practice And Procedure of The Judicial Conference of The United States, Standing Committee On Rules of Practice And Procedure*, 77 F.R.D. 507 (February 1978) (emphasis added).[1]

For these reasons, criminal defense lawyers negotiate with prosecutors in an environment of confidentiality, fostered by the protections of Rules 410 and 11. These rules encourage a process of searching and honest disclosures, and parties expect that their negotiations, and the information they exchange, will be protected from future use by an adversary. And because criminal defense lawyers are *required,* by ethical and constitutional considerations, to engage in plea negotiations to discharge their duty to represent the client's *best interest*, they do so with the well-founded expectation that communications made during those negotiations will not later be used *to harm the client*.

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[1] Rule 11(f) was formerly Rule 11(e)(6), which read almost identical to Rule 410.

1. The Court Should Recognize A Plea Negotiations Privilege Because Plea Negotiations Are Critical To The Criminal Justice System

The Supreme Court has recognized that "Rules 410 and 11(e)(6) 'creat[e], in effect, a privilege of the defendant . . . .'" *Mezzanatto*, 513 U.S. at 204.This privilege encourages disposition of criminal cases by plea agreement, which is essential to the administration of justice:

> The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining," is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the states and the federal government would need to multiply by many times the number of judges and court facilities.

Santobello [redacted]. *New York*, 404 U.S. 257, 260 (1971). "[T]he fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned." *Blackledge* [redacted]. *Allison,* 431 U.S. 63, 71 (1977).

Those sentiments are just as true today. The Bureau of Justice Statistics of the Department of Justice reports that in 2005, 96.1% of federal criminal cases were resolved by way of a plea bargain. www.ojp.usdoj.gov/bjs/pub/html/fjsst/2005/fjs05st.htm That today's justice system depends on plea negotiations is a monumental understatement.

2. The Court Should Recognize A Plea Negotiations Privilege Because Plea Negotiations Are Critical To The Effective Representation of Counsel

Whether to negotiate a plea or contest a criminal charge "is ordinarily the most important single decision in any criminal case." *Boria* [redacted]. *Keane*, 99 F.3d 492 (2d Cir. 1996). In the age of the Sentencing Guidelines, with the draconian sentences called for in federal criminal cases, minimum mandatories, and the abolition of parole, engaging in meaningful and effective plea negotiations is

perhaps one of the most important roles of a criminal defense attorney. Today, the lawyer's "ability to persuade the judge or the jury is . . . far less important than his ability to persuade the prosecutor" during plea negotiations. *United States* v. *Fernandez*, 2000 WL 534449 (S.D.N.Y. May 3, 2000) at *1.

Counsel's failure to discharge his duties during plea negotiations is malpractice: "[I]t is malpractice for a lawyer to fail to give his client timely advice concerning" pleas. *Id.* It also constitutes ineffective assistance of counsel, and violates the Constitution. Thus, counsel has a duty to advise clients fully on whether a particular plea is desirable, since "[e]ffective assistance of counsel includes counsel's informed opinion as to what pleas should be entered." *United States* v. *Villar,* 416 F. Supp. 887, 889 (S.D.N.Y. 1976); *Boria* v. *Keane*, 99 F.3d 492, 497 (2d Cir. 1996), citing ABA Model Code of Professional Responsibility, Ethical Consideration 7-7 (1992).

Counsel also has a constitutional obligation to seek out information from the government, especially information that the government intends to use against the client. Failure to do so constitutes ineffective assistance of counsel. *Rompilla* v. *Beard*, 545 U.S. 374 (2005). "The notion that defense counsel must obtain information that the state has and will use against the defendant is not simply a matter of common sense, . . . it is the duty of the lawyer . . . ." *Rompilla* v. *Beard*, 545 U.S. 374, 386 (2005), citing 1 ABA Standards for Criminal Justice 4–4.1 (2d ed. 1982 Supp).[2]

The constitution also requires that criminal defense lawyers conduct "a prompt investigation of the circumstances of the case," and this includes making every effort to secure information directly from the prosecutors:

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[2] The Supreme Court has "long . . . referred [to these ABA Standards] as 'guides in determining what is reasonable.'" *Rompilla* v. *Beard*, 545 U.S. 374, 387 (2005).

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.

Rompilla [redacted] *Beard*, 545 U.S. 374, 386 (2005), citing 1 ABA Standards for Criminal Justice 4–4.1 (2d ed. 1982 Supp).

The lawyer's duty to investigate and obtain information from the prosecutor goes hand-in-hand with the lawyer's additional duty to "make suitable inquiry" to determine whether valid defenses exist. *Jones* [redacted] *Cunningham*, 313 F.2d 347 (4th Cir.1963) ("Of course, it is not for a lawyer to fabricate defenses, but he does have an affirmative obligation to make suitable inquiry to determine whether valid ones exist").

And regardless of whether valid defenses exist, counsel has a duty *to initiate plea negotiations* if he is to discharge his duty to faithfully represent the client's interests. *Hawkman* [redacted] *Parratt,* 661 F.2d 1161, 1171 (8th Cir. 1981) (counsel's "failure to initiate plea negotiations concerning the duplicitous felony counts constituted ineffective assistance of counsel which prejudiced Hawkman").

3. The Court Should Recognize A Plea Negotiations Privilege To Avoid A Meaningful And Irreparable Chill In Plea Negotiations

Reason and experience tell us that the system we have in place of sentencing laws, ethical rules, federal court dockets, and constitutional considerations, will not function if plea negotiations are not privileged. After all, "it is immediately apparent that no defendant or his counsel [would] pursue [plea negotiations] if the remarks uttered during the course of it are to be admitted in evidence as proof of guilt." *Herman*, 544 F.2d at 797. Plea negotiations are "rooted in the imperative need

for confidence and trust," *Jaffee,* 518 U.S. at 10, and maintaining their confidentiality advances significant public and private ends. Discovery and use of plea negotiations will cause "a meaningful and irreparable chill" to the "frank and complete disclosures" that result in negotiated resolution of criminal matters. *In re Air Crash Near Cali, Colombia,* 957 F.2d at 1533.

For these reasons, plea negotiations are properly subject to a common law privilege under Federal Rule of Evidence 501. The Court should hold that the plea negotiation letters and emails between Mr. Epstein's lawyers and the government are privileged and not subject to discovery or evidentiary use by the plaintiffs.

PART III

MR. EPSTEIN HAS STANDING TO INVOKE RULE 6(E)

During the August 12 hearing, the Court asked whether only the government has standing under Rule 6(e) to object to disclosure of grand jury materials. [Trans. at 27]. The answer is no. Mr. Epstein, too, has standing to raise these issues. The grand jury was created to protect the citizens, not to protect the government. Rule 6(e) implements those protections by requiring secrecy of matters occurring before the grand jury. The rule protects citizens against disclosure of information that is damaging to them, and in particular "protects the reputation of an accused who is not indicted." *United States* [redacted]. *Malatesta*, 583 F.2d 748, 753 (5th Cir. 1978). Mr. Epstein therefore has standing under Rule 6(e) to object to disclosure of matters occurring before the grand jury.

We certify that on September 2, 2011, the foregoing document was filed electronically with the Clerk of the Court using the CM/ECF system.

Respectfully submitted,

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On Behalf of Jeffrey Epstein

183 F.R.D. 458, 51 Fed. R. Evid. Serv. 35
(Cite as: 183 F.R.D. 458)

United States District Court,
D. Maryland,
Baltimore Division.
NUTRAMAX LABORATORIES, INC.,
Plaintiff,
v.
TWIN LABORATORIES INC., et. al., Defendants.

No. Civ.AB–97–787.
Dec. 7, 1998.

In six patent infringement suits consolidated for discovery, defendants moved to compel the production of various documents used by counsel for the plaintiff to prepare a number of witnesses, including management officials of plaintiff, for their depositions. The District Court, Grimm, United States Magistrate Judge, held that: (1) documents supplied by plaintiff's counsel to prepare two management officials for deposition were subject to disclosure under evidence rule allowing discovery of documents reviewed by a witness to prepare for deposition, based on implied waiver of work product protection, and (2) supplied by plaintiff's counsel to prepare other witnesses for deposition were not subject to disclosure under evidence rule, absent proof that witnesses used documents to refresh their memory for the purpose of testifying.

Motion granted in part and denied in part.

West Headnotes

[1] 1381

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(C) Depositions of Parties and Others Pending Action
170AX(C)3 Examination in General
170Ak1381 k. In General. Most Cited Cases
(Formerly 170Ak1414.1)

While instructions not to answer questions during depositions are generally improper, a witness may be instructed not to answer a question if the answer would reveal privileged information. Fed.Rules Civ.Proc.Rule 30(d)(1), 28 U.S.C.A.

[2] 1604(2)

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)3 Particular Subject Matters
170Ak1604 Work Product Privilege; Trial Preparation Materials
170Ak1604(2) k. Waiver. Most Cited Cases
(Formerly 170Ak1600(5))

If otherwise discoverable documents, which do not contain pure expressions of legal theories, mental impressions, conclusions or opinions of counsel, are assembled by counsel, and are put to a testimonial use in the litigation, then an implied limited waiver of the work product doctrine takes place, and the documents themselves, not their broad subject matter, are discoverable. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.; Fed.Rules Evid.Rule 612, 28 U.S.C.A.

[3] Federal Civil Procedure 170A 1381

170A Federal Civil Procedure

whether the documents previously have been disclosed to the party taking the deposition; and (9) whether there are credible concerns regarding manipulation, concealment or destruction of evidence. Fed.Rules Evid.Rule 612, 28 U.S.C.A.

[6] Federal Civil Procedure 170A 1381

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(C) Depositions of Parties and Others Pending Action
170AX(C)3 Examination in General
170Ak1381 k. In General. Most Cited Cases

1417

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(C) Depositions of Parties and Others Pending Action
170AX(C)4 Scope of Examination
170Ak1417 k. Work Product Privilege; Trial Preparation Materials. Most Cited Cases
(Formerly 170Ak1415)

Testimonial use of documents supplied by plaintiff's counsel to prepare witnesses for deposition resulted in a limited, implied waiver of the attorney work product doctrine; witnesses used documents to refresh their memory prior to their depositions, for the purpose of testifying, and it was necessary in the interest of justice that the documents be disclosed to the defendants. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.; Fed.Rules Evid.Rule 612, 28 U.S.C.A.

[7] Federal Civil Procedure 170A 1381

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(C) Depositions of Parties and Others Pending Action
170AX(C)3 Examination in General
170Ak1381 k. In General. Most Cited Cases

With respect to evidence rule allowing discovery of documents reviewed by a witness to prepare for a deposition, establishing that a witness used a writing to refresh his or her memory for the purpose of testifying may be accomplished by direct proof (an admission by the deponent that review of documents aided memory) or circumstantial proof, from which an inference may be drawn whether such assistance was received. Fed.Rules Evid.Rule 612, 28 U.S.C.A.

[8] Federal Civil Procedure 170A 1381

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(C) Depositions of Parties and Others Pending Action
170AX(C)3 Examination in General
170Ak1381 k. In General. Most Cited Cases

1417

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(C) Depositions of Parties and Others Pending Action
170AX(C)4 Scope of Examination
170Ak1417 k. Work Product Privilege; Trial Preparation Materials.

than what the defendants expected. To test the accuracy of their memories, counsel for the defendants asked whether the witnesses had reviewed any documents before their depositions to assist them in recalling the events relating to the first sale of Cosamin. Although it was acknowledged that documents had been reviewed with counsel for Nutramax during deposition preparation, the witnesses were instructed not to answer all questions designed to discover their identity. The basis ***461** for the instruction not to answer was Nutramax's assertion of the work product rule. [FN4] Contending that Fed.R.Evid. 612 entitles them to the production of documents used to refresh the recollection of a witness prior to a deposition, the defendants filed a motion to compel the production of the documents used to prepare the Nutramax witnesses. (Paper no. 145). Nutramax has filed an opposition and the Defendants a reply. (Paper nos. 150 and 155, respectively). The documents which are the subject of this dispute were reviewed by me in camera, and a hearing was conducted on December 4, 1998. For the reasons cited below, the motion will be granted, in part, and denied, in part.

FN3. In July, 1998, the defendants deposed the following witnesses, who are the subject of this motion: Edgar J. Sharbaugh, Dr. Robert Henderson, Robert Picard, Todd Henderson, and Jeffrey Fara.

FN4. While instructions not to answer questions during depositions are generally improper, a witness may be instructed not to answer a question if the answer would reveal privileged information. *See* Fed.R.Civ.P. 30(d)(1); Local Discovery Guideline 5(d)

(D.Md.1997); *Boyd [redacted]. University of Maryland Med. Sys.,* 173 F.R.D. 143, 144 (D.Md.1997).

DISCUSSION

[2] The issue presented in this case, whether Fed.R.Evid. 612 requires the production of work product materials used to prepare a witness for a deposition, but not used during the deposition itself to refresh the witnesses' recollection, is an important one. It is a rare case today which does not involve the production of documents during discovery, and these documents can be of enormous importance in questioning witnesses about events which may have occurred years earlier. Recognizing the importance of documents in conducting effective deposition discovery, counsel frequently postpone, as was done in this case, deposition discovery until document production has taken place pursuant to Fed.R.Civ.P. 34. *See Lee [redacted]. Flagstaff Indus.,* 173 F.R.D. 651, 654–56 (D.Md.1997).

In preparing to defend depositions in cases where substantial document production has taken place, no competent counsel can afford to ignore reviewing with witnesses the documents which relate to critical issues. During a deposition, counsel questioning a witness will seldom fail to ask the witness about what he or she did to prepare for the deposition, and the identity of any documents reviewed for this purpose. Most often, this inquiry is not resisted by counsel defending the deposition, because the documents have already been produced to the opposing counsel. However, where, as here, many thousands of pages of documents have been produced and counsel have analyzed them and selected a population of "critical documents" relevant to case dispositive issues, a depos-

8A Wright, Miller & Marcus, Federal Practice and Procedure § 2113 (2d ed.1994). There is contrary authority, however. *See, e.g. Omaha Pub. Power Dist. v. Foster Wheeler Corp.,* 109 F.R.D. 615, 616–17 (D.Neb.1986) (Rule 30(c) does not incorporate Fed.R.Evid. 612, because that rule implies testimony before a judicial officer). However, because depositions are so frequently used at trial in place of live testimony, *see* Fed.R.Civ.P. 32; Fed.R.Evid. 804(b)(1), the better reasoned conclusion is that Rule 612 does apply at depositions.

1. The Work Product Doctrine

In the now famous case of *Hickman v. Taylor,* 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), the Supreme Court recognized the work product doctrine. The doctrine creates a "protected zone" surrounding an attorney's preparation of a client's case which extends to information the attorney, or her agent, assembles in anticipation of litigation, as well as the deliberative process she uses to separate relevant from irrelevant facts, determine strategy and legal theories. *Id.* at 510–11, 67 S.Ct. 385. Despite its recognition of the importance of the work product doctrine for "an orderly working of our system of legal procedure," the Court acknowledged that the protection it afforded was not absolute, and could be "invaded" upon a showing of adequate reasons to justify production. *Id.* at 512, 67 S.Ct. 385. Fed.R.Civ.P. 26(b)(3) which, as noted above, codifies the work product doctrine, fleshes it out, and provides, relevantly:

> 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 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.

The Fourth Circuit has explained that this formulation of the doctrine divides work product into two categories, "fact work product," which may be discovered upon a showing of substantial need and inability, without undue hardship, to obtain the substantial equivalent of the materials by other means, and "opinion work product" which it has characterized variously as "absolutely immune" or "nearly absolutely immune" from discovery. *See In re Allen,* 106 F.3d 582, 607 (4th Cir.1997) (opinion work product enjoys "nearly absolute" immunity); *In Re Grand Jury Proceedings,* 33 F.3d 342, 348 (4th Cir.1994) (opinion work product even "more scrupulously protected" than fact work product); *National Union Fire Ins. Co. v. Murray Sheet Metal Co.,* 967 F.2d 980, 984 (4th Cir.1992) (opinion work product "absolutely immune" from discovery); *In re Martin Marietta Corp.,* 856 F.2d 619, 625 (4th Cir.1988); ***In re John Doe,* 662 F. 2d 1073, 1080 (4th Cir. 1981**), *cert. denied* 455 U.S. 1000, 102 ***463** S.Ct. 1632, 71 L.Ed.2d 867 (1982) (opinion

guage of Fed.R.Civ.P. 26(b)(3) suggests especial protection for opinion work product.

Martin Marietta, 856 F.2d at 626 (internal citations omitted). In sum, a careful reading of *Martin Marietta* permits the conclusion that if testimonial use has been made of work product information, a limited, non-subject matter implied waiver has occurred as to the materials put to that use, provided the disclosure of those materials would not reveal "core" opinion work product, namely pure expressions of attorney mental impressions, opinions or legal theory.

The final Fourth Circuit opinion which must be considered with respect to the work product doctrine is *In re Allen,* 106 F.3d 582 (4th Cir.1997). In *Allen,* the Fourth Circuit, in a lengthy opinion, addressed whether information covered by the attorney client privilege and the work product doctrine was subject to discovery in a civil case. The most significant part of this case, for purposes of the present dispute, came at the very end of ***466** the opinion, when the court considered whether an attorney's selection and collection of certain records of her client, which were themselves discoverable, constituted work product. The court stated:

> Yet, just as Allen prepared the interview notes and summaries in anticipation of litigation, she also chose and arranged these records in anticipation of litigation. This choice and arrangement constitutes opinion work product because Allen's selection and compilation of these particular documents reveals her thought processes and theories regarding this litigation.

Allen, 106 F.3d at 608. It is noteworthy that, although *Allen* did not address the issue presented in this case,[FN12] it did cite as authority for its conclusion that documents selected and compiled by counsel constitute opinion work product two cases which addressed the very issue raised in this case, the applicability of Fed.R.Evid. 612 to depositions. [FN13] More tellingly, the *Allen* court did not cite *Martin Marietta,* which contains the most detailed discussion by the Fourth Circuit of the distinction between fact and opinion work product.

> FN12. The First Circuit has considered the issue of whether an attorney's selection of certain documents from a larger population of discoverable documents is opinion work product, and, therefore, shielded from disclosure, even if used to prepare witnesses for depositions. In an opinion which is critical of the reasoning used in *Sporck,* one of the cases relied on in *Allen,* the First Circuit concluded "[the reasoning used in *Sporck*], we suggest, is flawed because it assumes that the relevatory nature of the sought-after information is, in itself, sufficient to cloak the information with the heightened protection of opinion work product. That is simply not the case; much depends on whether the fruits of the screening would soon be revealed in any event." *In re San Juan Dupont Plaza Hotel Fire Litig.,* 859 F.2d 1007, 1018, (1st Cir.1988).

> FN13. These cases are: *James Julian* [redacted] *Raytheon Co.,* 93 F.R.D. 138 (D.Del.1982) and *Sporck* [redacted] *Peil,* 759 F.2d 312 (3d Cir.1985). In neither case did the court hold that

way that the attorney client privilege can.

Whether the information involved is fact, as opposed to opinion, work product also affects how easily it can be waived. In *Martin Marietta,* the Fourth Circuit explained in considerable detail the rationale underlying the distinction between fact and opinion work product, and the reason why the latter is entitled to such expansive protection. Because of the importance of the *Martin Marietta* opinion to the resolution of the issue presented in this dispute, it merits discussion at more length.

In *Martin Marietta,* a former employee of that company was charged with mail fraud in connection with a government contract with the Department of Defense ("DOD"). *Martin Marietta,* 856 F.2d at 620. To assist in his defense, he sought to compel production of correspondence and notes from Martin Marietta relating to an administrative settlement agreement between that company and the DOD involving events which were the subject of the charges against the employee. *Id.* at 622. The employee sought the records to make out a defense that he was being made a scapegoat. *Id.* The records included the results of an internal audit, interview notes, transcripts, electronic recordings and correspondence relevant to the settlement agreement. *Id.* The company resisted the disclosure of the documents, asserting the attorney client and work product privileges. *Id.* The district court ordered the production of certain of the requested documents, but not others. On appeal, the Fourth Circuit addressed the issue of whether the production of work product materials to the DOD and U.S. Attorney's office during the negotiation of the administrative settlement agreement constituted an "implied waiver" of this privilege. *Id.* at 622–26.

The court began its analysis with a consideration of the Supreme Court's decision in Nobles, noting that that decision held that an attempt to make testimonial use of work product resulted in an implied waiver of the privilege. *Id.* at 624. The Fourth Circuit then considered whether the scope of this waiver constituted broad subject matter waiver, or a more narrow waiver, applicable only to the work product materials actually produced. Citing *Duplan Corp. v. Deering Milliken, Inc.,* 540 F.2d 1215 (4th Cir.1976), the court stated that *Nobles* established a rule that non-opinion work product put to a testimonial use resulted in subject matter waiver of those materials, and that, accordingly, Martin Marietta had impliedly waived its work product protection for the non-opinion work product matter disclosed to the government. *Id.* at 625. In so doing, the court conceded that even if the production was limited to non-opinion work product, this information "necessarily will be reflective of a counsel's approach," but added "a distinction can be made between non-opinion work product, which may nevertheless be ordered produced if counsel has waived work product protection, and pure mental impressions severable from the underlying data and arguably not subject to subject matter waiver." *Id.* This distinction is of vital importance to the present case, for it illustrates the essential difference between non-opinion and opinion work product.

The court recognized that "the line between opinion and non-opinion work product can be a fine one." *Id.* at 626. However, it emphasized that the essence of what the ***465** work product doctrine is intended to protect is "pure expressions of

> the work product doctrine absolutely shielded documents selected and compiled by an attorney from disclosure if Fed.R.Evid. 612 was otherwise applicable. Indeed, in *Julian,* the court ordered the production of the notebook of records selected and compiled by counsel. *See Julian,* 93 F.R.D. at 146. In *Sporck,* the court did not order disclosure of such documents, not because it concluded they were absolutely immune from discovery, but instead, because it concluded that the party seeking disclosure of these documents had failed to lay a proper foundation to trigger application of Evidence Rule 612. *See Sporck,* 759 F.2d at 317–18.

At first blush, reading *Allen* and *Martin Marietta* together could lead to the conclusion that if documents otherwise discoverable in litigation are selected and compiled by an attorney in anticipation of litigation, they constitute opinion work product and, therefore, are protected from disclosure, even if put to a testimonial use, because of the court's ruling in *Martin Marietta* that testimonial use of work product information only results in implied waiver of non-opinion work product. However, to reach such a result would exalt form over substance for several important reasons. First, as stated in *Martin Marietta,* the dividing line between fact and opinion work product is not always easily discernable, *see Martin Marietta,* 856 F.2d at 626, and the mere selection of otherwise discoverable documents by counsel falls closer to fact work product on the continuum than it does to core opinion work product. Second, the disclosure of even "pure" fact work product will necessarily disclose information about an attorney's approach to the litigation of the case, so it is never possible to completely insulate an attorney's thought process from discovery when any form of work product is disclosed. *See id.* at 625. Third, what the work product doctrine is fundamentally designed to protect against is disclosure of "pure" mental impressions or opinions of counsel. *See id.* Disclosure of opinion work product consisting of records of a party to the litigation which are themselves subject to discovery, and which do not contain "pure" expressions of counsel's mental impressions or theories, does not do violence to the policy underlying the work product doctrine, particularly if those documents already have been put to a testimonial use by the party whose attorney selected and compiled them. Fourth, neither *Martin Marietta, Allen,* nor any other Fourth Circuit opinion, has addressed the exact question presented in this case, and therefore, did not have to reconcile the conflict which exists between the important policies which underlie the work product doctrine***467** and Evidence Rule 612. And, finally, neither the *Martin Marietta* nor the *Allen* court held that the protection afforded to opinion work product was absolute. *See Martin Marietta,* 856 F.2d at 625–26; *Allen,* 106 F.3d at 607 ("opinion work product 'enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances' "). FN14

> FN14. In *Berkey Photo, Inc. v. Eastman Kodak Co.,* 74 F.R.D. 613 (S.D.N.Y.1977), one of the first, and most often cited, cases to address the issue presented here, the court was faced with reconciling decisions, such as *Martin Marietta* and *Allen,* which held that opinion work product was entitled to a nearly "absolute immunity from

has been noted that the legislative history of Rule 612 is somewhat ambiguous, because the rule itself is silent with respect to whether it applies to work product materials used to refresh recollection. *See James Julian,* 93 F.R.D. at 145, *Bank Hapoalim,* 1994 WL 119575, at *5. It does appear, however, as though the House Committee on the Judiciary did not intend the rule to operate in such a way that it would allow a "fishing expedition" into the documents a witness may have referred to in preparing for trial, nor did that committee intend for it to bar "the assertion of a privilege with respect to writings used by a witness to refresh his memory." H.Rep. No. 650, 93rd Cong., 1st Sess. (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7086.

Because of the apparent conflict between Evidence Rule 612 and the work product doctrine, as codified in Fed.R.Civ.P. 26(b)(3), ***468** courts have looked for various ways to harmonize the two rules. *See Joint Eastern and Southern Dist. Asbestos Litig.,* 119 F.R.D. 4 at 5, *Redvanly [redacted] NYNEX Corp.,* 152 F.R.D. 460, 470 (S.D.N.Y.1993). The process has produced inconsistent results, with some courts concluding that work product materials which were reviewed by a witness prior to being deposed were subject to disclosure under Rule 612,[FN16] and others concluding that they were not.[FN17]

FN16. *See, e.g. Wheeling–Pittsburgh Steel [redacted] Underwriters Labs., Inc.,* 81 F.R.D. 8 (N.D.Ill.1978); *James Julian [redacted] Raytheon Co.,* 93 F.R.D. 138 (D.Del.1982); *Omaha Public Power Dist. [redacted] Foster Wheeler Corp.,* 109 F.R.D. 615 (D.Neb.1986); *Joint Eastern and Southern Dist. Asbestos Litig.,* 119 F.R.D. 4 (E.&S.D.N.Y.1988); *Redvanly [redacted] NYNEX Corp.,* 152 F.R.D. 460 (S.D.N.Y.1993); *Bank Hapoalim [redacted] American Home Assurance Co.,* No. 92 CV 3561, 1994 WL 119575 (S.D.N.Y.1994); *Ehrlich [redacted] Howe,* 848 F.Supp. 482 (S.D.N.Y.1994); *Audiotext Communications Network, Inc. [redacted] U.S. Telecom, Inc.,* 164 F.R.D. 250 (D.Kan.1996).

FN17. *See, e.g. Sporck [redacted] Peil,* 759 F.2d 312 (3d Cir.1985); *Berkey Photo [redacted] Eastman Kodak Co.,* 74 F.R.D. 613, (S.D.N.Y.1977); *Derderian [redacted] Polaroid Corp.,* 121 F.R.D. 13 (D.Mass.1988); *Baker [redacted] CNA Insurance,* 123 F.R.D. 322 (D.Mont.1988); *Timm [redacted] Mead Corp.,* No. 91 CV 5648, 1992 WL 32280 (N.D.Ill.1992), *Butler Mfg. Co. Inc. [redacted] Americold Corp.,* 148 F.R.D. 275 (D.Kan.1993); *Arkwright Mut. Ins. Co. [redacted] National Union Fire Ins. Co.,* No. 90 CV 7811, 1994 WL 510043 (S.D.N.Y.1994).

[3] As a threshold matter, three foundational elements must be met before Rule 612 is applicable with respect to documents reviewed by a witness to prepare for a deposition: (1) a witness must use a writing to refresh his or her memory; (2) for the purpose of testifying; and (3) the court must determine that, in the interest of justice, the adverse party is entitled to see the writing. Fed.R.Evid. 612; *see Sporck [redacted] Peil,* 759 F.2d 312, 317 (3d Cir.1985); *Butler Mfg. Co., Inc. [redacted] Americold Corp.,* 148 F.R.D. 275, 278 (D.Kan.1993); 4 Jack B. Weinstein and Margaret A. Berger, Weinstein's Federal Evidence § 612.07[1] (2d ed.1997). The first element insures that the writing is relevant to an attempt to test the

Fed.R.Evid. 602. Others, however, are not so restricted. Expert witnesses, for example, may base their opinions on information supplied by others, if reliable. Fed.R.Evid. 703. Similarly, Fed.R.Civ.P. 30(b)(6) allows a party to designate a witness to testify on its behalf with respect to specified subjects. The testimony of such witnesses also is not limited to matters within their personal knowledge, but extends to "matters known or reasonably available to" the party designating the witness. Rule 30(b)(6). There is a greater need to know what materials were reviewed by expert and designee witnesses in preparation for deposition since the substance of their testimony may be based on sources beyond personal knowledge.[FN19] (2) The nature of the issue in dispute. Whether a witness is testifying generally about the transactions which are the subject of the litigation, or more precisely about a subset of facts which relate to a case dispositive issue (such as a statute of limitations defense, or, as in this case, the on sale bar defense) may affect the need to know what materials were reviewed to prepare for deposition. (3) When the events took place. Whether the events about which the witness will testify took place recently, or years ago, affects the need to know what materials were reviewed. The ability of a witness to perceive, remember, and relate events is fair game for cross examination, and a deposing attorney has a legitimate need to know whether the witness is testifying from present memory, unaided by any review of extrinsic information, present memory "refreshed" by reference to other materials, or really has no present memory at all, and can only "testify" as to what is memorialized in writings prepared by the witness or others. The greater the passage of time since the events about which the witness will testify, the more likely that the witness needed to refresh his or her recollection to prepare for testimony. (4) When the documents were reviewed. As noted, Fed.R.Evid. 612 only applies to use of documents to refresh recollection for purposes of providing testimony. Thus, review of documents for purposes other than deposition or trial testimony is exempt from the rule. In complex cases, or cases involving many documents, counsel may have many occasions to review with clients documents which relate to the issues in the litigation, such as preparation of pleadings or motions, responding to Fed.R.Civ.P. 34 document production requests, and development of case strategy. Such review is not for purposes of providing testimony. Accordingly, if a witness reviewed documents months before a deposition, for a purpose other than to prepare to testify, disclosure of the documents reviewed should not be required in response to a Rule 612 demand. The nearer the review of documents to the date of the deposition may affect whether the court concludes that the purpose was to prepare for testimony. (5) The number of documents reviewed. Whether a witness reviewed hundreds of documents, as opposed to a few critical ones, ***470** may affect the decision whether to order the disclosure of work product materials in response to a Rule 612 demand. If an attorney has culled through thousands of documents to identify a population of several hundred which are most relevant to the litigation, and the witness reviews these documents to prepare for the deposition, a court may be less inclined to order the production of such work product than if the witness reviewed a single document, or very few documents, selected by the attorney which relate to a critical issue in the case.[FN20] (6) Whether the witness prepared the document(s) reviewed. If the witness prepared the document (s) reviewed in preparation for the de-

3. Analysis

Five witnesses are implicated by the pending motion: Edgar J. Sharbaugh, Dr. Robert Henderson, Robert Picard, Todd Henderson, and Jeffrey Fara. (Defendants motion to compel, Paper no. 145, at 2–7). Sharbaugh is co-owner of Nutramax, and vice-president of marketing. He was deposed as a designee of Nutramax, pursuant to Fed.R.Civ.P. 30(b)(6) regarding a number of subjects, including the creation, retention and destruction of documents, the existence of records regarding purchase and sales transactions of the plaintiff, as well as product identification and sales information of the company between 1991 and 1993. *Id.* at 2–3. Dr. Henderson is a co-owner and the president of Nutramax. He is the inventor of the two patents which are the subject of this litigation, and was ***471** deposed as a rule 30(b)(6) designee regarding the first combination of ingredients of Cosamin, the subject of the patents, as well as the first purchase dates of the ingredients for Cosamin, and its first sale and use. *Id.* at 3. Picard is a shipping clerk for the plaintiff, and apparently was not deposed as a designee witness. *Id.* at 4. Todd Henderson, Dr. Henderson's son, is a co-owner of Nutramax, and a vice-president, in charge of its veterinary science division. He signed the plaintiff's interrogatory answers, and testified as a fact witness, not as a Rule 30(b)(6) designee. *Id.* The final witness, Jeffrey Fara, is a longstanding friend of Dr. Henderson, who assertedly purchased Cosamin on March 27, 1992, just days before the critical date of March 31, 1992. *Id.* at 6–7. Excerpts from the depositions of Sharbaugh, Dr. Henderson, and Picard were provided as attachments to the plaintiff's motion. None were provided with respect to Todd Henderson and Jeffrey Fara.

Pursuant to my order dated October 22, 1998, (Paper no. 158), the plaintiffs provided me with a notebook containing the documents used to prepare the foregoing witnesses for their depositions. I reviewed these documents in camera. They remain under seal, and the defendants have not seen them. The notebook contains 41 documents. Plaintiffs further provided a helpful chart listing the documents used to prepare each of the witnesses. Eleven were used to prepare Sharbaugh, 32 to prepare Dr. Henderson, five for Picard, two for Todd Henderson, and nine for Fara. With the exception of document no. 23, for which the attorney client privilege was asserted, plaintiffs state that all of the documents contained in the notebook have been produced to the defendants during discovery.[FN23] (Paper no. 150, at p. 7).

FN23. During the hearing held on December 4, 1998, counsel for the defendants acknowledged that the defendants do, at present, have all of the disputed documents, except no. 23, but asserted that some of these documents, relating to Dr. Bucci, a non-party witness, were not provided to the defendants until after the Sharbaugh and Dr. Henderson depositions. Because I am ordering the production of the documents used to prepare both of these witnesses, (except for document no. 23), as well as the limited reopening of their depositions, it is not necessary for me to separately consider the significance of the fact that some of the "Bucci documents" were not produced until after Dr. Henderson's deposition. However, to the extent that documents were produced by the defendants after Dr. Henderson's deposition which

accordingly, demonstrated the first two elements of Rule 612, and, concomitantly, for purposes of work product doctrine analysis, that the documents selected by plaintiff's attorneys for him to review were used by Sharbaugh for a testimonial purpose. Whether they must be disclosed, as demanded by the defendants, turns on the third element of Rule 612, the balancing test, and an evaluation of the factors identified above.

Sharbaugh was a Rule 30(b)(6) designee, and therefore his testimony was not limited to facts personally known to him, but also to those reasonably available to the plaintiff. Fed.R.Civ.P. 30(b)(6). Because of this, the defendants had a heightened need to discover the factual basis for his testimony. This was underscored by the fact that he testified as to issues which are potentially case determinative, and events which took place more than five years ago. Sharbaugh's ability to perceive, remember and relate these events, which are highly relevant to his credibility, are legitimate areas for inquiry by the defendants, particularly in light of his direct involvement in the destruction of documents in 1994 and 1998.[FN25]

FN25. From the limited information provided to me, I am unable to draw any conclusions about whether the destruction of documents was innocent, as plaintiff asserts, or sinister, as the defendants contend. *See supra* note 24.

Sharbaugh only reviewed eleven documents, some selected by him, and others by plaintiff's attorneys,[FN26] and all of them are apparently now in the defendants' possession. In other circumstances, this factor would militate against disclosure. However, given the fact that thousands, perhaps hundreds of thousands, of documents have been produced for inspection during discovery, it would be difficult for the defendants to easily determine a population of documents which likely would be relevant to Sharbaugh's testimony. From my review of the documents in camera, it is clear that none contain "pure" opinion attorney work product, such as discussion of case strategy, litigation theories or mental impressions. Finally, as noted above, there is no dispute that documents have been destroyed, both before and after the commencement of this litigation, which relate to important issues in the case. Sharbaugh is at the center of the dispute regarding these documents, and much will hinge on his credibility. While the outcome of this controversy cannot now be predicted, it is undeniably significant. In light of all of these circumstances, I conclude that use of the documents selected by counsel to prepare Sharbaugh for his deposition constituted a testimonial use of these documents which resulted in a limited, implied waiver of the attorney work product doctrine as to them. I further find that the first two elements of Rule 612 have been met as to him, and that, having considered the balancing factors discussed above, it is necessary in the interest of justice for the eleven documents used to prepare Sharbaugh be produced to the defendants.[FN27]

FN26. Assuming those eleven documents had been selected by Sharbaugh, with plaintiff's attorneys taking no part in that selection, such a situation would not implicate the work product doctrine, and therefore, disclosure would be warranted based solely on Fed.R.Evid. 612.

FN27. Plaintiff also asserted the attorney client privilege as an inde-

the inventor of this product and, presumably, a significant actor in the events surrounding the first use and sale, is of great importance, his testimony as a designee required him to provide information based on information reasonably available to the plaintiff. Fed.R.Civ.P. 30(b)(6). Dr. Henderson admitted that it was possible that the first use and sale of Cosamin occurred before March 31, 1992, and that he "flat out" did not know if it was offered for sale before that date. In such circumstances, the ability to have questioned him in more detail about the events of that time using documents prepared in the ordinary course of business was of unquestionable importance to defendants. Combined with the fact that the overwhelming majority of the plaintiff's own records relating to that time apparently have been destroyed by Nutramax, the defendant's need for access to the documents which Dr. Henderson reviewed for purposes of testing his memory cannot be understated. It is all too easy for a witness to testify that his recollection is vague, as did Dr. Henderson, and to give the appearance of candor by acknowledging the possibility of the occurrence of an important event, all the while maintaining that it cannot be conceded that it actually did. Rigorous cross examination is needed to test such self-serving statements by focused, analytical questioning, using contemporaneously prepared documents, if available, to test the witness's assertions. Without the use of such documents, or others which might have assisted if they had not been destroyed by the plaintiff, the defendants were at a clear ***474** disadvantage. Additionally, from my review of the documents in camera, it is clear that none contain "pure" opinion attorney work product, such as discussion of case strategy, litigation theories or mental impressions. Therefore, the first four, seventh and ninth factors overwhelmingly militate in favor of disclosure.

The remaining factors are either neutral, or do not sufficiently undermine the argument for disclosure to change the outcome of the analysis. With the exception of document 23, which clearly is exempt from disclosure under the attorney client privilege, none of the documents reviewed by Dr. Henderson contain "pure" opinion work product. Accordingly, I conclude that with respect to the 32 documents used to prepare Dr. Henderson for his deposition, all except no. 23 are discoverable. Having been put to a testimonial use, a limited, implied waiver of work product immunity has occurred, and the first two elements of Rule 612 have been met. The third element of that rule, the balancing of factors, also strongly supports disclosure of these documents in the interests of justice.

[8] Robert Picard testified, apparently as a fact witness, and not a rule 30(b)(6) designee.[FN28] He admitted meeting with counsel for the plaintiff within weeks of his deposition to prepare for it, and reviewing documents, although the details regarding this review were not disclosed because counsel for Nutramax instructed him not to answer these questions. When asked whether his review of the documents refreshed his recollection with respect to the events surrounding them, he stated that it did not. (Paper No. 145, Ex. E at 89–93, 159–60, Picard deposition, July 29, 1998). Having read the five documents which Picard did review, it is understandable why he denied that they assisted in his recollection of the events surrounding the first sale of Cosamin. Accordingly, I conclude that the first element of Rule 612 has not been established, making the documents not subject to discovery. Nevertheless, were I to

ments used to prepare the deposition witnesses who are the subject of this dispute, or the identification of the documents used to prepare each of those witnesses.

CONCLUSION

In conclusion, the eleven documents reviewed by Sharbaugh, and the documents reviewed by Dr. Henderson, except for no. 23, shall be disclosed. The motion to compel as to Picard, Todd Henderson and Fara is denied. Plaintiffs will make the ordered disclosures within 14 days of this order. In addition, I will permit a limited reopening of the depositions of Sharbaugh and Dr. Henderson to permit defendants to examine them further regarding their use of the documents I have ordered disclosed, and to further test their memories in light of these documents. Counsel will, within 14 days of this order, contact my chambers to schedule a telephone conference call to discuss the limits of these depositions.

D.Md.,1998.
Nutramax Laboratories, Inc. [redacted]. Twin Laboratories Inc.
183 F.R.D. 458, 51 Fed. R. Evid. Serv. 35

END OF DOCUMENT

Westlaw

537 F.Supp.2d 761
(Cite as: 537 F.Supp.2d 761)

United States District Court,
D. Maryland.
CONTINENTAL CASUALTY COMPANY, et al., Plaintiffs,
v.
UNDER ARMOUR, INC., Defendant.

No. 06 CV 3224 CCB.
Feb. 13, 2008.

Background: In declaratory judgment action, three insurance companies sued their insured, seeking a determination that they were not obligated to defend or indemnify it in connection with litigation brought against insured by two Nevada corporations. Insured filed motion for a ruling regarding what use, if any, it could make of a file it received from its independent insurance broker, containing copies of claims notes allegedly containing attorney client privileged and work product protected communications from insurers' counsel, which erroneously had been posted in the wrong location by insurers' claims specialist on insurers' website.

Holdings: The District Court, Paul W. Grimm, United States Magistrate Judge, held that:
(1) attorney-client privilege was waived by insurers' claims specialist's inadvertent posting of insurers' privileged communications on insurers' website, and
(2) insurers' inadvertent posting of work product, prior to the filing of lawsuit, on a website to which insurers' adversary had been given access, waived work product protection.

Order in accordance with opinion.

West Headnotes

[1] Federal Courts 170B ⚿416

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk416 k. Evidence law. Most Cited Cases

In declaratory judgment action bottomed on diversity of citizenship, state law governed issue as to whether attorney-client privilege was waived by insurers' claims specialist's inadvertent posting of insurers' privileged communications on insurers' website. Fed.Rules Evid.Rule 501, 28 U.S.C.A.

[2] Privileged Communications and Confidentiality 311H ⚿168

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk168 k. Waiver of privilege. Most Cited Cases
(Formerly 410k219(3))

In declaratory judgment action seeking determinations of insurers' obligation to defend or indemnify insured, attorney-client privilege was waived under Maryland law by insurers' claims specialist's inadvertent posting of insurers' privileged communications on insurers' website; the disclosure to insured and its insurance broker was a result of the voluntary, albeit inadvertent, acts by claims specialist, and not because of any wrongdoing by insured, or its insurance broker.

[3] Federal Civil Procedure 170A ⚿ 1604(2)

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)3 Particular Subject Matters
170Ak1604 Work Product Privilege; Trial Preparation Materials
170Ak1604(2) k. Waiver. Most Cited Cases
(Formerly 170Ak1600(5))

Waiver of the attorney-client privilege for a communication does not automatically waive whatever work-product immunity that communication may also enjoy.

[4] Federal Courts 170B 416

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk416 k. Evidence law. Most Cited Cases

In a diversity case, court applies federal law to resolve work product claims. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

[5] Federal Civil Procedure 170A 1604(2)

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)3 Particular Subject Matters
170Ak1604 Work Product Privilege; Trial Preparation Materials
170Ak1604(2) k. Waiver. Most Cited Cases
(Formerly 170Ak1600(5))

Disclosing party's work product privilege will be deemed waived only if such disclosure substantially increases the possibility that an opposing party could obtain the information disclosed. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

[6] Federal Civil Procedure 170A 1604(2)

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)3 Particular Subject Matters
170Ak1604 Work Product Privilege; Trial Preparation Materials
170Ak1604(2) k. Waiver. Most Cited Cases
(Formerly 170Ak1600(5))

Insurers' inadvertent posting of work product, prior to the filing of lawsuit, on a website to which insurers' adversary had been given access, waived work product protection. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

[7] Federal Civil Procedure 170A 1604(2)

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)3 Particular Subject Matters
170Ak1604 Work Product Privilege; Trial Preparation Materials
170Ak1604(2) k. Waiver. Most Cited Cases
(Formerly 170Ak1600(5))

Disclosure of work product to an agent

is tantamount to disclosure to the principal, for purpose of waiver of the privilege.

***762** David P. Durbin, D. Stephenson Schwinn, Jordan Coyne and Savits LLP, Washington, DC, Arthur J. Mccolgan, II, Ryan M. Henderson, Walker Wilcox Matousek LLP, Chicago, IL, for Plaintiffs.

Michael Thomas Sharkey, Andrew M. Weiner, Dickstein Shapiro LLP, Washington, DC, for Defendant.

MEMORANDUM AND OPINION

PAUL W. GRIMM, United States Magistrate Judge.

In this declaratory judgment action, three insurance companies, Continental Casualty Company, Transcontinental Insurance Company, and Valley Forge Insurance***763** Company, collectively referred to as "CNA", sued their insured, Under Armour, Inc., seeking a determination that, under a series of insurance policies issued to Under Armour, they are obligated neither to defend nor indemnify it in connection with litigation brought against Under Armour by two other companies, Topolewski America Inc., and Metal Jeans, Inc. The case has been assigned to me to resolve all discovery disputes. Paper No. 33. The pending dispute involves Under Armour's motion for a ruling regarding what use, if any, it may make of a .pdf file it received from its independent insurance broker, Frenkel and Company, ("Frenkel") containing copies of claims notes allegedly containing attorney client privileged and work product protected communications from CNA's counsel, which erroneously had been posted in the wrong location by the CNA claims specialist assigned to the Under Armour claim on a CNA website, cnacentral.com. Frenkel was authorized by CNA to access and read the claims notes for "its own individual use" by a Terms of Service Agreement it entered into with CNA. As to these allegedly privileged and protected materials, Under Armour contends that neither the attorney client privilege nor work product doctrine is applicable, or, if applicable, that they have been waived. CNA asserts that the claims notes at issue are privileged and protected, and that there has been no waiver.

The motion has been fully briefed in Papers No. 27, 28, 29, 39, and 40, and the parties have stipulated that Maryland law governs, Paper No. 37. On January 14, 2008, a hearing was held in court during which I assumed, without deciding, that the claims notes at issue were both privileged and work product protected, but ruled that both the privilege and protection had been waived, Paper No. 41. Although I fully explained the basis for my ruling during the hearing, I reserved the right to supplement the ruling with a written memorandum and opinion, to provide guidance to counsel in other cases regarding the recurring difficult issues raised by this dispute. This memorandum and order serves this purpose.

Background

CNA issued four insurance policies to Under Armour-two general liability policies and two umbrella policies. Compl., Paper No. 1, ¶ 19. In February 2006, Under Armour was sued by two Nevada corporations, Topolewski America, Inc., and Metal Jeans, Inc., in the United States District Court for the Central District of California. Compl., Paper No. 1, ¶¶ 9-10. The lawsuit asserted multiple causes of action, including allegations that Under Armour had infringed trademarks held by Topolewski and Metal, and was selling clothing and accessories under a logo that was confusingly similar to their own. *Id.* at ¶ 11. The law-

suit sought both injunctive and monetary relief. After it was served, Under Armour put CNA on notice of the suit and requested that CNA undertake its defense, and indemnify it in the event that it was found liable.

CNA assigned Under Armour's coverage claim to James J. Hoefer, a claims consultant, Aff. of James Hoefer, Ex. B, ¶¶ 3-4, Pls.' Resp. to Def.'s Mot., Paper No. 28 (hereinafter "Hoefer Aff. at ___"), who coordinated with in-house claims counsel, (referred to in CNA's claims file as "CLEM counsel") and outside coverage counsel. As he worked on the coverage issues, Hoefer posted claims notes memorializing his actions, including summaries and copies of communications with CLEM counsel and coverage counsel, on a website, cnacentral.com, a web-based program designed to permit independent insurance brokers who sell CNA products to quote and request issuance of policies for their clients, and thereafter to track claims for coverage once the insurance has been issued.***764** Aff. of Nancy Stoecker, Ex. A. ¶¶ 4-5, 13, Pls.' Resp. to Def.'s Mot., Paper No. 28 (hereinafter "Stoecker Aff. at ___").

Under Armour purchased the policies from CNA by using such an independent insurance broker, Frenkel and Co. When the Topolewski suit was filed, Michael Peace, a senior claims consultant at Frenkel, was assigned to monitor the suit and CNA's response to Under Armour's coverage claim. CNA had provided Frenkel with access to its cnacentral.com website, issuing it a password, account number and login ID to facilitate its monitoring the claims notes posted on the website pertaining to the Under Armour coverage claim. Aff. of Michael Peace, ¶¶ 5-11, attached to Under Armour's Mem. in Supp. of its Mot. for a Ruling on the Use of the Claims Notes, Paper No. 27 (hereinafter "Peace Aff. at ___"). Prior to receiving this access, Frenkel signed a Terms of Service Agreement with CNA in which it agreed, *inter alia,* to "visit, view and to retain a single copy of pages of this Site solely for [its] ... own individual use". Ex. C, Paper No. 28, CNA's Resp. to Under Armour's Mot.

To monitor the handling of Under Armour's coverage claim, Peace accessed the cnacentral.com website and reviewed claims notes posted by Hoefer. In December 2006, when he received notice from CNA that it had determined to deny Under Armour a defense and file a declaratory judgment action, he exchanged email with Hoefer in which he referenced the earlier claims notes he had read, and questioned why CNA had decided to disclaim coverage when it previously had been proceeding in the direction of providing Under Armour with a defense, under a reservation of rights. Peace Aff. at ¶ 16-17. Unbeknownst to Peace, Hoefer was supposed to have designated privileged and protected communications from counsel as confidential before he posted them on the cnacentral.com website, by selecting a "button" on the computer that would not post them to the portion of the site to which Peace had access, but rather to a restricted portion of the website. Hoefer Aff. at ¶¶ 9-11, Stoeker Aff. at ¶¶ 14-16. Hoefer inadvertently neglected to designate the privileged and protected material as confidential when he posted it to cnacentral.com.

With regard to the specific claims entries that are the subject of the pending motion, Hoefer summarized communications he had with CLEM and coverage counsel in his cnacentral.com claim notes, and also attached copies of email commu-

nications from them as well. Hoefer posted a minimum of eight potentially privileged and protected entries on the website on August 17, 2006 (multiple postings), September 12, 2006, November 17, 2006, and November 22, 2006 (multiple postings). [FN1] When Hoefer notified Peace that CNA had disclaimed coverage and decided to file a declaratory judgment action, Peace prepared a .pdf file containing the above referenced postings, and provided them to Under Armour. Peace Aff. at ¶ 12. Under Armour, in turn, provided the .pdf to the attorneys representing it in this action. When they reviewed the file and determined that it appeared to contain entries that could be privileged or protected, they ceased reading further, and notified counsel for CNA on July 10, 2007. Ex. D, Paper No. 28, CNA Resp. to Under Armour's Mot. In response, on July 11, 2007, counsel for CNA replied, asserting that the claims notes included attorney client privileged and work product protected communications, and denying that these ***765** protections had been waived. Ex. E. Paper No. 28, CNA Resp. to Under Armour's Mot.[FN2] This motion followed.

FN1. Because the exhibits to the motions papers remain sealed until the final resolution of the pending motion, including any objections filed to the rulings by the undersigned, this memorandum will describe them only in general terms.

FN2. As noted during the hearing, when dealing with each other in connection with this sensitive and important issue, counsel for both Under Armour and CNA acted with the utmost professionalism and courtesy in their correspondence and their court filings. Disputes such as these can tend to bring out the worst in counsel, prompting accusations of unethical and unprofessional behavior, and counter allegations of incompetence or carelessness. Such behavior was entirely absent here, where the disagreements were on the merits, and not *ad hominem.*

Discussion

1. Waiver of the Attorney Client Privilege by Inadvertent Disclosure

As noted, CNA argues that the entries at issue are attorney client privileged and work product protected, and that Hoefer's inadvertent posting of them on the cnacentral.com website did not waive either protection, inasmuch as CNA took prompt action to assert the privilege and protection as soon as it learned of the inadvertent postings. Under Armour disputes the applicability of either the privilege or work product protection, but argues, alternatively, that even if privileged and protected when created, these protections were waived. Of the two issues, the privilege one is the more easily resolved, and will be addressed first.

[1][2] Although this is a declaratory judgment action filed pursuant to 28 U.S.C. § 2201 (2000), this court's underlying jurisdiction lies in diversity of citizenship, pursuant to 28 U.S.C. § 1332 (2000), *See Volvo Const. Equip N. Am., Inc. v. CLM Equip. Co.,* 386 F.3d 581, 592 (4th Cir.2004) (holding "a federal court may properly exercise jurisdiction in a declaratory judgment proceeding when three essentials are met: (1) the complaint alleges an 'actual controversy' between the parties 'of sufficient immediacy and reality to warrant issuance of a declaratory judgment;' (2) the court possesses an independent basis for

jurisdiction over the parties (e.g., federal question or diversity jurisdiction); and (3) the court does not abuse its discretion in its exercise of jurisdiction."). As noted, counsel have stipulated that in this diversity of citizenship declaratory judgment action seeking an interpretation of four insurance policies, Maryland law governs. Paper No. 37. Further, Fed. R. of Evid. 501 states:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. *However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.*

(emphasis added). Accordingly, Maryland law governing applicability and waiver of the attorney client privilege supplies the rule of decision. *F.H. Chase [redacted] Clark/Gilford,* 341 F.Supp.2d 562, 563 (D.Md.2004) (finding that Maryland law governed whether inadvertent production waived attorney client privilege in a diversity breach of contract case) [FN3]. In *Elkton* ***767** *Care Center Associates, Ltd. Partnership [redacted] Quality Care Management,* 145 Md.App. 532, 805 A.2d 1177 (2002), the Maryland Court of Special Appeals surveyed the law relating to inadvertent waiver of the attorney client privilege, noting that three distinct approaches had been followed by courts within the United States: a strict waiver approach, finding waiver whenever a non-privileged disclosure occurs; a lenient approach, finding waiver only in the instance of an intentional waiver by the holder of the privilege; and an intermediate approach, which considers multiple factors to determine whether a waiver should be found. *Elkton Care,* 145 Md.App. at 544-45, 805 A.2d 1177. The court adopted the intermediate approach, which requires a court to consider: " '(1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the ... production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay and measures taken to rectify the disclosure; and (5) whether the overriding interests of justice would or would not be served by relieving a party of its error.' " *Id.* Applying these factors to the present case compels the conclusion that the privilege has been waived by the inadvertent posting of the privileged communications on cnacentral.com. First, CNA failed to take sufficient precautions to prevent the inadvertent disclosure of the privileged information. Despite the existence of a recognized procedure to mark such communications "confidential"-with a simple "mouse click"-at the time of their creation, Mr. Hoefer, an experienced claims consultant, repeatedly posted email from CLEM and coverage counsel containing their analysis of the coverage issues, as well as posting entries paraphrasing their views. There were multiple postings over an extended period of time-from August 18, 2006 through November 22, 2006. The repetitive failure to adhere to the established policy demonstrates that reasonable precautions were not taken. Second, there were a minimum of eight privileged communications posted, during this extended

period, hardly a one-time occurrence. Third, the disclosure was extensive, outlining the very rationale for abandoning what appeared to be the initial decision to provide Under Armour with a defense under a reservation of rights, in favor of a decision to deny any coverage-defense or indemnification-and file a declaratory judgment action. Fourth, while counsel for CNA responded immediately after notification by counsel for Under Armour that it had received the .pdf file and that it appeared to contain privileged communications, this does not vitiate the fact that this action took place in July, 2007. The postings on the website remained there from their inception, between August and November, 2006, despite the fact that Mr. Hoefer must have reviewed the website many times during that period, yet evidently never realized what should have been immediately apparent-he had forgotten to designate the information as confidential and posted it where it could be read by third parties, including Under Armour's insurance broker. Finally, the record is devoid of any facts that would indicate that there is any overriding interest of justice that would be served by relieving CNA of the consequences of its error. The disclosure was a result of the voluntary, albeit inadvertent, acts by Mr. Hoefer, and not because ***768** of any wrongdoing by Under Armour, or its insurance broker, Mr. Peace of Frenkel and Co.

> FN3. The application of Fed.R.Evid. 501 in civil cases can be tricky. It is easiest to do where it is clear that either federal or state law governs the privilege determination. Where both federal and state substantive law is applicable, such as a federal question case with supplemental state law claims, Rule 501 would seem to require that federal privilege law control the federal claims, and state privilege law control the supplemental state law claims. Of course, in instances where both the federal and state privilege law is the same, there is no practical difficulty. However, sometimes the federal and state law is different. An example of this lies in the issue presented in this case. As discussed above, Maryland has adopted the intermediate of the three approaches to determining the result of an inadvertent disclosure of attorney client information. *Elkton Care Ctr. Assocs. Ltd. P'ship v. Quality Care Mgmt.,* 145 Md.App. 532, 543-45, 805 A.2d 1177 (2002). However, the Fourth Circuit Court of Appeals has not yet ruled on which of the three approaches should be followed. There are district court cases within the Fourth Circuit that have adopted the same intermediate approach as the Maryland Court of Special Appeals, see e.g. *McCafferty's, Inc. v. The Bank of Glen Burnie,* 179 F.R.D. 163 (D.Md.1998) (adopting the intermediate approach, and citing other district court cases within the Fourth Circuit that have done so). However, other district courts have questioned whether the Fourth Circuit, if called upon to address this issue, would adopt the intermediate test, *see, e.g., F.C. Cycles Int'l v. Fila Sport,* 184 F.R.D. 64, 76 (1998), and a recent examination of Fourth Circuit law regarding waiver of the attorney client privilege concluded that, based on its past decisions, the circuit was closely aligned with decisions from other

jurisdictions that have adopted the harshest of the three approaches to inadvertent disclosure of privileged information-namely that such disclosure waives the privilege. *See, e.g. Hopson [redacted] Mayor and City Council of Baltimore,* 232 F.R.D. 228, 237-38, (D.Md.2005) (noting that Fourth Circuit cases appear to interpret the attorney client privilege very strictly, and appear to favor the "strict liability" approach to inadvertent disclosure of privileged information, under which waiver is the consequence of such disclosure). If a civil case in federal court contains claims governed by both federal and state substantive law, what law should the court apply when the federal privilege law is different from the state privilege law? This is a complex question, but it appears that the majority of courts that have faced it have held that federal privilege law trumps state law, because were it otherwise, the jury would be faced with a hopelessly confusing task. *See, e.g., Hancock [redacted] Hobbs,* 967 F.2d 462, 466-67 (11th Cir.1992) (applying federal rule of privilege to both federal and state claims and finding that "it also would be impractical to apply two different rules of privilege to the same evidence before a single jury."); *Hancock [redacted] Dodson,* 958 F.2d 1367, 1373 (6th Cir.1992) (holding that the existence of pendent state claim did not relieve the Court of its obligation to apply the federal law of privilege); *Wm. T. Thompson Co. [redacted] Gen. Nutrition Corp.,* 671 F.2d 100, 104 (3d Cir.1982) (holding "that when there are federal law claims in a case also presenting state law claims, the federal rule favoring admissibility ... is the controlling rule."); *von Bulow [redacted] von Bulow,* 811 F.2d 136, 141 (2d Cir.1987) (holding that federal law controlled question of privilege where federal civil RICO claims were joined with state law claims); *Andritz Sprout-Bauer, Inc. [redacted] Beazer East, Inc.,* 174 F.R.D. 609, 632 (M.D.Pa.1997) ("In a federal question case with supplemental state law claims, the federal law of privileges governs the entire case."); *In re Combustion, Inc.,* 161 F.R.D. 51, 54 (W.D.La.1995) (holding that "the federal law of privilege provides the rule of decision with respect to privilege issues affecting the discoverability of evidence in this federal question case involving pendent state law claims."; this result is consistent with "the general policies of the federal rules favoring uniformity and simplicity"); *Tucker [redacted] United States,* 143 F.Supp.2d 619, 622-25 (S.D.W.Va.2001) (finding federal privilege law, not state privilege law, applied to both FTCA and pendent state law claims in medical malpractice case); *Syposs [redacted] United States,* 179 F.R.D. 406, 411 (W.D.N.Y.1998) (finding medical malpractice claim under the FTCA is a federal question case and therefore the federal common law of privileges applies). *But see Sprague [redacted] Thorn Americas, Inc.,* 129 F.3d 1355, 1368-69 (10th Cir.1997) (suggesting that in case involving both federal claims and pendent state claims, "both bodies" of privilege law should be considered); *Motley [redacted] Marathon Oil Co.,* 71

> F.3d 1547, 1551 (10th Cir.1995) (case involving federal and state claims; suggesting that for state claims, state law of privilege should apply); *Ellis [redacted]. United States,* 922 F.Supp. 539, 540 (D.Utah 1996) (finding the case does not involve a federal question and that Utah law, not federal law, "determines the applicable clergy privilege."), 2 Stephen A. Saltzburg, Michael M. Martin & Daniel J. Capra, Federal Rules of Evidence Manual 501-9 (8th ed. 2002) ("We note that most Courts, when confronted with this question, have held that the federal law of privilege applies to both the federal claim and to the pendent state claim."). In this case, the underlying jurisdiction of this court is diversity of citizenship, and the parties have agreed that Maryland substantive law is controlling. Accordingly, because this case presents only state law claims, federal privilege law is inapplicable, and the Court is not called upon to select between potentially competing versions of the law of privilege.

In this regard, CNA argues that Peace violated the Terms of Service agreement for use of the cnacentral.com website, because that agreement restricted access to the site "solely for [Frenkel's] ... own individual use", and prohibited him from duplicating, downloading, publishing, or otherwise distributing any material on the site for "any purpose other than for [Frenkel's] ... own individual use". See Ex. C, Paper No. 28, CNA's Resp. to Under Armour's Mot. This argument is unpersuasive. First, the Terms of Service agreement, which CNA drafted, does not define "own individual use", and it must be read in the context of the entire agreement, and given a reasonable interpretation. As the Stoecker and Peace affidavits show, CNA permits independent insurance brokers access to the cnacentral.com website to enable them to determine premium costs and underwrite CNA insurance policies, and, once issued, to monitor claims relating to policies that have been issued to their clients by CNA. Peace's access to the website was entirely consistent with that permitted purpose. Further, it is clear that Frenkel and Co., as an independent insurance broker, owed a duty towards its client, which was Under Armour, not CNA. Indeed, Frenkel's website, http:// www. frenkel. com, the contents of which this court judicially noticed pursuant to Fed.R.Evid. 201, make it clear that as part of their services to their clients they "meet regularly with the insurance companies that assume your specific business risks, *and navigate a claims process that can be tedious* in hard and soft markets alike". *See* Frenkel & Co, Inc., http:// www. cosmetic insurance. com, (last visited Feb. 12, 2008) (emphasis added). Moreover, the courts of Maryland long have held that an insurance broker is an agent of its principal the entity that is seeking insurance, not the company issuing the policy. *Am. Cas. Co. of Reading [redacted]. Ricas,* 179 Md. 627, 631, 22 A.2d 484 (1941) ("Ordinarily, the relation between the insured and the broker is that between principal and agent. An insurance broker is ordinarily employed by a person seeking insurance, and when so employed, is to be distinguished from [the] ordinary insurance agent, who is employed by insurance companies to solicit and write insurance by, and in the company."); *Cooper [redacted]. Berkshire Life Ins. Co.,* 148 Md.App. 41, 83, 810 A.2d 1045 (2002) ("[I]nsurance agents and brokers clearly owe a professional's duty to the insured. 'An agent, employed to effect

insurance, must exercise such reasonable skill and ordinary diligence as may fairly be expected from a person in his profession or situation, in doing what is necessary to effect a policy, in seeing that it effectually covers the property to be insured, in selecting the insurer and so on'.... The failure to meet that duty allows a recovery in tort.") (internal citations omitted). It would be disingenuous of CNA to suggest that Frenkel had any need for "individual use" of the cnacenttral.com website claims notes relating to the suit filed against Under Armour by Topolewski America Inc. for any purpose other than to learn information regarding the status of Under Armour's demand for coverage from CNA, which it had a legal duty to report to Under Armour. Any other reading of the language of the agreement would produce an absurd result. Similarly, the Terms of Service agreement permitted Frenkel to "download, publish, modify or otherwise distribute any material on [the cnacentral.com] Site" for the same "individual use", which by necessity permitted its disclosure to Under Armour. Accordingly, I find no merit in CNA's argument that Peace's downloading to a .pdf file the contents of the cnacentral.com claims file relating to Under Armour's ***769** claim and thereafter providing it to Under Armour, its principal, was in violation of the Terms of Service Agreement. Accordingly, I find that the attorney client privilege has been waived as to the materials posted on cnacentral.com. [FN4]

> FN4. Under Armour's motion only seeks a ruling by the Court regarding what use, if any, it may make of the privileged and protected information posted on cnacentral.com. It has neither argued nor briefed the issue of whether the disclosure amounted to subject matter waiver of the attorney client privilege. Because this issue is not before the Court, this ruling addresses only the privileged materials actually posted and nothing more.

2. Waiver of Work Product Protection By Disclosure to An Adverse Party

[3][4] The conclusion that the attorney client privilege has been waived as to the claims notes as a result of their inadvertent disclosure to Frenkel and Under Armour does not concomitantly compel the conclusion that they also have lost work product immunity. [FN5] This is because:

> FN5. As I did with the attorney client analysis, I have assumed, without deciding, that the claims notes at issue would qualify as attorney opinion work product.

> [t]he waiver of the attorney-client privilege for a communication does not automatically waive whatever work-product immunity that communication may also enjoy, as the two are independent and grounded on different policies. Waiver of the privilege should always be analyzed distinctly from waiver of work product, since the privilege is that of the client and the work product essentially protects the attorney's work and mental impressions from adversaries and third parties even when communicated to the client.
>
> Edna S. Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 608 (4th ed.2001). Because the work product doctrine is not a privilege, but rather a qualified immunity from discovery,[FN6] Fed.R.Evid. 501 is inapplicable, and Maryland law does not govern this waiver issue. Rather, federal law does, even though jurisdiction in this case is bottomed on diversity of citizenship. *United Coal Cos. [redacted]. Powell Constr.*, 839

F.2d 958, 966 (3d Cir.1988) (unlike the attorney client privilege, the work product doctrine is governed, even in diversity cases, by federal law); *Coregis Ins. Co. v. Law Offices of Carole F. Kafrissen, P.C.* 57 Fed.Appx. 58, 60 (3d Cir.2003) (federal-not state-standard applied in determining scope of work product privilege in diversity case); *In re Powerhouse Licensing, LLC*, 441 F.3d 467, 472 (6th Cir.2006) ("In a diversity case, the court applies federal law to resolve work product claims and state law to resolve attorney-client claims."); *Baker v. Gen. Motors Corp.,* 209 F.3d 1051, 1053 (8th Cir.2000) (federal courts apply state law to resolve attorney client privilege issues and federal law to resolve work product issues in diversity cases); *Frontier Ref. Inc. v. Gorman-Rupp Co.,* 136 F.3d 695, 702 n. 10 (10th Cir.1998) ("[u]nlike the attorney client privilege, the work product [doctrine] is governed, even in diversity cases, by a uniform federal standard embodied in Fed.R.Civ.P. 26(b)(3)."); *Allied Irish Banks v. Bank of America, N.A.,* 240 F.R.D. 96, 105 (S.D.N.Y.2007) ("While state law governs the question of attorney-client privilege in a diversity action, federal law governs the applicability of the work product doctrine."); *Schipp v. Gen. Motors *770 Corp.,* 457 F. Supp 2d 917, 923 (E.D.Ark.2006) ("In a diversity case, the Court applies federal law to resolve work product claims."); *Bank of the West v. Valley Nat. Bank of Ariz.,* 132 F.R.D. 250 (N.D.Cal.1990) (in diversity action, California law would govern resolution of issues arising out of plaintiff's invocation of attorney client privilege whereas work product issues would be resolved under federal law); *Nicholas v. Bituminous Cas. Corp.,* 235 F.R.D. 325, 329 n. 2 (N.D.W.Va.2006) ("In a diversity case, federal courts apply federal law to resolve work-product privilege claims and state law to resolve attorney-client privilege claims."); *Maertin v. Armstrong World Industries, Inc.,* 172 F.R.D. 143, 147 (D.N.J.1997) ("[T]he work product privilege is governed, even in diversity cases, by uniform federal law..."); *S.D. Warren Co. v. E. Elect. Corp.,* 201 F.R.D. 280, 281 (D.Me.2001) (federal courts apply federal law when addressing the work product doctrine, even in diversity cases lacking any federal question); 8 Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d. § 2023 (2d ed. 1994) ("At least since the adoption of Rule 26(b)(3) in 1970, it has been clear that in federal court the question whether material is protected as work product is governed by federal law even if the case is in court solely on grounds of diversity of citizenship.") [FN7].

FN6. *Musselman v. Phillips,* 176 F.R.D. 194, 195 n. 1 (D.Md.1997) (collecting authority); *Nutramax Labs., Inc. v. Twin Laboratories Inc.,* 183 F.R.D. 458, 463, n. 8 (D.Md.1998); 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure: Civil 2d § 2023 at 335 (2d ed.1994)(work product materials are not beyond the scope of discovery on grounds of "privilege").

FN7. However, the result almost certainly would be the same even if Maryland law controlled. In Maryland, the work product doctrine has been codified at Maryland Rule 2-402(d), the text of which is substantially identical to Fed.R.Civ.P. 26(b)(3). Moreover, Maryland

courts long have cited federal cases when ruling on issues involving the work product doctrine in state cases. *See, e.g. Balt. Transit Co. v. Mezzanotti,* 227 Md. 8, 14 n. 2, 174 A.2d 768 (citing *Hickman v. Taylor,* 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947) as authority in interpreting the work product doctrine under Maryland law); *E.I. du Pont de Nemours & Co. v. Forma-Pack Inc.,* 351 Md. 396, 407, 718 A.2d 1129 (1998) (citing federal law in interpreting work product doctrine under Maryland law); *Gallagher v. Office of the Att'y Gen.,* 141 Md.App. 664, 677, 787 A.2d 777 (2001) (citing federal cases in evaluating whether, under Maryland law, work product protection had been waived); *Elkton Care,* 145 Md.App. at 543, 805 A.2d 1177 (citing federal case law in determining whether, under Maryland law, work product protection had been waived); *DeVetter v. Alex. Brown Mgmt. Svcs., Inc.,* No. 24-C-03-007514, 2006 WL 1314014, at * 11 (Md.Cir.Ct. Mar.22, 2006) (citing federal case law in deciding issue of whether work product protection was waived, under Maryland law).

CNA contends that, under Fourth Circuit authority, opinion work product, such as the email from coverage and CLEM counsel and Hoefer's characterization of their legal analysis, is afforded particularly robust protection, being viewed as "absolutely immune" or "nearly absolutely immune" from discovery [FN8]. No one can quarrel with this point, but it is irrelevant. Under Armour does not seek discovery pursuant to Fed.R.Civ.P. 34 of the claims notes that Hoefer posted on cnacentral.com. They were obtained by Under Armour from its insurance broker, Frenkel, entirely outside of the discovery process. The issue presented in this case is not whether the opinion work product contained in the claims notes can be discovered, but whether its inadvertent posting prior to the filing of this lawsuit on a website to which CNA's adversary, Under Armour, had been given access, waives work product protection. And, as will be ***771** seen, the Fourth Circuit clearly has recognized that opinion work product protection, however exalted and immune from discovery, may nonetheless be waived.

FN8. *See, e.g. In re Allen,* 106 F.3d 582, 607 (4th Cir.1997) (opinion work product enjoys "nearly absolute" immunity from discovery); *Nat'l Union Fire Ins. Co. v. Murray Sheet Metal Co.,* 967 F.2d 980, 984 (4th Cir.1992) (opinion work product "absolutely immune" from discovery); *Nutramax Labs., Inc. v. Twin Labs., Inc.* 183 F.R.D. 458, 462 (D.Md.1998) (under Fourth Circuit case law opinion work product has [been] characterized variously as "absolutely immune" or "nearly absolutely immune" from discovery, collecting cases).

In *Duplan Corp. v. Deering Milliken, Inc.,* 540 F.2d 1215 (4th Cir.1976), the Fourth Circuit held that work product protected information that had been produced either voluntarily or inadvertently to an adversary did not result in subject matter waiver, as would be the case for attorney client privileged materials. The court summarized its holding as follows:

> Thus, to the extent that a concept of subject matter waiver is applicable to Rule

> 26(b)(3) under the rationale of the *Nobles* [FN9] case which held that testimonial use of work product constituted waiver, we are of [the] opinion it does not extend to a case such as this where there has been only inadvertent or partial disclosure in response to specific inquires, and in which no testimonial use has been made of the work product.
>
> FN9. Referring to *United States* v. *Nobles,* 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975).

Duplan, 540 F.2d at 1223. Of course, the subject of the *Duplan* case was the *extent* to which the inadvertent or partial production constituted a waiver, and if so, whether additional discovery of protected materials was warranted. It did not attempt a comprehensive analysis of the underlying circumstances that would trigger a waiver in the first instance. Implicit in the conclusion that broad subject matter waiver did not apply to opinion work product is an acknowledgment that the inadvertent production of opinion work product could result in more limited waiver, as to the materials actually produced. This concept was clarified further by the Court in *Martin Marietta Corp.* v. *Pollard,* 856 F.2d 619, 626 (4th Cir.1988), where it stated:

> First and most generally, opinion work product is to be accorded great protection by the courts. While certainly *actual disclosure of pure mental impressions may be deemed waiver,* and while conceivably there may be indirect waiver in extreme circumstances, we think generally such work product is not subject to discovery.

(emphasis added). The Fourth Circuit more comprehensively addressed the circumstances that could result in the waiver of opinion work product protection in ***Doe*** v. ***United States,*** **662 F. 2d 1073, 1081 (4th Cir. 1981)**, where it ruled:

> **Recent decisions considering [waiver of work product protection] ... have focused on a concern inherent in the work product rule: that since an attorney's work is for his client's advantage, opposing counsel or adverse parties should not gain the use of that work through discovery. The attorney and client can forfeit this advantage, but their actions effecting the forfeiture or waiver must be consistent with a conscious disregard of the advantage that is otherwise protected by the work product rule. Disclosure to a person with an interest common to that of the attorney or the client normally is not inconsistent with an intent to invoke the work product doctrine's protection and would not amount to such a waiver . However, when an attorney freely and voluntarily discloses the contents of otherwise protected work product to someone with interests adverse to his or those of the client, knowingly increasing the possibility that an opponent will obtain and use the material, he may be deemed to have waived work product protection .... Additionally, release of otherwise protected material without an intent to limit its future disposition might forfeit work product *772 protection, regardless of the relationship between the attorney [sic] and the recipient of the material. *In other words, to effect a forfeiture of work product protection by waiver, disclosure must occur in circumstances in which the attorney cannot reasonably expect to limit the future use of the otherwise protected material.***
>
> (emphasis added).

[5] The notion that disclosure of work product protected material in a manner that creates a substantial risk that it will be received by an adversary waives the protection because it cannot be expected that the future use of the information could be limited is a common sense proposition that has been recognized by other courts and commentators for the simple reason that once an adversary has become aware of the content of the information disclosed it cannot purge it from its mind. This principle has been stated authoritatively as follows: "Work-product immunity is waived if the client, the client's lawyer, or another authorized agent of the client: ... (4) discloses the material to third persons in circumstances in which there is a significant likelihood that an adversary or potential adversary in anticipated litigation will obtain it." Restatement (Third) of the Law Governing Lawyers § 91 (2000). The notion is that failure to take adequate precautions to prevent an adversary from obtaining work product information warrants waiver because "[i]ndifference to such a consequence indicates that protection of the immunity was not important to the person claiming the protection." § 91 cmt. b. Further, as long as the disclosure was voluntary, waiver results, even if it was not consensual. § 91, cmt. a ("Most decided cases of waiver involve actions of the attorney or client that are voluntary, but not explicitly consensual."). *See, e.g. GAF Corp. v. Eastman Kodak Co.,* 85 F.R.D. 46, 51-52 (D.C.N.Y.1979), *abrogated on other grounds by In re Steinhardt Partners,* 9 F.3d 230, 233 (2d Cir.1993) ("The majority rule provides that disclosure of the privileged information by the party asserting the attorney work product privilege to a third-party does not constitute waiver unless such disclosure, under the circumstances, is inconsistent with the maintenance of secrecy from the disclosing party's adversary. Therefore, only if such disclosure substantially increases the possibility that an opposing party could obtain the information disclosed will the disclosing party's work product privilege be deemed waived. This majority rule reflects the purpose of the work product privilege which is to prevent an opposing party from securing the protected information rather than to prevent the outside world generally from obtaining the information.") (internal citations omitted); *Niagara Mohawk Power Corp. v. Stone & Webster Eng'g Corp.,* 125 F.R.D. 578, 587 (N.D.N.Y.1989) ("[W]ork product protection is waived when protected materials are disclosed in a manner which 'substantially increases the opportunity for potential adversaries to obtain the information' ".); *Carter v. Gibbs,* 909 F.2d 1450, 1451 (Fed.Cir.1990) (Fed.Cir.1990) (en banc), *superseded in non-relevant part.* Pub.L. No. 103-424, § 9(c). 108 Stat. 4361 (1994), as recognized in *Mudge v. United States,* 308 F.3d 1220, 1223 (Fed.Cir.2002) ("Assuming the motion to strike asserts the work product as well as the attorney-client privilege, we believe the government has waived the former by voluntarily attaching a copy of the offending memorandum to appellants' copy of the motion for an extension of time. It is irrelevant whether the attachment was inadvertent, as the government alleges. Voluntary disclosure of attorney work product to an adversary in the litigation for which the attorney produced that information defeats the policy underlying ***773** the privilege."); *Frank Betz Assocs., Inc. v. Jim Walter Homes, Inc.,* 226 F.R.D. 533, 535 (D.S.C.2005) (finding that "courts generally find a waiver of the work product privilege only if the disclosure substantially increases the opportunity for potential adversaries to obtain the information.")

(quoting *In re Grand Jury,* 561 F.Supp. 1247, 1257 (E.D.N.Y.1982)) (internal quotations omitted); 8 Wright, Miller & Marcus, Federal Practice and Procedure; Civil 2d § 2024 at 369 (2d ed. 1994) ("Thus, the result should be that disclosure of a document to third persons does not waive the work-product immunity unless it has substantially increased the opportunities for potential adversaries to obtain the information."); 6 James Wm. Moore, *et al., Moore's Federal Practice* § 26.70[6][c] (3d ed.2004) at 26-167 ("Because the work product privilege is intended to protect the adversary process, some cases draw a distinction between disclosures made to non-adversaries and disclosures made to adversaries. While disclosures made to non-adversaries do not necessarily waive the work product privilege, a disclosure only to one adversary waives the privilege as against all other adversaries. Furthermore a party may not avoid waiver by asserting the retention of the privilege while at the same time disclosing the material to the adversary.").

[6][7] In this case, CNA's disclosure of the opinion work product of its Cl and coverage counsel was made to Mic Peace of Frenkel and Co, who was U Armour's agent. Disclosure to an ag tantamount to disclosure to the prin See *Mut. Life Ins. Co. of New Y Hilton-Green,* 241 U.S. 613, 622, 3 676, 60 L.Ed. 1202 (1916) ("The rule which imputes an agent's kn to the principal is well established. derlying reason for it is that an third party may properly presume will perform his duty and report which affect the principal's inter statement (Second) of Agency § (1958) ("The principal is affected by the knowledge which the agent has when acting for him or, if it is the duty of the agent to communicate the information and not otherwise to act, the principal is affected after the lapse of such time as is reasonable for its communication."). Accordingly, by disclosing the content of protected opinion work product to its adversary-Under Armour-CNA cannot now maintain that the protection continues to exist. As a matter of law the protection has been waived. As a practical matter, no other result makes sense. CNA cannot expect to limit the future use by Under Armour of the protected material it disclosed. Neither Under Armour nor its counsel can purge from their consciousness this information that they received not through any wrongdoing of their ... rather, as a result of the volun... ...tent action of CNA. ...torney-Cli...

et al., Moo...

26.70[6][c] (3d ed.2004) at 26-467 ("A waiver of work-product protection encompasses only the items actually disclosed. Thus, disclosure of some documents does not imply that work product protection has been destroyed for other documents of the same character.").

Having found that both the attorney client privilege and work product protection have been waived as to the claims notes posted by Mr. Hoefer on cnacentral.com, CNA is at liberty to use those materials, to the extent that they are relevant and otherwise admissible in the pending lawsuit.

D.Md.,2008.
Continental Cas. Co. [redacted]. Under Armour, Inc.
537 F.Supp.2d 761

END OF DOCUMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE No. 08-80736-CIV-MARRA/JOHNSON

JANE DOE 1 and JANE DOE 2,

Plaintiffs,

[redacted]

UNITED STATES OF AMERICA,

Defendant.
_____/

SUPPLEMENTAL BRIEFING IN SUPPORT OF MOTION TO INTERVENE OF ROY BLACK, MARTIN WEINBERG, AND JAY LEFKOWITZ

During the hearing on August 12, 2011, the Court directed the proposed intervenors to file additional briefing on their argument that plea negotiations are privileged and not subject to discovery or use as evidence in these proceedings. Proposed intervenors submit the following memorandum of law, which is identical to Parts I and II of the memorandum of law submitted by proposed intervenor Jeffrey Epstein in support of his motion for a protective order and his opposition to the motions of the plaintiffs for production, use, and disclosure of his plea negotiations. If allowed to intervene, the lawyers would incorporate these arguments into their motion for a protective order, which was attached to their initial motion to intervene.

Established case law as well as sound and substantial policy considerations prohibit disclosure of the letters and emails prepared by Mr. Epstein's lawyers during plea negotiations with the government, and require that the letters and emails that Jane Doe 1 and Jane Doe 2 already have remain confidential. In support of their position, proposed intervenors submit this memorandum

of law.

Part I shows that the Court should deny disclosure and use of the plea negotiations by simple reference to Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(f), without having to reach the other issues raised by the parties and the proposed intervenors. This is because during the hearing on August 12, 2011, Jane Doe 1 and Jane Doe 2 admitted that they intend to use the plea negotiation letters and emails as substantive evidence at a "remedies hearing" where they will seek invalidation of Mr. Epstein's Non-Prosecution Agreement. Using this correspondence as evidence against Mr. Epstein is plainly prohibited by Evidence Rule 410 and Criminal Rule 11.

Part II of this memorandum shows that Jane Doe 1 and Jane Doe 2 are not entitled to discovery or use of the plea negotiations not only because of the reach of Rules 410 and 11, but also because plea negotiations enjoy an evidentiary privilege as recognized by the Supreme Court in *United States v. Mezzanatto,* 513 U.S. 196, 204 (1995) ("Rules 410 and 11(e)(6) 'creat[e], in effect, a privilege of the defendant,' and, like other evidentiary privileges, this one may be waived or varied at the defendant's request"). Additionally, because plea negotiations are "rooted in the imperative need for confidence and trust," and because their confidentiality serves significant public and private ends, they are properly subject to a common law privilege under Federal Rule of Evidence 501. Similar privileges, which are "rooted in the imperative need for confidence and trust" and which serve significant public and private ends, have been recognized by Judge Marcus in the case of *In Re Air Crash Near Cali, Colombia*, 959 F. Supp. 1529 (S.D. Fla. 1997); by Chief Judge Vinson of the Northern District of Florida in *Reichhold Chemicals, Inc. v. Textron, Inc.*, 157 F.R.D. 522 (N.D. Fla. 1994); and by a number of district courts recognizing a mediation privilege which shields from disclosure and use mediation documents, letters, and communications.

PART I

A.
PLEA NEGOTIATIONS MAY NOT BE USED AGAINST MR. EPSTEIN UNDER THE PLAIN LANGUAGE OF THE FEDERAL RULES

The Court should deny disclosure and use of the plea negotiations by simple reference to Rule of Evidence 410 and Rule of Criminal Procedure 11(f), without having to reach the other issues raised by the parties and the proposed intervenors. During the August 12, 2011 hearing, the plaintiffs admitted that they seek the defense letters and emails to offer them as evidence to support their request that the Court invalidate Mr. Epstein's Non-Prosecution Agreement. According to the plaintiffs, the plea negotiations will show that Mr. Epstein supposedly "engineered" and "orchestrated" the claimed Crime Victims' Rights Acts violations and that therefore the plaintiffs are entitled to negate Mr. Epstein's interest in the protections and finality of the Non-Prosecution Agreement. [August 12, 2011 Trans. at 33-34, 61, 107-09].

The letters and emails exchanged between the government and defense counsel during plea negotiations are classic settlement discussions, written with the intention that they remain confidential. As such, they are protected by the constitutional right to effective assistance of counsel and the express language of Rule 410 and Federal Rule of Criminal Procedure 11(f). FED. R. EVID. 410 (discussions made during plea negotiations are "not, in any civil or criminal proceeding, admissible against the defendant who . . . was a participant in the plea discussions"); FED. R. CRIM. P. 11(f) ("the admissibility or inadmissibility of . . . a plea discussion and any related statement is governed by Federal Rule of Evidence 410").

Obviously, the plaintiffs intend to use the plea negotiation letters "against" Mr. Epstein. They protested during the August 12 hearing that the letters would be offered "against the

government" and "not against Mr. Epstein," but this is disingenuous given their emphatic and categorical representations to the contrary. [Compare Trans. at 29-30 with Trans. at 33-34, 61, 107-09]. The plaintiffs' arguments and accusations throughout this litigation, including the various conspiracy allegations leveled against Mr. Epstein during the August 12 hearing, establish that the plaintiffs' true purpose is to use the plea negotiations against Mr. Epstein in the current proceeding.

The prohibition on admission of plea negotiation communications clearly extends to the current proceeding, whether it is denominated a quasi-criminal or a civil proceeding. The committee notes to former Rule 11(e)(6), which read almost identical to Rule 410, specifically state that the words "*not . . . admissible against the defendant*" refer to "***the purpose*** for which [the evidence] is offered" and not "to the kind of proceeding in which the evidence is offered." FED. R. CRIM. PRO. 11 advisory committee note 1979 amendment (emphasis added). Rule 11 was amended in 1979 specifically to avoid confusion or misunderstanding regarding this phrase, and to emphasize that "against the defendant" means "the purpose" for which the evidence is being used:

> The phrase "in any civil or criminal proceeding" has been moved from its present position, following the word "against," for purposes of clarity. An ambiguity presently exists because the word "against" may be read as referring either to the kind of proceeding in which the evidence is offered or ***the purpose for which is offered***. The change makes it clear that the latter construction is correct.

Committee on Rules of Practice And Procedure of The Judicial Conference of The United States, Standing Committee On Rules of Practice And Procedure, 77 F.R.D. 507, 538 (February 1978) (emphasis added).

Even though the plaintiffs claim that they would technically offer the plea negotiation letters against the government because the government is its opponent, their real and express purpose is to offer the plea negotiations against Mr. Epstein to prove his supposed culpability in encouraging the

government to breach what the plaintiffs contend is their statutory right to consultation, and to then seek the unprecedented and unconstitutional remedy of invalidation of the Non-Prosecution Agreement despite the fact that Mr. Epstein has already suffered all of its penal and adverse collateral consequences: jail, community custody, payment of substantial legal fees to an attorney representative for his accusers, payment of substantial civil settlements driven by waivers negotiated by the government to facilitate its witnesses bringing successful civil lawsuits, and registration requirements.

Rules 410 and 11 plainly prohibit admission of the plea communications.

B.
BECAUSE PLEA NEGOTIATIONS ARE INADMISSIBLE, THE PLAINTIFFS BEAR THE BURDEN OF PARTICULARIZING A PROPER BASIS FOR DISCOVERY

When a discovery request seeks "information subject to exclusion under the Federal Rules of Evidence, *such as settlement information, . . .* many courts shift the burden to the requesting party, requiring them to make a particularized showing that the inadmissible evidence is likely to lead to admissible evidence." *Reist* [redacted]. *Source Interlink Co.*, 2010 WL 4940096 at *2 (M.D. Fla. Nov. 29, 2010); *Bottaro* [redacted]. *Hatton Assocs.*, 96 F.R.D. 158, 159-60 (E.D.N.Y. 1982) ("the object of the inquiry must have some evidentiary value before an order to compel disclosure of otherwise inadmissible material will issue"). Such a burden-shifting analysis is particularly important where the discovery is protected by a rule of inadmissibility, where the plaintiffs have not identified any principled basis for discovery other than to seek to admit the plea communications in evidence, and where the policies behind the rule of inadmissibility would be compromised by any disclosure, regardless of whether the communications are later excluded as evidence in proceedings in this case.

The plaintiffs in *Bottaro* sued a number of defendants for securities fraud. One defendant

settled and was dismissed from the lawsuit. The remaining defendants later moved to compel disclosure of the settlement agreement. In denying the motion to compel, the Court recognized the strong public policy favoring settlements, and the need to encourage settlements by ensuring against "unnecessary intrusion" into "the bargaining table." *Id.* at 160. For this reason, the Court held, parties seeking discovery of inadmissible settlement negotiations must first make a "particularized showing of a likelihood that admissible evidence will be generated" by their discovery request:

> Given the strong public policy of favoring settlements and the congressional intent to further that policy by insulating the bargaining table from unnecessary intrusions, we think the better rule is to require some particularized showing of a likelihood that admissible evidence will be generated by the dissemination of the terms of a settlement agreement. Since the terms of settlement do not appear to be reasonably calculated to lead to discovery of admissible evidence and the defendants have not made any showing to the contrary, this justification for [discovery] must fail.

Id.; accord Reist, 2010 WL 4940096 at *2 (recognizing the "chilling effect" that discovery can have on the willingness of parties to enter into settlement negotiations).

Other than their conclusory statement during the August 12 hearing that the plea negotiations would be used against the government and not Mr. Epstein, the plaintiffs have not made any particularized showing to convince this Court that any admissible evidence would result from their discovery of the plea negotiations. Accordingly, their request for discovery of clearly inadmissible evidence should be denied.

C.
THE PLEA NEGOTIATIONS ARE IRRELEVANT BECAUSE THE PLAINTIFFS ARE NOT ENTITLED TO INVALIDATE THE NON-PROSECUTION AGREEMENT

Additionally, the purpose for which the plaintiffs seek the plea negotiation letters – to set aside the Non-Prosecution Agreement – is a remedy that, if granted, would violate the Constitution and the statutory rights of *both* the government and Mr. Epstein. It would also be extraordinarily

inequitable given that while the plaintiffs failed to urge that this Court resolve their Complaint as an exigent or emergency matter, Mr. Epstein served the entirety of a prison sentence that resulted from obligations imposed upon him by the Non-Prosecution Agreement. He also served the entire community control consecutive sentence, and pursuant to the Non-Prosecution Agreement, he made payments of huge sums of money to the attorney representative of certain claimants. Finally, Mr. Epstein settled cases because of waivers within the Non-Prosecution Agreement.

Under the Crime Victims' Rights Act, neither Jane Doe 1 nor Jane Doe 2 can invalidate the Non-Prosecution Agreement. The Act expressly prohibits it: "Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." 18 U.S.C. § 3771(d)(6).

Under the Crime Victims' Rights Act, neither Jane Doe 1 nor Jane Doe 2 can invalidate the Non-Prosecution Agreement. The Act expressly prohibits it: "Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." 18 U.S.C. § 3771(d)(6).

The Act codifies the long-standing principle that "[t]he Attorney General and United States Attorneys retain broad discretion to enforce the Nation's criminal laws." *United States v. Armstrong*, 517 U.S. 456, 464 (1996). This is due in large part to the separation of powers doctrine. *Id.*; U.S. CONST. art. II, § 3. Whether to investigate possible criminal conduct, grant immunity, negotiate a plea, or dismiss charges, are all central to the prosecutor's executive function. *United States v. Smith*, 231 F.3d 800, 807 (11th Cir. 2000). "The judiciary cannot interfere with a prosecutor's charging discretion, except in narrow circumstances where it is necessary to do so in order to discharge the judicial function of interpreting the Constitution." *Id.* And this Court has not been

called upon to interpret the Constitution.

Even in the case of *In re Dean*, 527 F.3d 391 (5th Cir. 2008), upon which the plaintiffs rely, the district court, after remand from the Fifth Circuit, *denied* the motion of the victims to invalidate the defendant's plea agreement as a remedy for the claimed violation of the Crime Victims' Rights Act. The court found that "[t]he purpose of the conferral right is not to give the victims a right to approve or disapprove a proposed plea in advance or to participate in plea negotiations." *In re Dean* on remand as *United States v. BP Products North America, Inc.*, 610 F. Supp. 2d 655, 727 (S.D. Tex. 2009). Instead, "[t]he purpose of the reasonable right to confer is for victims to provide information to the government, obtain information from the government, and to form and express their views to the government and court." *Id.* The district court concluded that the violations alleged by the victims did not provide a basis for rejecting the plea agreement. *Id.* at 726-27; *see In re Acker*, 596 F.3d 370, 373 (6th Cir. 2010) (denying mandamus where petitioners sought to vacate plea agreement which made no provision for restitution in deference to pending civil litigation); *United States v. Aguirre-Gonzalez*, 597 F.3d 46 (1st Cir. 2010) (relying on the "strong interest in the finality of criminal sentences" to reject mandamus under the Act where a defendant had pleaded guilty and had been sentenced more than two years earlier); *see also United States v. Bedonie*, 413 F.3d 1126, 1129-30 (10th Cir. 2005) (district court had no authority under mandatory restitution act to reopen restitution proceedings after sentencing).

More recently in the case of *In re Peterson*, No. 2:10-CV-298, 2010 WL 5108692 (N.D. Ind. Dec. 8, 2010), the district court denied relief under the Crime Victims' Rights Act before any charges were filed. The court recognized that the Act "guarantees crime victims a range of substantive and participatory rights," but that "[w]hether charges might be filed and proceedings initiated in the

future is a matter of prosecutorial discretion, and the [Act] expressly provides that '[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any office under his direction.'" *Id.* at *2 (quoting 18 U.S.C. § 3771(d)(6)).

For these reasons, the Court should deny the motion of Jane Doe 1 and Jane Doe 2 to discover and use the plea negotiation letters as evidence.

PART II

MR. EPSTEIN'S PLEA NEGOTIATIONS ARE PRIVILEGED AND NOT DISCOVERABLE UNDER RULE 501

Jane Doe 1 and Jane Doe 2 are also not entitled to discovery or use of the plea negotiations because plea negotiations enjoy an evidentiary privilege, as recognized by the Supreme Court in *United States* [redacted] *Mezzanatto*, 513 U.S. 196 (1995). Additionally, because plea negotiations are "rooted in the imperative need for confidence and trust," and because their confidentiality serves significant public and private ends, they are properly subject to a common law privilege under Federal Rule of Evidence 501. That Rule provides, in relevant part:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

FED. R. EVID. 501. This Court "has the power to recognize new privileges, consistent with Rule 501 of the Federal Rules of Evidence, in cases arising under federal law." *In Re Air Crash Near Cali, Colombia*, 959 F. Supp. 1529, 1533 (S.D. FL. Feb. 7, 1997).

A.
"REASON AND EXPERIENCE" ARE THE TOUCHSTONES FOR ACCEPTING A COMMON LAW PRIVILEGE FOR PLEA NEGOTIATIONS

Jaffee v. Redmond, 518 U.S. 1 (1996), is perhaps the leading case addressing Rule 501 and the common-law principles underlying the recognition of testimonial privileges. The case involved a police officer and the extensive counseling she received after a traumatic incident in which she shot and killed a man. She was sued by the man's estate, which demanded discovery of the notes taken by the clinical social worker who provided therapy. *Id.* at 5-6. The officer and the therapist objected and asserted that their sessions were privileged, but the district court disagreed.

The Seventh Circuit reversed and concluded that "reason and experience," which are "the touchstone for acceptance of a privilege under Federal Rule of Evidence 501," compelled recognition of a privilege between patient and psychotherapist. *Id.* "Reason tells us that psychotherapists and patients share a unique relationship, in which the ability to communicate freely without fear of public disclosure is the key to successful treatment." *Id.* The Seventh Circuit also observed that even though a number of older federal decisions had previously rejected the privilege, things had changed in the intervening years and the "need and demand for counseling" had "skyrocketed during the past several years." *Id.*

The Supreme Court accepted certiorari to resolve a conflict among the Circuits, and affirmed the finding of a privilege. The Court's analysis was grounded "in the light of reason and experience," which showed that a therapist's ability to help a patient "is completely dependent" upon the patient's "willingness and ability to talk freely." *Id.* at 10, quoting Advisory Committee's Notes to Proposed Rules, 56 F.R.D. 183, 242 (1972). The Court found that the psychotherapist-patient privilege is "rooted in the imperative need for confidence and trust" and that "the mere possibility

of disclosure may impede the development of the confidential relationship necessary for successful treatment." *Id.* at 10.

Following *Jaffee*, three important sets of decisions have recognized privileges under Rule 501 to protect information that is exchanged in an environment that encourages candid disclosures, and that depends on this open exchange of information to promote significant private and public interests. They are:

> the decision of Judge Marcus, before he was appointed to the Eleventh Circuit, denying discovery and recognizing a privilege for airline pilots who report incidents and violations, *In Re Air Crash Near Cali, Colombia*, 959 F. Supp. 1529 (S.D. Fla. 1997);
>
> the decision of Judge Vinson, now the Chief Judge in the Northern District of Florida, denying discovery and recognizing a privilege for a corporation that reports contamination and other environmental hazards and violations to the Florida Department of Environmental Regulation, *Reichhold Chemicals, Inc.* [redacted] *Textron, Inc.*, 157 F.R.D. 522 (N.D. Fla. 1994); and
>
> a number of district court decisions denying discovery and recognizing a mediation privilege where litigants can "rely on the confidential treatment of everything that transpires during mediation . . . ." *Lake Utopia Paper Ltd.* [redacted] *Connelly Containers, Inc.*, 608 F.2d 928 (2d Cir.1979); *Folb* [redacted] *Motion Picture Ind. Pension & Health Plans,* 16 F. Supp. 2d 1164, 1173 (C.D.Ca. 1998); *Sheldone* [redacted] *Pennsylvania Turnpike Comm'n,* 104 F. Supp. 2d 511, (W.D. Pa. 2000); *Microsoft Corporation* [redacted] *Suncrest Enterprise*, 2006 WL 929257 (N.D. Cal. Jan. 6, 2006).

1. Judge Marcus and The Common Law Privilege Of Pilots Reporting Incidents And Violations, *In Re Air Crash Near Cali, Colombia*, 959 F. Supp. 1529 (S.D. Fla. 1997)

In re Air Crash Near Cali, Colombia involved the crash of an American Airlines plane as it arrived in Cali just before Christmas, 1995. The crash killed 159 passengers and crew members. One hundred and thirty lawsuits were consolidated before Judge Marcus, and a steering committee was created to represent the plaintiffs. 959 F. Supp. at 1530.

During discovery, American Airlines refused to produce a number of responsive documents, asserting that they were privileged because they were prepared pursuant to the American Airlines Safety Action Partnership Program, known as the ASAP program. The program was an initiative by the FAA, the Allied Pilots Association, and American Airlines. It was a "voluntary pilot self-reporting program designed to encourage pilots to report incidents and violations." *Id.* at 1531. The objectives of the ASAP program were "to identify and to reduce or eliminate possible flight safety concerns, as well as to minimize deviations from Federal Aviation Regulations." *Id.*

Judge Marcus agreed that American Airlines had made "a compelling argument for recognition of a limited common law privilege for the ASAP materials." *Id.* at 1533. Relying on *Jaffee*, Judge Marcus found that he had the ability "to recognize new privileges, consistent with Rule 501 of the Federal Rules of Evidence, in cases arising under federal law." *Id.* He addressed the following four factors:

First, the "private interests" involved – "in other words, whether dissemination of the information will chill the 'frank and complete disclosure of facts' shared in an 'atmosphere of confidence and trust.'" *Id.* at 1533. Judge Marcus found that American Airlines, the pilots, and the FAA had an interest in air safety and in encouraging the flow of safety information. The FAA, as the regulatory body, also had an interest in being made aware of violations. *Id.* at 1534.

Second, Judge Marcus considered the "public interests" furthered by the proposed privilege and found that there was a compelling public interest in improving the safety of commercial flights.

Third, the "likely evidentiary benefit that would result from the denial of the privilege." *Id.* Judge Marcus did not find a benefit from denying the privilege. On the contrary, he agreed that violations would be "kept secret if the pilots believed that their reports might be used in litigation

or otherwise disseminated to the public." *Id.* Judge Marcus also agreed that failure to recognize the privilege would "reduce the willingness of pilots to report incidents" and would "seriously damage and probably terminate a uniquely successful safety program . . . [which] relies on an assumption of strict confidentiality." Id. at 1534. He concluded that "without a privilege, pilots might be hesitant to come forward with candid information about in-flight occurrences, and airlines would be reluctant, if not altogether unwilling, to investigate and document the kind of incidental violations and general flight safety concerns whose disclosure is safeguarded by the ASAP program." *Id.* Finally, Judge Marcus warned that absent a privilege, "the prospect of ASAP reports being used by adverse parties in the course of litigation undoubtedly will affect the content, timeliness and candor of the reports submitted by its pilots." *Id.*

Fourth, whether the privilege had been recognized by the states. *Id.* The Court was not aware of any state or federal court that had recognized the privilege claimed by American Airlines, but that did not dissuade him from finding that a privilege existed.

With these considerations in mind, Judge Marcus ruled that "[t]here is a genuine risk of a meaningful and irreparable chill from the compelled disclosure of ASAP materials in connection with the pending litigation." *Id.* at 1534. Likewise in Mr. Epstein's case, there is a genuine risk of a meaningful and irreparable chill from the compelled disclosure of plea negotiations in connection with the pending litigation.

Significant private interests support a plea negotiations privilege. It cannot be denied that defendants, prosecutors, the court system, victims, and law enforcement agencies all have a legitimate interest that criminal cases or investigations resolve by pleas. Plea negotiations benefit defendants by limiting their exposure to jail or other punishment; they benefit all the parties in the

system by avoiding the many expenses associated with jury trials; they benefit the court by keeping the flow of its dockets and making judges available to handle matters that are proceeding to trial or that are contested; and they benefit prosecutors and law enforcement not only by freeing their time so that they can focus on contested matters, but also by allowing them to debrief defendants and gather information about criminal activity.

The public interests in criminal cases resolving by way of plea negotiations also cannot be denied. The public has an interest in the finality of plea negotiations, in ensuring that the courts, prosecutors, and law enforcement agencies are available to dedicate their time to contested matters, and in information that may be provided by defendants that will help curb criminal activity in their communities. The public, as well as private victims and government entities, all have an interest in restitution.

There are significant evidentiary consequences if the Court denies a privilege to plea negotiations. As with air safety violations that would be "kept secret if pilots believed their reports might be used in litigation," defendants and people under criminal investigation would not engage in plea negotiations and waive their Fifth Amendment rights if they believed that statements made during those negotiations could be used against them later in litigation with third parties. Candid discussions simply cannot take place if defendants fear that statements made during negotiations can be divulged to third parties in other proceedings and used to harm them, send them to prison, or invalidate their bargains years after they have served prison sentences and suffered all the consequences of their deals. Just as the work-product privilege is created, in part, to encourage lawyers to keep notes without fear of disclosure, a privilege for plea communications is necessary to encourage lawyers to communicate, in writing, without fear that their proposals, submissions,

arguments, analysis of the facts, or legal arguments will become the grist of later civil litigation to the potential detriment to the client.

Few if any lawyers would engage in candid and open discussions with a prosecutor if their statements could later be used against their clients. The ethical and constitutional obligations we now have to initiate and engage in plea negotiations would be terribly at odds with any rule that made those negotiations public and admissible in evidence to be used as ammunition to harm our clients.

2. Chief Judge Vinson and the Common Law Privilege Of Reporting Environmental Hazards and Violations, *Reichhold Chemicals, Inc.* [redacted] *Textron, Inc.*, 157 F.R.D. 522 (N.D. Fla. 1994)

Reichhold Chemicals involved a Consent Order between Reichhold and the Florida Department of Environmental Regulation. The Order obligated Reichhold "to investigate and remediate the contamination of groundwater on and under, and storm water runoff from, an industrial plant site it owns in Pensacola, Florida." 157 F.R.D. 523-24.

Reichhold brought an action against former owners of the plant site, to recover some of the cost of remediating the land. The defendants sought reports that Reichhold had prepared describing possible environmental violations. Reichhold asserted that these documents were protected by "the privilege of self-critical analysis." *Id.* at 524. This privilege, "also known as the self-evaluative privilege," had been adopted in other jurisdictions, but at the time, it presented an issue of first impression to Chief Judge Vinson. He ruled in favor of Reichhold and found that the privilege allows individuals and companies to candidly assess their compliance with legal requirements without creating evidence to be later used against them by their adversaries:

The self-critical analysis privilege has been recognized as a qualified privilege which

> protects from discovery certain critical self-appraisals. It allows individuals or businesses to candidly assess their compliance with regulatory and legal requirements without creating evidence that may be used against them by their opponents in future litigation. The rationale for the doctrine is that such critical self-evaluation fosters the compelling public interest in observance of the law.

Id. at 524. Judge Vinson agreed with Reichhold that the privilege was necessary to protect an organization or individual from the Hobson's choice of either undertaking an aggressive investigation and correcting dangerous conditions, "thereby creating a self-incriminating record that may be evidence of liability," or "deliberately avoiding making a record on the subject (and possibly leaving the public exposed to danger) in order to lessen the risk of civil liability." *Id.*

In recognizing the privilege, Judge Vinson relied on *Bredice* [redacted]. *Doctor's Hospital, Inc.*, 50 F.R.D. 249 (D.D.C.1970), the first case to find a common law self-evaluation privilege. There, the hospital held staff meetings where the professional staff evaluated the treatment provided to patients. In a medical malpractice action, the estate of Bredice sought the minutes of the hospital's staff meetings where Bredice's treatment or death were discussed. The court denied the discovery, noting that "review of the effectiveness and results of treatments were valuable in improving the quality of health care available to the general public," and that "physicians would be unwilling to candidly critique the actions of their colleagues if such evaluations were subject to discovery and use as evidence in a subsequent malpractice action." *Id.* at 525.

3. The Common Law Mediation Privilege

As is true in the case of plea negotiations, it seems self-evident that no system of mediation can function if parties fear that statements made and documents submitted in furtherance of mediation create a trail of incrimination that can later be used against them. "[C]ounsel, of necessity, [would] feel constrained to conduct themselves in a cautious, tight-lipped, noncommittal manner

more suitable to poker players in a high-stakes game than adversaries attempting to arrive at a just solution of a civil dispute." *Lake Utopia Paper Ltd. v. Connelly Containers, Inc.*, 608 F.2d 928 (2d Cir.1979).

Lake Utopia involved the Second Circuit's Civil Appeals Management Plan, which called for parties to engage in a conference before oral argument, to hopefully settle their dispute. The Circuit adopted this mediation program to encourage the parties to settle, and to expedite the processing of civil appeals. *Id.* at 929.

Counsel for the parties in *Lake Utopia* met pursuant to the program in an attempt to settle. The appellee later disclosed to the Court certain admissions made during the conference which showed that the appeal was frivolous. Rather than embrace this information, the Court chastised the appellee for disclosing it, holding that the purpose of the conference program was to encourage the parties to settle, and that the program would not function if statements made during the conference were later used against the parties. "It is essential to the proper functioning of the Civil Appeals Management Plan that all matters discussed at these conferences remain confidential. The guarantee of confidentiality permits and encourages counsel to discuss matters in an uninhibited fashion often leading to settlement . . . ." *Id.* at 930.

Ten years later, in *Folb v. Motion Picture Ind. Pension & Health Plans*, 16 F. Supp. 2d 1164, (C.D.Ca. 1998), the district court in California became the first federal court to adopt the mediation privilege as federal common law under Rule 501. Relying on *Lake Utopia Paper* as well as a number of other decisions addressing the confidentiality of settlement negotiations, *Folb* held that "the need for confidentiality and trust between participants in a mediation proceeding is sufficiently imperative to necessitate the creation of some form of privilege." *Id.* at 1175. The court emphasized

that the mediation privilege is particularly important because federal courts rely on mediation to manage their dockets: "This conclusion takes on added significance when considered in conjunction with the fact that many federal district courts rely on the success of ADR proceedings to minimize the size of their dockets." *Id.*

More recently in *Sheldone v. Pennsylvania Turnpike Comm'n*, 104 F. Supp. 2d 511, (W.D. Pa. 2000), the court relied on *Jaffee* and on Judge Marcus' decision in *In re Air Crash Near Cali, Colombia* to hold that all mediation documents and mediation communications are privileged and not subject to discovery. Mediation "afford[s] to litigants an opportunity to articulate their position[s] and to hear, first hand, both their opponent's version of the matters in dispute and a neutral assessment of the relative strengths of the opposing positions." *Id.* at 513. Without a mediation privilege, "parties and their counsel would be reluctant to lay their cards on the table so that a neutral assessment of the relative strengths and weaknesses of their opposing positions could be made." *Id.* This, of course, assumes that parties "would even agree to participate in the mediation process absent confidentiality." *Id.* Confidentiality is therefore "essential to the mediation process," and it is "beyond doubt that the mediation privilege is rooted in the imperative need for confidence and trust." *Id.* at 514.

No real distinction exists between the need to keep mediation confidential and the need to keep plea negotiations confidential. Both processes, and the goals they serve, are essentially identical. Both processes aim at encouraging settlement and compromise. Both processes depend on parties speaking candidly about the strengths and weaknesses of their positions. And in both processes, it would be manifestly unfair to require that parties attempt to settle their disputes in this fashion, only to later allow third parties to use their words as a weapon against them.

B.

THE COURT SHOULD RECOGNIZE A PLEA NEGOTIATIONS PRIVILEGE

The "central feature" of Rule 410 "is that the accused is encouraged candidly to discuss his or her situation in order to explore the possibility of disposing of the case through a consensual arrangement." *United States v. Herman*, 544 F.2d 791, 797 (5th Cir. 1977). The Rule is derived from "the inescapable truth that for plea bargaining to work effectively and fairly, a defendant must be free to negotiate without fear that his statements will later be used against him." *Id.* at 796. The legislative history, too, "shows that the purpose of Fed.R.Ev. 410 and Fed.R.Crim.P. 11(e)(6) is to permit the unrestrained candor which produces effective plea discussions between the . . . government and the . . . defendant." *Committee on Rules of Practice And Procedure of The Judicial Conference of The United States, Standing Committee On Rules of Practice And Procedure*, 77 F.R.D. 507 (February 1978) (emphasis added).[1]

For these reasons, criminal defense lawyers negotiate with prosecutors in an environment of confidentiality, fostered by the protections of Rules 410 and 11. These rules encourage a process of searching and honest disclosures, and parties expect that their negotiations, and the information they exchange, will be protected from future use by an adversary. And because criminal defense lawyers are *required,* by ethical and constitutional considerations, to engage in plea negotiations to discharge their duty to represent the client's *best intcrest*, they do so with the well-founded expectation that communications made during those negotiations will not later be used *to harm the client*.

[1] Rule 11(f) was formerly Rule 11(e)(6), which read almost identical to Rule 410.

1. The Court Should Recognize A Plea Negotiations Privilege Because Plea Negotiations Are Critical To The Criminal Justice System

The Supreme Court has recognized that "Rules 410 and 11(e)(6) 'creat[e], in effect, a privilege of the defendant . . . .'" *Mezzanatto*, 513 U.S. at 204.This privilege encourages disposition of criminal cases by plea agreement, which is essential to the administration of justice:

> The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining," is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the states and the federal government would need to multiply by many times the number of judges and court facilities.

Santobello [redacted]. *New York*, 404 U.S. 257, 260 (1971). "[T]he fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned." *Blackledge* [redacted]. *Allison,* 431 U.S. 63, 71 (1977).

Those sentiments are just as true today. The Bureau of Justice Statistics of the Department of Justice reports that in 2005, 96.1% of federal criminal cases were resolved by way of a plea bargain. www.ojp.usdoj.gov/bjs/pub/html/fjsst/2005/fjs05st.htm That today's justice system depends on plea negotiations is a monumental understatement.

2. The Court Should Recognize A Plea Negotiations Privilege Because Plea Negotiations Are Critical To The Effective Representation of Counsel

Whether to negotiate a plea or contest a criminal charge "is ordinarily the most important single decision in any criminal case." *Boria* [redacted]. *Keane*, 99 F.3d 492 (2d Cir. 1996). In the age of the Sentencing Guidelines, with the draconian sentences called for in federal criminal cases, minimum mandatories, and the abolition of parole, engaging in meaningful and effective plea negotiations is

perhaps one of the most important roles of a criminal defense attorney. Today, the lawyer's "ability to persuade the judge or the jury is . . . far less important than his ability to persuade the prosecutor" during plea negotiations. *United States* v. *Fernandez*, 2000 WL 534449 (S.D.N.Y. May 3, 2000) at *1.

Counsel's failure to discharge his duties during plea negotiations is malpractice: "[I]t is malpractice for a lawyer to fail to give his client timely advice concerning" pleas. *Id.* It also constitutes ineffective assistance of counsel, and violates the Constitution. Thus, counsel has a duty to advise clients fully on whether a particular plea is desirable, since "[e]ffective assistance of counsel includes counsel's informed opinion as to what pleas should be entered." *United States* v. *Villar,* 416 F. Supp. 887, 889 (S.D.N.Y. 1976); *Boria* v. *Keane*, 99 F.3d 492, 497 (2d Cir. 1996), citing ABA Model Code of Professional Responsibility, Ethical Consideration 7-7 (1992).

Counsel also has a constitutional obligation to seek out information from the government, especially information that the government intends to use against the client. Failure to do so constitutes ineffective assistance of counsel. *Rompilla* v. *Beard*, 545 U.S. 374 (2005). "The notion that defense counsel must obtain information that the state has and will use against the defendant is not simply a matter of common sense, . . . it is the duty of the lawyer . . . ." *Rompilla* v. *Beard*, 545 U.S. 374, 386 (2005), citing 1 ABA Standards for Criminal Justice 4–4.1 (2d ed. 1982 Supp).[2]

The constitution also requires that criminal defense lawyers conduct "a prompt investigation of the circumstances of the case," and this includes making every effort to secure information directly from the prosecutors:

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[2] The Supreme Court has "long . . . referred [to these ABA Standards] as 'guides in determining what is reasonable.'" *Rompilla* v. *Beard*, 545 U.S. 374, 387 (2005).

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.

Rompilla [redacted] *Beard*, 545 U.S. 374, 386 (2005), citing 1 ABA Standards for Criminal Justice 4–4.1 (2d ed. 1982 Supp).

The lawyer's duty to investigate and obtain information from the prosecutor goes hand-in-hand with the lawyer's additional duty to "make suitable inquiry" to determine whether valid defenses exist. *Jones* [redacted] *Cunningham*, 313 F.2d 347 (4th Cir.1963) ("Of course, it is not for a lawyer to fabricate defenses, but he does have an affirmative obligation to make suitable inquiry to determine whether valid ones exist").

And regardless of whether valid defenses exist, counsel has a duty *to initiate plea negotiations* if he is to discharge his duty to faithfully represent the client's interests. *Hawkman* [redacted] *Parratt,* 661 F.2d 1161, 1171 (8th Cir. 1981) (counsel's "failure to initiate plea negotiations concerning the duplicitous felony counts constituted ineffective assistance of counsel which prejudiced Hawkman").

3. The Court Should Recognize A Plea Negotiations Privilege To Avoid A Meaningful And Irreparable Chill In Plea Negotiations

Reason and experience tell us that the system we have in place of sentencing laws, ethical rules, federal court dockets, and constitutional considerations, will not function if plea negotiations are not privileged. After all, "it is immediately apparent that no defendant or his counsel [would] pursue [plea negotiations] if the remarks uttered during the course of it are to be admitted in evidence as proof of guilt." *Herman*, 544 F.2d at 797. Plea negotiations are "rooted in the imperative need

for confidence and trust," *Jaffee,* 518 U.S. at 10, and maintaining their confidentiality advances significant public and private ends. Discovery and use of plea negotiations will cause "a meaningful and irreparable chill" to the "frank and complete disclosures" that result in negotiated resolution of criminal matters. *In re Air Crash Near Cali, Colombia,* 957 F.2d at 1533.

For these reasons, plea negotiations are properly subject to a common law privilege under Federal Rule of Evidence 501. The Court should hold that the plea negotiation letters and emails between Mr. Epstein's lawyers and the government are privileged and not subject to discovery or evidentiary use by the plaintiffs.

We certify that on September 2, 2011, the foregoing document was filed electronically with the Clerk of the Court using the CM/ECF system.

Respectfully submitted,

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531 F.3d 197
(Cite as: 531 F.3d 197)

United States Court of Appeals,
Second Circuit.
UNITED STATES of America, Appellee,
v.
Donald FELL, Defendant-Appellant.

Docket No. 06-2882-cr.
Argued: June 27, 2007.
Decided: June 27, 2008.

Background: Defendant was convicted in the United States District Court for the District of Vermont, William K. Sessions III, Chief Judge, of murder in course of carjacking and kidnapping, and he was sentenced to death. Defendant appealed.

Holdings: The Court of Appeals, B.D. Parker, Jr., Circuit Judge, held that:
(1) prospective juror who strongly opposed death penalty and was unprepared to conclude that defendant deserved death simply because murder was premeditated and simultaneously claimed that she could impose death penalty as part of her responsibilities as juror in spite of her expressed reluctance to do so had views that might have substantially impaired her duties as juror;
(2) prospective juror whose voir dire responses were not consistent or clear on whether he understood that death penalty could be imposed for murder resulting from reckless disregard for human life and whether he would be able to apply it under such circumstances could be excluded for cause;
(3) prospective juror who provided inconsistent and generally negative responses when asked whether she would consider imposing death penalty for single murder could be excluded for cause;
(4) district court's decision to exclude opinions of prosecutors set forth in draft plea agreement with defendant was within its traditional authority to exclude evidence of questionable relevance;
(5) defendant had not been prejudiced by exclusion of draft plea agreement;
(6) prosecutor's arguments were reasonable responses to defendant's use of stipulation;
(7) defendant's Fifth Amendment right to fair sentencing hearing had not been prejudiced by prosecutor's allegedly plainly erroneous closing comments; and
(8) evidence of defendant's satanic beliefs was not admissible to show motive in penalty phase for lack of relevance.

Affirmed.

West Headnotes

[1] Criminal Law 110 ⚿1152.2(2)

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1152 Conduct of Trial in General
110k1152.2 Jury
110k1152.2(2) k. Selection and Impaneling. Most Cited Cases
(Formerly 110k1152(2))

Challenges to a juror's excusal are reviewed for abuse of discretion, inquiring whether the trial court's findings are fairly supported by the record.

[2] Criminal Law 110 ⚿1153.1

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1153 Reception and Admissibility of Evidence

⚿1788(3)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(3) k. Presentation and Reservation in Lower Court of Grounds of Review. Most Cited Cases

Provision of Federal Death Penalty Act (FDPA) under which appellate court shall remand a case if it finds that death sentence was imposed under influence of passion, prejudice, or any other arbitrary factor does not create exception to rule under which unpreserved objections to jury instructions may be reviewed only for plain error. 18 U.S.C.A. § 3595(c)(2).

[9] Jury 230 ⚿108

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k104 Personal Opinions and Conscientious Scruples
230k108 k. Punishment Prescribed for Offense. Most Cited Cases

Not all prospective jurors who oppose the death penalty are subject to removal for cause in capital cases; instead, those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

[10] Jury 230 ⚿108

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k104 Personal Opinions and Conscientious Scruples
230k108 k. Punishment Prescribed for Offense. Most Cited Cases

A juror's views on capital punishment prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath, subjecting the juror to exclusion for cause, when those views create an obstacle to a prospective juror's impartial consideration of the law and the facts.

[11] Criminal Law 110 ⚿1166.17

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1166.5 Conduct of Trial in General
110k1166.17 k. Sustaining Challenges to Jurors. Most Cited Cases

Erroneously excluding a prospective juror based on her view on the death penalty is reversible error.

[12] Jury 230 ⚿108

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k104 Personal Opinions and Conscientious Scruples
230k108 k. Punishment Prescribed for Offense. Most Cited Cases

To survive review of a challenge to a district court's exclusion of a prospective juror based on her view on the death penalty, voir dire need not establish juror partiality with unmistakable clarity; rather, it must be sufficient to permit a trial judge to form a definite impression that a prospect-

fendant with murder resulting from reckless disregard for human life. 18 U.S.C.A. §§ 2119(2, 3), 3591(a)(2)(D).

[18] Jury 230 ⚿128

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k124 Challenges for Cause
230k128 k. Order of Challenges. Most Cited Cases

A juror's voir dire responses that are ambiguous or reveal considerable confusion may demonstrate that the performance of his duties as a juror in accordance with his instructions and his oath may be substantially impaired, subjecting the juror to exclusion for cause.

[19] Jury 230 ⚿108

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k104 Personal Opinions and Conscientious Scruples
230k108 k. Punishment Prescribed for Offense. Most Cited Cases

Prospective juror who provided inconsistent and generally negative responses when asked whether she would consider imposing death penalty for single murder could be excluded for cause in death penalty case charging defendant with murder in course of carjacking and kidnapping. 18 U.S.C.A. §§ 2119(2, 3), 3591.

[20] Sentencing and Punishment 350H ⚿1652

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1652 k. Aggravating Circumstances in General. Most Cited Cases

Sentencing and Punishment 350H ⚿1667

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1666 Nature or Degree of Offense
350Hk1667 k. In General. Most Cited Cases

Sentencing and Punishment 350H ⚿1670

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1670 k. Intent of Offender. Most Cited Cases

Under the Federal Death Penalty Act (FDPA), a defendant is eligible for the death penalty if the jury finds the charged homicide, a statutory intent element or threshold mental culpability factor, and at least one of the statutory aggravating factors. 18 U.S.C.A. §§ 3591(a)(2), 3592(c).

[21] Sentencing and Punishment 350H ⚿1757

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1757 k. Evidence in Mitigation in General. Most Cited Cases

District court's decision to exclude opinions of prosecutors set forth in draft

guilty to prove acceptance of responsibility as mitigating factor, that capital murder defendant offered to plead guilty in exchange for minimum penalty authorized for his conduct only when faced with overwhelming evidence of his guilt and that government proceeded to trial that defendant could have avoided by pleading unconditionally when offer was not accepted, were reasonable responses to defendant's use of stipulation, where jury repeatedly had been told that arguments were not evidence.

[26] Criminal Law 110 ⚿1171.1(2.1)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1171 Arguments and Conduct of Counsel
110k1171.1 In General
110k1171.1(2) Statements as to Facts, Comments, and Arguments
110k1171.1(2.1) k. In General. Most Cited Cases

In order to prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's remarks were improper and that the remarks, taken in the context of the entire trial resulted in substantial prejudice.

[27] Constitutional Law 92 ⚿4745

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)6 Judgment and Sentence
92k4741 Capital Punishment; Death Penalty
92k4745 k. Proceedings. Most Cited Cases

Sentencing and Punishment 350H ⚿1780(2)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(2) k. Arguments and Conduct of Counsel. Most Cited Cases

Capital murder defendant's Fifth Amendment right to fair sentencing hearing had not been prejudiced by prosecutor's allegedly plainly erroneous closing comments, allegedly suggesting that relevance of his mitigating evidence depended on its connection with his crimes of conviction, where jury had been given thorough instructions, prosecutor's comments formed very brief part of his summation and were not repeated during his rebuttal, and great amount of time and attention had been devoted to defendant's early life experiences by both parties. U.S.C.A. Const.Amend. 5.

[28] Sentencing and Punishment 350H ⚿1757

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1757 k. Evidence in Mitigation in General. Most Cited Cases

Before imposing the death penalty, a jury must be able to consider and give effect to a defendant's mitigating evidence. 18 U.S.C.A. §§ 3592(a)(8), 3593(c).

[29] Sentencing and Punishment 350H ⚿1757

350Hk1762 k. Other Offenses, Charges, or Misconduct. Most Cited Cases

Testimony during sentencing phase of capital murder trial indicating that interest of defendant in Native American and Muslim religions was cynical or feigned, and that his multiple religiously-related grievances reflected failure to adjust to incarceration, was relevant, and did not result in denial of due process or violate his associational or religious rights under First Amendment, in context of testimony that defendant had successfully adjusted to prison, was genuinely interested in several religions, and filed grievances for entirely legitimate purposes. U.S.C.A. Const.Amends. 1, 5.

[33] Constitutional Law 92 ⚿1170

92 Constitutional Law
92X First Amendment in General
92X(B) Particular Issues and Applications
92k1170 k. In General. Most Cited Cases

The First Amendment forbids the uncabined reliance on a defendant's abstract beliefs at sentencing. U.S.C.A. Const.Amend. 1.

[34] Constitutional Law 92 ⚿1170

92 Constitutional Law
92X First Amendment in General
92X(B) Particular Issues and Applications
92k1170 k. In General. Most Cited Cases

Constitutional Law 92 ⚿1440

92 Constitutional Law
92XVI Freedom of Association
92k1440 k. In General. Most Cited Cases

The government may introduce evidence of beliefs or associational activities without violating a defendant's First Amendment rights, so long as they are relevant to prove, for example, motive or aggravating circumstances, to illustrate future dangerousness, or to rebut mitigating evidence. U.S.C.A. Const.Amend. 1.

[35] Sentencing and Punishment 350H ⚿1789(3)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1789 Review of Proceedings to Impose Death Sentence
350Hk1789(3) k. Presentation and Reservation in Lower Court of Grounds of Review. Most Cited Cases

Trial memorandum that specifically objected to introduction of satanic evidence on basis that it "would create a new aggravating circumstances [sic] which the government ha[d] not previously alleged," and therefore would have violated requirement of formal notice under Federal Death Penalty Act (FDPA), was not sufficient to preserve First Amendment or due process challenge to testimony during sentencing phase of capital murder trial regarding defendant's cynical or feigned interest in Native American and Muslim religions. U.S.C.A. Const.Amend. 1; 18 U.S.C.A. § 3593(a).

[36] Sentencing and Punishment 350H ⚿1789(3)

350H Sentencing and Punishment

An excited utterance need not be contemporaneous with the startling event to be admissible; rather, the key question governing admission is whether the declarant was under the stress of excitement caused by the event or condition. Fed.Rules Evid.Rule 803(2), 28 U.S.C.A.

[40] Sentencing and Punishment 350H ⚿1766

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1766 k. Hearsay. Most Cited Cases

Statement of highly distraught mother of capital murder defendant to bartender after mother called for assistance from police after defendant had aggressively struck his mother inside bar and then assaulted her once they were outside of bar, that "she was afraid of [defendant]," was relevant in penalty phase of trial that charged defendant with murder of other person in course of carjacking and kidnapping to rebut mitigating factor that defendant had truthfully admitted responsibility for victim's murder. 18 U.S.C.A. §§ 2119(2, 3), 3593(c); Fed.Rules Evid.Rule 401, 28 U.S.C.A.

[41] Sentencing and Punishment 350H ⚿1766

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1766 k. Hearsay. Most Cited Cases

Statement of highly distraught mother of capital murder defendant to bartender after mother called for assistance from police after defendant had aggressively struck his mother inside bar and then assaulted her once they were outside of bar, that "she was afraid of [defendant]," was not unduly prejudicial and would not have misled jury in penalty phase of trial that charged defendant with murder of other person in course of carjacking and kidnapping, where it was clear from plethora of evidence that defendant and his mother had estranged and pathological relationship and such statement did little other than confirm what jury already knew. 18 U.S.C.A. §§ 2119(2, 3), 3593(c); Fed.Rules Evid.Rule 403, 28 U.S.C.A.

[42] Sentencing and Punishment 350H ⚿1765

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1765 k. Declarations and Confessions. Most Cited Cases

Prior statements conveying willingness of capital murder defendant to commit multiple murders and his desire to kill his mother, offered at sentencing phase in response to defendant's showing concerning abuse and neglect he suffered at hands of his parents, was relevant to defendant's background and general character and was not unduly prejudicial with regard to defendant's murder of other person in course of carjacking and kidnapping, where government never alleged premeditated murder as aggravating factor and did not argue in closing that defendant ever intended to kill his mother and jury was instructed to only consider charged aggravating factors. 18 U.S.C.A. §§ 2119(2, 3), 3591; Fed.Rules

motive for defendant's murder of victim did not subsume factor which provided that defendant "participated in the murder of [victim] after substantial premeditation to commit the crime of carjacking"; although addressing same carjacking conduct as other factors, including abduction of victim, premeditation factor for carjacking did not focus on motive for murder and prosecutor's statements did not encourage jury to confuse those factors, and thus similar but nonetheless distinct concepts justified separate consideration and separate findings. 18 U.S.C.A. § 3591 et seq.

[48] Sentencing and Punishment 350H ⚿1789(9)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1789 Review of Proceedings to Impose Death Sentence
350Hk1789(9) k. Harmless and Reversible Error. Most Cited Cases

Any constitutional error in submission of aggravating factors in death penalty phase would not have affected fairness of proceedings in light of instructions to jury, where jurors had been instructed to not simply count number of aggravating factors in reference to mitigators, but to "consider the weight and value of each"; thus, jury would have known going into deliberations that, in reaching verdict, it should make qualitative assessment of aggravating and mitigating evidence as whole, rather than focusing on number of factors on each side of scale. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. § 3591 et seq.

[49] Indictment and Information 210 ⚿113

210 Indictment and Information
210V Requisites and Sufficiency of Accusation
210k113 k. Matter of Aggravation in General. Most Cited Cases

Government's failure to include non-statutory aggravating factors in indictment did not violate Fifth Amendment's Indictment Clause, where jury, not judge, found both statutory and non-statutory aggravating factors beyond reasonable doubt and Federal Death Penalty Act (FDPA) required only that jury sentencing defendant find mental culpability and at least one statutory aggravator, both charged in superseding indictment, before finding him "eligible" for death penalty; thus, factors that jury assessed when determining permissibility of death penalty did not change maximum sentence authorized under statute. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. § 3591(a)(2).

[50] Indictment and Information 210 ⚿113

210 Indictment and Information
210V Requisites and Sufficiency of Accusation
210k113 k. Matter of Aggravation in General. Most Cited Cases

The government must charge statutory aggravating factors under the Federal Death Penalty Act (FDPA) in the indictment. 18 U.S.C.A. § 3591 et seq.

[51] Sentencing and Punishment 350H ⚿1626

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(A) In General
350Hk1622 Validity of Statute or

errors in the admission of certain evidence, prejudicial comments by the prosecutors, and the violation of certain provisions of the Federal Death Penalty Act (FDPA), 18 U.S.C. § 3591 *et seq.* We affirm.

BACKGROUND

This case stems from the brutal murders by Fell and his accomplice Robert Lee in November 2000 of Fell's mother Debra, her companion Charles Conway, and King. The facts are largely undisputed. Fell, who was 20 years old at the time of the murders, does not contest his guilt and the government does not contest much of the evidence of the troubled childhood and adolescence that Fell adduced in an effort to avoid the death penalty.

Fell spent his early years in Pennsylvania with parents who were chronic alcoholics. Both Fell and his sister were raped by babysitters when they were young children, abandoned by their parents, and raised by relatives. Fell had frequent brushes with the law of increasing seriousness and, for a period of time, was committed to a home for delinquent youth. After his release, his involvement with the law continued to escalate and was punctuated by serious drug and alcohol abuse.

Fell's mother moved to Rutland, Vermont in the fall of 1996 and Fell joined her in 2000. Their stormy relationship continued. Fell and his mother (and their friends) drank heavily, argued frequently, and abused drugs. For example, in November 2000, in an incident that was the subject of disputed trial testimony, Fell assaulted his mother in a bar. After taking his mother's drink and attempting to rob her, Fell punched her in the head, knocked her to the ground and was arrested.

On the evening of November 26, 2002, Fell, Lee, Debra Fell, and Charles Conway were playing cards at her residence. All were drinking heavily and some were using drugs. For reasons not reflected in the record, a violent altercation ensued. Fell produced a kitchen knife and stabbed Conway approximately 50 times causing his death. Lee began stabbing Debra Fell and killed her with multiple wounds to the head and neck. Fell and Lee then showered, took a shotgun that Fell had brought from Pennsylvania, and left on foot at approximately 3:30 am for a local mall in search of shells for the gun.

Fell and Lee first went to Wal-Mart, but were turned away by a cleaning crew that informed them that the store was closed. Fell and Lee then approached a Price Chopper convenience store, where they found King, a 53 year old grandmother, just arriving for work in her car. Fell and Lee stole her car and forced her into the backseat at gunpoint. King attempted to escape while on the highway but Fell restrained her. After driving for several hours and entering New York state, Fell told King that she would be released. As they stopped the car to do so, Lee apparently had second thoughts and convinced Fell that they should kill her to prevent her from identifying them. The two ***206** forced King out of her car into the adjoining woods where they repeatedly kicked her and Lee struck her around the head and face with a rock. After killing her, Fell wiped his boots on her clothing. The two proceeded to Pennsylvania where they stole license plates, placed them on King's car, and drove to Arkansas where they were arrested on November 30th. Following questioning by the Arkansas police and the FBI, Fell, verbally and in a written statement, confessed to the murder of Conway, described Debra Fell's murder, and

of such act or acts; and (4) intentionally and specifically engaged in one or more acts of violence, knowing that the act or acts created a grave risk of death to a person, other than one of the participants in the offense, such that participation in such act or acts constituted a reckless disregard for human life, and Teresca King died as a direct result of such act or acts. *See* 18 U.S.C. § 3591(a)(2)(A)-(D).

FN2. The statutory aggravating factors were: (1) "The death of Teresca King occurred during the commission of a kidnapping"; (2) "Donald Fell committed the offense in an especially heinous, cruel, or depraved manner in that it involved serious physical abuse to Teresca King"; and (3) "Donald Fell intentionally killed or attempted to kill more than one person in a single criminal episode." *See* 18 U.S.C. §§ 3592(c)(1), (6) & (16).

FN3. The non-statutory aggravating factors were: (1) "Donald Fell participated in the abduction of Teresca King to facilitate his escape from the area in which he and an accomplice had committed a double murder"; (2) "Donald Fell participated in the murder of King to prevent her from reporting the kidnapping and carjacking"; (3) "Donald Fell participated in the murder of King after substantial premeditation to commit the crime of carjacking"; and (4) "As reflected by the victim's personal characteristics as an individual human being and the impact of the offense on the victim and the victim's family, the Defendant caused loss, injury and harm to the victim and the victim's family, including but not limited to the following: a) Infliction of distress on the victim b) Impact of the offense on the family of the victim...." *See* 18 U.S.C. § 3593(a).

Fell, represented by the Federal Public Defender for the Northern District of New York, moved to dismiss the indictment on a number of grounds. He contended that the FDPA was unconstitutional because it permitted imposition of the death penalty on the basis of evidence that had not been tested according to the Sixth Amendment's guarantee of confrontation or the Fifth Amendment's guarantee of due process, or that would have been deemed inadmissible under the Federal Rules of Evidence. *Id.* at 489. The district court granted the motion. *See United States v. Fell,* 217 F.Supp.2d 469, 491 (D.Vt.2002).[FN4]

FN4. The painstaking work of Chief Judge Sessions generated a number of published opinions. *United States v. Fell,* 217 F.Supp.2d 469 (D.Vt.2002), *rev'd United States v. Fell,* 360 F.3d 135 (2d Cir.2004); *United States v. Fell,* 372 F.Supp.2d 753 (D.Vt.2005); 372 F.Supp.2d 773 (D.Vt.2005); and *United States v. Fell,* 372 F.Supp.2d 766 (D.Vt.2005); *United States v. Fell,* 372 F.Supp.2d 786 (D.Vt.2005).

The government appealed and we reversed. *See United States v. Fell,* 360 F.3d 135 (2d Cir.2004) (" *Fell I* "), *cert. denied,* 543 U.S. 946, 125 S.Ct. 369, 160 L.Ed.2d 259 (2004). We held that the Constitution did not require adherence to the Federal Rules of Evidence. We also found the FDPA's evidentiary provisions constitutional because they were consistent with

counts one and two relating to carjacking and kidnapping. On the gun charges, the court sentenced Fell to 120 months' imprisonment on count four, and 84 months' imprisonment on count three, consecutive to count four.

DISCUSSION

Fell raises a number of issues each of which we must consider separately. 18 U.S.C. § 3595.[FN6] Most of our discussion ***209** considers the district court's exclusion of three jurors, its exclusion of the draft plea agreement, the admission of evidence of a religious nature, the government's compliance with the court's instruction regarding mental health experts, and several allegedly improper arguments made by the prosecution, as well as Fell's challenges to the superseding indictment.[FN7]

FN6. Specifically, Fell argues that: (1) the district court erred in dismissing three prospective jurors and (2) by excluding a draft plea agreement; (3) the government impermissibly argued that Fell's exercise of his right to a jury trial was inconsistent with acceptance of responsibility; (4) the government impermissibly told the jury that it could ignore certain mitigating evidence; (5) the district court's orders and the government's conduct regarding mental health experts in the penalty phase violated the Fifth and Eighth Amendments; (6) the government violated the First, Fifth, and Eighth Amendments through its reliance on Fell's interest in satanism and other religions; (7) the district court erred in admitting a hearsay statement made by Debra Fell; (8) the district court erred in admitting testimony by a former friend of Fell's as proof of premeditation; (9) the cumulative impact of the government's misconduct and the district court's errors violated the constitution and the Federal Death Penalty Act (FDPA); (10) duplicative aggravating factors unconstitutionally skewed the jury's weighing process towards the death penalty; (11) the government was required to allege the non-statutory aggravating factors in the indictment; and (12) the bifurcated capital trial mandated by the FDPA violates the Fifth and Sixth Amendments. This opinion resolves each of these issues.

FN7. 18 U.S.C. § 3595(c)(1) also requires that a reviewing court consider whether a death sentence was "imposed under the influence of passion, prejudice, or any other arbitrary factor[.]" The record reveals no evidence that any of those factors led to Fell's sentence. Indeed, there is every indication that the jury carefully considered the district court's instructions. Significantly, it *sua sponte* found mitigating factors in addition to those proposed by defense counsel. "Viewed collectively, these findings suggest that the jury considered the evidence in a thorough, even-handed, and dispassionate manner." *United States v. Sampson,* 486 F.3d 13, 52 (1st Cir.2007). Additionally, we must independently determine that the evidence supported the finding of at least one of the charged statutory aggravating factors under 18 U.S.C. § 3592. 18 U.S.C. § 3595(c)(1). Given that Fell confessed to the crime, we have

that juror would react. *See Fell,* 372 F.Supp.2d at 770. Each potential juror was then questioned individually, rather than in an array, first by the court, which generally inquired into exposure to pre-trial publicity and views on the death penalty, and then by the parties.

Fell contends that the district court improperly excused three qualified prospective jurors, numbers 64, 141 and 195, in violation of *Witherspoon* [redacted] *Illinois,* 391 U.S. 510, 519, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) and *Wainwright* [redacted] *Witt,* 469 U.S. 412, 420-21, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). Prospective Juror 64, Fell argues, was excused based on her general disfavor of capital punishment. Prospective Jurors 141 and 195 were, Fell contends, excused for expressing reservations about applying the death penalty under specific factual circumstances not presented by this case, even though they affirmed that they could consider and impose a death sentence if warranted by the evidence.

[9][10] Under *Witherspoon* and its progeny, "not all [prospective jurors] who oppose the death penalty are subject to removal for cause in capital cases." *Lockhart* [redacted] *McCree,* 476 U.S. 162, 176, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986). Instead, "those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." *Id.* In *Witt,* the Supreme Court explained that "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment ... is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." 469 U.S. at 424, 105 S.Ct. 844 (internal quotation marks omitted); *see also Uttecht* [redacted] *Brown,* 551 U.S. 1, 127 S.Ct. 2218, 2224, 167 L.Ed.2d 1014 (2007). That impairment occurs when those views "create an obstacle" to a prospective juror's impartial consideration of the law and the facts. *Witt,* 469 U.S. at 434, 105 S.Ct. 844.

[11][12][13] Erroneously excluding a prospective juror based on her view on the death penalty is reversible error, *see Gray* [redacted] *Mississippi,* 481 U.S. 648, 668, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987), and we review ***211** challenges to a district court's exclusion of a juror on that basis for abuse of discretion. *United States* [redacted] *Quinones,* 511 F.3d 289, 304 (2d Cir.2007). To survive our review, *"voir dire* need not establish juror partiality with 'unmistakable clarity.' Rather, it must be sufficient to permit a trial judge to form 'a definite impression that a prospective juror would be unable to faithfully and impartially apply the law.' " *Quinones,* 511 F.3d at 301 (quoting *Witt,* 469 U.S. at 424, 426, 105 S.Ct. 844). As the Supreme Court explained in *Witt*:

> Many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.... [T]his is why deference must be paid to the trial judge who sees and hears the juror.

that she could not "say to [the court] that [she] absolutely and unequivocally do[es] not believe in the death sentence." When pressed further by the court on whether she could impose the death penalty under circumstances where that penalty would be appropriate under the law, she responded equivocally that she "probably could, yes." The government then asked a series of questions, culminating in whether Juror 64 could impose a death sentence if the government carried its burden. She responded: "In theory, I'm very opposed to the death penalty, but it's part of the process of this government, and so I guess if I was sitting as a juror, that-and that was part of the process, and I had made that decision to do that, then, yes, I could make that decision" but then further explained:

> Well, I am just playing the question over that you asked me in terms of if I could do that, and, you know, again, I would much more lean towards someone being [sentenced to] life without parole, but I think that if ... I had to make that decision, that I could be able to make that decision, yes.

Defense counsel asked Juror 64 whether she could honestly consider imposing the death penalty, and she responded, "Yes."

Before excusing Juror 64 from the courtroom, the court made a final inquiry:

> "[D]o you think that, based on your views, you might lean unfairly ... toward one side or the other? Or do you feel that you could put aside any views ... [and] be very impartial in your decision about whether the death penalty is appropriate or whether life imprisonment is appropriate?"

In response, she stated, "I guess I would have to say that I would definitely lean more towards life imprisonment than I would towards the death sentence, yes."

After counsel for both sides declined the court's invitation to ask follow-up questions, Juror 64 was excused from the courtroom, and the government then moved to exclude her for cause. The court granted the government's motion, explaining that it could not rely on Juror 64's pledge to follow the court's instructions:

> 99 percent of the juror[s] would say that they can follow [the instructions of the court]. The question is whether somebody, in light of their own particular views, can be impartial and fair. And, I really wanted an honest response and I think I got an honest response at the very end.... I asked whether she could be fair, and her response was, "I would lean toward life imprisonment." ... I appreciate that she said she could follow instructions but ... I think my responsibility ... is to make an analysis of whether somebody really could be fair and impartial.... I think that in context,***213** she could not be fair and impartial, and so that's the Court's ruling, and she is excused.

Defense counsel objected to the exclusion.

[16] A prospective juror is not required to affirm that she would favor, or lean toward, the death penalty under any particular circumstances in order to serve. Even "those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases," as long as they are able to subjugate their own beliefs to the need to follow the court's instructions. *Lockhart [redacted] McCree,* 476 U.S. 162, 176, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986).

Fell, 372 F.Supp.2d at 770, the government asked Juror 141 whether he could consider the death penalty in a case that "didn't involve murder, but simply involved someone engaging in violence, knowing that the act created a grave risk of death-not premeditated murder." Juror 141 responded "no" without qualification or elaboration. The government then asked whether he would consider the death penalty in a case where the defendant committed an act that "constituted a reckless disregard for human life [but] not first degree or premeditated murder." Juror 141 again replied, unequivocally, "No."

Defense counsel objected to the government's line of questioning. In response, the government argued that because reckless disregard for human life under 18 U.S.C. § 3591(a)(2)(D) was alleged in the indictment as a gatekeeping factor, the government had the right to pursue questions related to whether the juror could impose the death penalty absent evidence of intent. Defense counsel then complained that this approach constituted a "stake-out" to determine whether Juror 141 *would* impose the death penalty if Fell were found guilty of reckless disregard for human life rather than whether he *could* impose death in that situation. The district court disagreed, stating that, in conformity with its prior ruling on case-specific questioning, *see Fell,* 372 F.Supp.2d at 770, the government could ask questions relating to its theory that Fell could be sentenced to the death penalty for conduct demonstrating recklessness. The court noted that defense counsel would have the opportunity to rehabilitate the juror and allowed the government to proceed.

In the course of the government's continued questioning, Juror 141 reiterated that "I just ... I really feel that the person, in order to be convicted of a death penalty, needs to have known what they were doing, to realize the consequences of what they were doing." Defense counsel then inquired into whether Juror 141 could infer intent from a description of the violence inflicted and "the resulting damage or injury." Juror 141 indicted that he could. Juror 141 also expressed a willingness to weigh aggravating and mitigating factors, pursuant to the instructions of the court, when considering whether death should be imposed. After this exchange, the district court returned to the issue of whether Juror 141 would consider imposing the death penalty for a killing that was reckless but not intentional, describing the reckless acts as "kicking or stomping." Juror 141 reversed course and claimed that he could consider imposing the death penalty on the basis of such violence, acknowledging that he was "somewhat contradicting [himself]." [FN9]

FN9. Specifically, the following colloquy took place:

> THE COURT: If the evidence showed that the defendant did not intentionally kill ... in other words, did not think about killing ... but intentionally engaged in an act of violence, knowing that the act created a grave risk of death, and that is, I think the facts, at least the defense is suggesting here, involved kicking or stomping, and that is that there wasn't necessarily an intent to kill, but that it was an intent ... intentionally acted with a grave risk of death to a person.
>
> JUROR 141: Right.

[18] We see no error in the district court's decision to exclude this prospective juror. Juror 141's responses were not consistent or clear on whether he understood that the death penalty could be imposed for murder resulting from reckless disregard for human life and whether he would be able to apply it under such circumstances. A juror's *voir dire* responses that are ambiguous or reveal considerable confusion may demonstrate substantial impairment. *Uttecht,* 127 S.Ct. at 2229 ("[A juror's] assurances that he would consider imposing the death penalty and would follow the law do not overcome the reasonable inference from his other statements that in fact he would be substantially impaired in this case...."). The district court properly considered all of Juror 141's responses in the context in which they were given and did not err in concluding that his views would significantly interfere with his duties as juror. *See Witt,* 469 U.S. at 434, 105 S.Ct. 844; *Darden,* 477 U.S. at 178, 106 S.Ct. 2464. We find no abuse of discretion.

3. Prospective Juror 195

[19] Prospective Juror 195 rated herself as an eight on the ten-point scale of support for the death penalty contained in the juror questionnaire. Despite her support for the death penalty "[a]t a philosophical level," she noted that she was unsure whether she "could vote in favor of ***216** it when the decision is in [her] hands." In response to the court's questions about whether she could impose the death penalty if the circumstances warranted, she repeatedly answered "I don't know" or "more yes than no" and gauged her ability to do so as "60/40."

The district court's decision to excuse Juror 195 turned on her inconsistent and generally negative responses when asked whether she would consider imposing the death penalty for a single murder. Juror 195 felt that the death penalty was "not appropriate for every murder" but would be justified "if it was a serial killer or mass murder, say on a mass shooting spree." She also stated that she did not think she would vote in favor of the death penalty "for one killing." The government moved to exclude her for cause following this exchange:

> THE COURT: The question is whether you could follow the instruction and consider the possible death penalty for one ... if there's only one death.
>
> JUROR 195: Probably not. I would probably not be in favor of the death penalty in that scenario.

[20] Under the FDPA, a defendant is eligible for the death penalty if the jury finds the charged homicide, a statutory intent element or threshold mental culpability factor under § 3591(a)(2), and at least one of the statutory aggravating factors in § 3592(c). Although Fell was charged with three statutory aggravating factors-including committing multiple killings in a single criminal episode under § 3592(c)-two of the factors related to the death of King. In the event that the jury found that the killings were not part of a single criminal episode, Fell would still be eligible for the death penalty if the jury found at least one of the threshold mental culpability factors and that he had caused King's death during the commission of a kidnapping or that he had committed the offense in an especially cruel or depraved manner. Therefore, the government argued that if Juror 195 could not consider imposing the death penalty without finding that Fell engaged in multiple killings, she would be substantially impaired in her ability to follow the law.

> 9-10.01-05. The material is reviewed by a Committee appointed by the Attorney General, which makes a recommendation to the Attorney General, who then decides whether the Government will seek the death penalty. After considering the committee's recommendation, the views of the relevant U.S. Attorney, and the advice of the Deputy Attorney General, the Attorney General will make the final decision on whether the government should file a notice of intention to seek the death penalty in a particular case. *Id.* at § 9-10.120.

In a pre-trial submission, the government moved to bar admission of the draft agreement as well as information surrounding plea negotiations at the guilt and penalty phases of the trial. *Fell,* 372 F.Supp.2d at 781. The government characterized the plea agreement, a conditional offer that was subject to acceptance by the Attorney General, as containing the unendorsed opinion of the prosecution and embodying inchoate compromise negotiations barred by Federal Rules of Evidence 408 and 410. Fell agreed that the evidence was irrelevant at the guilt phase, but opposed the motion, claiming that the proposed agreement contained binding judicial admissions that substantial mitigating factors existed. He also contended that the Fifth and Eighth Amendments as well as § 3593(c) of the FDPA compelled admission of the draft.

On May 26, 2005, the district court excluded the draft plea agreement-and statements made during plea negotiations-as irrelevant because "a prosecutor's statements of personal belief regarding [aggravating and mitigation] factors should have no bearing on the jury's independent evaluation of the evidence." *United States v. Fell,* 372 F.Supp.2d 773, 783 (D.Vt.2005). The court also emphasized that the statements in the proposed plea agreement were never adopted by the government. *See id.* It concluded that while the draft's probative value was negligible***218** because "the opinions of the prosecutors [did not] make the existence or non-existence of any mitigating factor more probable or less probable," *id.,* it could prejudicially distract the jury from making its own independent evaluation of the mitigating and aggravating factors. Finally, the court determined that public policy disfavored evidence that would deter plea bargaining.

However, the district court permitted Fell to introduce during the penalty phase a stipulation that he had offered to plead guilty to Count 2 in exchange for a sentence of life imprisonment without parole. In the court's view, Fell's "offer [was] relevant to the mitigating factor of acceptance of responsibility." *Id.* The stipulation informed the jury that "on May 18th, 2001, Donald Fell, through his attorneys and in writing, offered to plead guilty to Count II of the indictment, kidnapping, death resulting, in exchange for a life sentence without the possibility of release. The government refused that offer." In summation, defense counsel contended that Fell's attempt to plead guilty demonstrated that he had accepted responsibility, assisted law enforcement, and felt remorse. In response, the government argued in closing:

> Ladies and gentlemen, the judge instructed you. You know the law. Life imprisonment without the possibility of release is the minimum sentence that Donald Fell faces for kidnapping with death resulting. It's the minimum sentence. When he offered to make that plea, he knew the

ter or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." FN12 *Lockett* v. *Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (emphasis in original). The Supreme Court recognized, however, that its holding did not "limit[ ] the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." *Id.* at 604 n. 12, 98 S.Ct. 2954. Likewise, the FDPA's evidentiary standards do "not mean that the defense has *carte blanche* to introduce any and all evidence that it wishes." *United States* v. *Purkey,* 428 F.3d 738, 756 (8th Cir.2005). Nor does the FDPA "eliminate th[e] function of the judge as gatekeeper of constitutionally permissible evidence." *Fell I,* 360 F.3d at 145.

FN12. In *Fell I,* we concluded that "to achieve such 'heightened reliability' [as required in considering a sentence of death], *more* evidence, not less, should be admitted on the presence or absence of aggravating and mitigating factors." *Fell I,* 360 F.3d at 143 (emphasis in original); *see also Gregg* v. *Georgia,* 428 U.S. 153, 203-04, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) ("So long as the evidence introduced ... at the presentence hearing do[es] not prejudice a defendant, it is preferable not to impose restrictions .... [and] desirable for the jury to have as much information before it as possible when it makes the sentencing decision."). However, even though the FDPA purportedly allows more evidence to be considered in the penalty phase of a capital case, "the presumption of admissibility of relevant evidence is actually narrower under the FDPA than under the FRE." *Fell I,* 360 F.3d at 145. "[T]he balancing test set forth in the FDPA is, in fact, more stringent than its counterpart in the FRE, which allows the exclusion of relevant evidence 'if its probative value is *substantially* outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.' " *Id.* (citing Fed.R.Evid. 403) (emphasis added). The FDPA requires only that the probative value be "outweighed" by such dangers. *See* 18 U.S.C. § 3593(c).

The court's exclusion of the draft agreement was within its "traditional authority" to exclude evidence of questionable relevance. The district court appropriately concluded that, pursuant to 18 U.S.C. § 3593(c), the draft agreement's inclusion of the unadopted statements of the prosecutors lacked evidentiary value and that it would distract the jury from an independent assessment of the mitigating factors. In addition, admission of the draft would ***220** authorize a confusing and unproductive inquiry into incomplete plea negotiations. *See Berger* v. *United States,* 295 U.S. at 88, 55 S.Ct. 629 (stating that the opinions of prosecutors should properly carry no weight with the jury); *accord United States* v. *Melendez,* 57 F.3d 238, 240-41 (2d Cir.1995). For these reasons, we see no error-much less abuse of discretion-in the district court's decision to exclude the opinions of the prosecutors set forth in the draft plea agreement.

[24] Fell next argues that the prosecutor misrepresented his willingness to plead guilty by stating, in closing argument, that "if [Fell] wanted to plead guilty he could

> Fell accepts responsibility for what he did. But he pleaded not guilty. And that's why we're here. And that's why you are here. And let's think a little bit about that. Think about the very nature of the crimes that he's charged with. They are all about evasion, about escape, about trying to avoid responsibility for what he did.

[26] We have held that, when addressing the jury, a prosecutor "must avoid commenting in a way that trenches on the defendant's constitutional rights and privileges. For example, [ ]he may not permissibly comment on the failure of the defendant to testify, or invite the jury to 'presume' in the absence of countervailing evidence that the government's view of the case is correct, or suggest that the defendant has any burden of proof or any obligation to adduce any evidence whatever." *United States v. Parker,* 903 F.2d 91, 98 (2d Cir.1990). In order to prevail on a claim of prosecutorial misconduct, a defendant must demonstrate "that the prosecutor's remarks were improper and ... that the remarks, taken in the context of the entire trial resulted in substantial prejudice." *United States v. Bautista,* 23 F.3d 726, 732 (2d Cir.1994).

The challenged comments occurred in response to Fell's endeavor to use the stipulation of his offer to plead guilty to prove acceptance of responsibility as a mitigating factor. In summation, the prosecution sought to place the stipulation in context by noting that, when faced with overwhelming evidence of his guilt, Fell offered to plead guilty in exchange for the minimum penalty authorized for his conduct. When this offer was not accepted, the government proceeded to a trial that Fell could have avoided by pleading unconditionally. At that trial, the government was put to a burden which it met. We believe these arguments-which the jury was repeatedly told were not evidence-were reasonable responses to Fell's use of the stipulation. No error occurred. *See Darden,* 477 U.S. at 183, 106 S.Ct. 2464.

III. PROSECUTOR'S STATEMENTS REGARDING CONSIDERATION OF MITIGATING FACTORS

[27] Fell next contends that he was denied a fair sentencing hearing because the prosecutor erroneously argued that the jury could not consider mitigating evidence that was unrelated to the crimes for which he had been found guilty. During summation, the prosecutor made the following arguments:

> [Y]ou should consider, one, [w]hat do these factors have to do with the crimes in this case? And do these factors actually lessen the defendant's responsibility and culpability for these crimes? ... [E]ven if you find evidence of some of those mitigating factors, we submit to you that the weight of these factors is not that heavy, and you need not give them much, if any, weight based upon those two questions ...
>
> ... you have heard so much about the defendant's childhood, so much about his background, and again, let me just remind you, the question is, we submit to you, what's the connection between his background and childhood and these crimes? What about his background and childhood makes him less responsible, less culpable? What about them means that he should receive a less-a lesser sentence?
>
> The question is, what does that sexual as-

court relied deal with the scope of a court's authority to exclude evidence that "[r]easonable jurists could conclude ... was relevant mitigating evidence." *Tennard,* 542 U.S. at 288, 124 S.Ct. 2562; *McKoy,* 494 U.S. at 442, 110 S.Ct. 1227 ("Under our decisions, it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, by the sentencing court, or by an evidentiary ruling." (quoting *Mills,* 486 U.S. at 375, 108 S.Ct. 1860 (citations omitted))). They further note that the Supreme Court has never held that, when arguing the weight of the evidence, a prosecutor may not question the connection between mitigating evidence and the defendant's crime of conviction. Finally, they conclude that the prosecutorial comments at issue in the instant case do not differ in substance from the comments that the Supreme Court found acceptable in *Boyde. See, e.g.,* 494 U.S. at 385, 110 S.Ct. 1190 (noting that the prosecutor had "argued to the jury that the mitigating evidence did not 'suggest that [Boyde's] crime is less serious or that the gravity of the crime is any less' and that '[n]othing I have heard lessens the seriousness of this crime' ") (quoting *Boyde* trial record). In sum, they do not see the prosecutor's observations about the lack of nexus between Fell's mitigating evidence and Fell's crime of conviction as "separate" from the prosecutor's arguments about the weight that the jury should accord to that mitigating evidence. It is not improper for a prosecutor to argue that, because such a nexus is absent, the mitigating evidence should be given little or no weight.

Judge Parker, on the other hand, agrees with the district court that the prosecutor permissibly argued that the weight of the mitigating evidence did not lessen Fell's culpability, *see Boyde,* 494 U.S. at 385, 110 S.Ct. 1190, but impermissibly suggested that the juror should disregard the mitigating evidence because it did not "connect" to the charged crimes. He focuses on the prosecution's language: "What's the evidence of mitigating factors? To the extent that you find some, there are not that many, respectfully, and they don't really relate to the crimes" as demonstrating that the prosecution improperly contended that mitigation evidence could be ignored because it bore no nexus to the crime. *See Tennard,* 542 U.S. at 285, 124 S.Ct. 2562 (concluding that "the Eighth Amendment requires that the jury be able to consider and give effect to a capital defendant's mitigating evidence") (internal citations omitted). He further believes that *Boyde* has no applicability where a prosecutor makes, in addition to an argument challenging the weight of the mitigating evidence, a separate argument questioning the relevance of that evidence.

Regardless, we need not resolve these differences as we find that

IV. MENTAL HEALTH EVIDENCE

[30] Fell next argues that the government committed misconduct by violating a district court order concerning mental health evaluations. During the course of plea negotiations in 2001, the defense provided a variety of mitigation information to the government, including the disclosure that it had hired experts to conduct mental health evaluations of Fell. After rejecting the proposed plea agreement and filing its notice of intent to seek the death penalty, the government moved for discovery of all mental health evidence and for Fell to submit to an examination by a government expert. Although the court never ruled on this motion,[FN15] the defense voluntarily produced the reports and agreed to limited evaluations by two government experts, doctors Richard Wetzel and John Rabun. *Fell,* 372 F.Supp.2d at 758. The district court later observed that the limitations were appropriate because "in absence of Fed.R.Crim.P. 12.2(c), Fell's statements could be used as evidence against him at trial." [FN16] *Fell,* 372 F.Supp.2d at 758. Drs. Wetzel and Rabun both produced reports based on their examinations of Fell.

> FN15. In late 2002, Federal Rule of Criminal Procedure 12.2 was amended to codify a common-law sanctioned practice of the court ordering discovery and mental health examinations by the government's experts upon notice by the defendant of intent to produce mental health evidence. FED.R.CRIM.P. 12.2 advisory committee's note (2002)
>
> FN16. The 2002 amendments to Rule 12.2 also allowed the government to admit statements made by a defendant during a medical examination by a government expert if the defendant had introduced his own expert mental health evidence. FED R.CRIM. P. 12.2 advisory committee's note (2002). The rule now provides that:
>
> > No statement made by a defendant in the course of any examination conducted *under this rule* (whether conducted with or without the defendant's consent), no testimony by the expert based on the statement, and no other fruits of the statement may be admitted into evidence against the defendant in any criminal proceeding except on an issue regarding mental condition on which the defendant:
> >
> > (A) has introduced evidence of incompetency or evidence requiring notice under Rule 12.2(a) or (b)(1), or
> >
> > (B) has introduced expert evidence in a capital sentencing proceeding requiring notice under Rule 12.2(b)(2).
> >
> > FED.R.CRIM.P. 12.2(c)(4) (emphasis added).

After we decided *Fell I,* in December 2004, the defense gave formal notice that it planned to introduce expert evidence on Fell's mental condition. *See* FED.R.CRIM.P. ***225** 12.2(b).[FN17] Subsequent to that announcement, the government moved for a court-ordered examination of Fell's mental health pursuant to Federal Rule of Criminal Procedure 12.2(c)(1)(B). The government then requested an unrestricted examination of Fell by a third expert, Dr. Michael Welner, it

agreement with the ***226** defense by deciding after two years that it wanted a new expert. *Id.* The court also denied as premature Fell's motion to exclude Welner's testimony, holding that the nature and scope of Welner's anticipated rebuttal testimony was unclear but that, even without interviewing Fell, his testimony might "shed light on Fell's upbringing and other relevant factors concerning sentencing." *Id.* Accordingly, the court declined to rule on admissibility prior to the government's disclosure of the scope of Welner's projected testimony.

Pursuant to the court's April 7, 2005 order, Wetzel interviewed Fell and prepared a report explaining his findings. *Fell,* 2006 U.S. Dist. LEXIS 24707, at *8. A video recording of the Wetzel interview was subsequently provided to Welner who compiled a report based on that interview. At the sentencing phase of the trial, Fell moved to exclude parts of Wetzel's report and also sought a copy of Welner's report. On July 5, 2005, after the government had rested, it disclosed Welner's report as ordered by the district court. The report revealed that Welner had supplied questions for Wetzel to ask Fell and had administered psychological tests that had not been previously disclosed to the defense-the Psychopathy Checklist-Revised ("PCL-R"), the Violent Risk Appraisal Guide ("VRAG"), and the Historical/Clincal/Risk Management (HCR-20)-to assess Fell's capacity for future violence. *Id.* at *13. Welner admitted that in scoring the PCL-R, he relied on Wetzel's videotaped interview. Welner's assessment based on these tests was that Fell was a psychopath and that sexual and physical abuse had played little role in his development.

The following day, Fell moved to exclude Welner's report and testimony, arguing that by supplying questions for Wetzel to ask him, Welner had used Wetzel as a proxy for interviewing Fell in violation of the court's April 7 order and that the government administered new testing without providing notice. The court scheduled a hearing on July 11 to address this issue and others regarding Welner's proposed testimony. Before the hearing took place, however, Fell changed course and elected not to call a mental health expert. [FN18] *Id.* at *15. The next day, the defense and the government entered into a stipulation to the effect that Fell suffered from no mental disease or defect and knew the difference between right and wrong at the time of the murders.[FN19] As a result, the government presented no mental health evidence during the penalty phase. *Id.* at *15-16.

FN18. Prior to this, Fell had already decided not to call another mental health expert, Dr. Mills, as part of its mitigation case. Mills was scheduled to testify on the first day of the defense's case, but the defense decided that it would save Mills's testimony for surrebuttal.

FN19. The full stipulation provided:

> [A]fter his arrest in late 2000, Donald Fell was subjected to full psychological and psychiatric examinations. Those examinations determined that, one, he had no cognitive or neurological deficits; two, his intellect and cognitive functions were intact; three, he did not suffer from any mental disease or defect. The examination also found that fell was competent to stand trial, and knew the difference between right and wrong at the time of offenses on November 27, 2000.

they were growing up, she testified that Fell initially did not believe in God and on several occasions jokingly characterized Satan as "the kindest beast." She also testified that Fell had a tattoo of an upside-down cross with "666," which she believed he had gotten when he was 15 or 16 years old. However, Teri Fell explained that she did not believe that Fell worshiped Satan.

James Rushlow testified on direct examination as to Fell's adjustment in prison and his participation in certain religious and educational opportunities afforded by the institution. On cross-examination, the prosecution confirmed that Fell had signed ***228** up for Christian Bible Studies, and asked Rushlow: "During your time working with Mr. Fell, has he also claimed to practice Native American rituals?" In response, Rushlow testified that Fell had filed a grievance and a lawsuit seeking the right to perform Native American rituals. With no objection from the defense, the government introduced into evidence a certified copy of the record in that litigation [FN20] Rushlow further stated that Fell had wanted to participate in Ramadan, as a Muslim, and that he had filed numerous other grievances for himself and on behalf of others. In addition, Rushlow testified, without objection, that Fell had both a "666" tattoo and one of an anarchy symbol.

> FN20. Defense counsel stated that he had no objection to the certified record being entered into evidence but he "may well" have an objection to Rushlow being asked to comment on it.

The defense called James Aiken to testify further about Fell's positive adjustment in prison. The government cross-examined Aiken regarding the possibility of Fell committing future assaults, and asked him to describe the significance of Fell's "666" tattoo. He responded:

> Well, the 666 denotes possible involvement in some type of relationship with an organization. I will leave it at that because I have not dwelled into that from the intelligence reports. Number two is that I am more concerned about who he's controlling at the prison. And he's not controlling anybody.

The prosecutor's summation made no reference to Fell's tattoos or Fell's purported satanic interest and made no attempt to explain the relevance of this evidence to the murders. The prosecutor did, however, argue that Fell had not made positive contributions while incarcerated because he generated numerous grievances and filed a lawsuit which was predicated on a feigned interest in multiple religions.[FN21]

> FN21. Specifically, the government argued that:
>
> > They want to claim that he is [*sic*] a positive contribution in resolving grievances? You heard from Jason Rushlow. The man generated grievances. Are you kidding me? You saw the lawsuit. You can read it for yourself when you go back there. This man signs up for bible study, and then files a lawsuit claiming to be American ... a Native American. He files a lawsuit so that he can practice his Native American religion on the yard. It's bogus, ladies and gentlemen. You know it's even more bogus, because, believe it or not, he observes Ramadan as a Muslim.

[33][34] The First Amendment forbids

other grounds, Miller-El v. Cockrell, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003), *Fuller v. Johnson,* 114 F.3d 491, 498 (5th Cir.1997) (distinguishing *Dawson* based on the fact that the government presented evidence that defendant was a member of a gang that had committed violent and unlawful acts); *Wainwright v. Lockhart,* 80 F.3d 1226, 1234 (8th Cir.1996) (ruling that questioning of defendant on involvement in street gang "did not serve any proper rebuttal purpose" where "[t]here was no credible, admissible evidence that [the defendant's] crime was gang-related, that [the defendant] belonged to a gang or that gang membership would impeach [the defendant's testimony] about his religious beliefs"); *United States v. Robinson,* 978 F.2d 1554, 1565 (10th Cir.1992) (rejecting a First Amendment challenge because "the government presented adequate expert testimony as to the meaning of the gang affiliation evidence").

1. Native American and Muslim Religious Interests

We conclude that the testimony regarding Fell's interest in Native American and Muslim religions was relevant in the context in which the testimony was elicited. Fell undertook to prove the following mitigating factor: "Donald Fell has made positive contributions to the Northwest Correctional Facility by working, gaining an education, and helping to resolve inmate grievances." In support of this factor, Rushlow testified that Fell was picked by management to act as a unit representative for other inmates, took part in Bible study and other educational opportunities, and had a disciplinary record reasonably free of infractions. However, on crossexamination, Rushlow retreated from several of his prior assertions. He conceded that Fell did not "resolve inmate grievances" but instead manufactured grievances based on his purported religious beliefs. The government also showed that while Fell participated in Bible studies, he simultaneously filed grievances and a lawsuit demanding that "sweat lodges" and "talking circles" be made available in the prison so that he could engage in Native American religious practices. During that same ***230** period, Fell also participated in Ramadan. The government elicited testimony that Fell was appointed unit manager in part because his familiarity with the administrative procedures, due to his constant filing of complaints, made it easier to have the other inmates funnel their grievances through him.

The jury was free to find that Fell had successfully adjusted to prison, was genuinely interested in several religions, and filed grievances for entirely legitimate purposes. By the same token, the jury was also free to find that Fell's interest in multiple religions was cynical or feigned and that his multiple grievances reflected a failure to adjust to incarceration. Contrary to Fell's contention that the evidence was intended to incite religious prejudice, the testimony was reasonably elicited to present a more complete picture of Fell that belied the one of a well-adjusted inmate offered by the defense. In any event, the evidence played a very minor role in the trial and added little to the quantum of evidence before the jury. We see no error and certainly no plain error in its admission.

2. Satanic Beliefs and "666" Tattoo

[36] We are more troubled by the testimony that the government elicited regard-

account of his relationship with his mother. In this confession, he recalled an incident at a local bar involving a physical altercation in which his mother was the aggressor.

The government called Thompson, the bartender at the local bar, to show that Fell had not given a truthful account of the altercation to the authorities investigating King's murder. Thompson testified that Fell aggressively struck his mother inside the bar and then assaulted her once they were outside of the bar. Thompson stated that she then called 911. After the police arrived and arrested Fell, his mother, highly distraught, returned to the bar and told Thompson that:

> She couldn't take it. She didn't want to go back home. She was afraid to go home. And I said to her, why don't you have him leave your home if you are afraid of him. She said I can't he's my son and I love him.

Prior to Thompson's testimony, the district court ruled that Fell's mother's statement that "she was afraid of [Fell]" qualified as an excited utterance under Federal Rule of Evidence 803(2), a "firmly rooted" hearsay exception under *Ohio v. Roberts,* 448 U.S. 56, 63-66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) (holding that the Confrontation Clause requires that a hearsay exception be firmly rooted and reliable). The court concluded that Thompson's testimony was relevant to impeach aspects of Fell's confession-particularly "to rebut the defense's claim that Donald Fell gave a truthful confession"-was reliable for Confrontation Clause purposes and was not unduly prejudicial under 18 U.S.C. § 3593(c). Because Fell preserved his objection to this testimony at trial, we review this evidentiary ruling for abuse of discretion. *Yousef,* 327 F.3d at 156.

[39][40][41] No abuse of discretion occurred here. First, although Fell claims that his mother's statement was too attenuated to qualify as an excited utterance, "an excited utterance need not be contemporaneous with the startling event to be admissible." *United States v. Jones,* 299 F.3d 103, 112 (2d Cir.2002). Rather, the key question governing admission is "whether the declarant was, within the meaning of Rule 803(2), 'under the stress of excitement caused by the event or condition.' " *Id.* (quoting *United States v. Scarpa,* 913 F.2d 993, 1017 (2d Cir.1990)). We find that the stressful events surrounding the statement support applying the excited utterance rule. *See id.* at 113. In any event, the FDPA permits the admission of evidence at the penalty phase ***232** regardless of its admissibility under the Federal Rules of Evidence. *See Fell I,* 360 F.3d at 144. The district court correctly admitted this statement because it was relevant to rebut the mitigating factor that Fell had truthfully admitted responsibility for Teresca King's murder. The statement was not unduly prejudicial and would not have misled the jury. *See* 18 U.S.C. § 3593(c). It was clear from a plethora of evidence that Fell and his mother had an estranged and pathological relationship and Thompson's testimony did little other than confirm what the jury already knew.

[42] Fell also challenges the admission, through the testimony of Matt Cunningham-a teenage friend of Fell's-of prior statements conveying Fell's willingness to commit multiple murders and his desire to kill his mother. The evidence was offered in response to Fell's showing concerning the abuse and neglect he suffered at the hands of his parents. Fell argued that because the prejudicial value of the evidence exceeded its probative value, its admission

prejudice from a "bleed-over" effect potentially allowing the jury to find the unalleged aggravating factor-that the murders were premeditated-we are confident that the court's instruction that the jury only consider the charged aggravating factors adequately dealt with this remark.[FN25] Finally, it is unquestioned that the jury knew from other testimony that Fell was "extraordinarily angry" with his mother and that he watched Lee stab her multiple times without intervention.

FN25. Although Fell summarily alleges Fifth and Eighth Amendment violations related to the admission of Cunningham's testimony, he offers no supporting arguments. "Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal." *Norton v. Sam's Club,* 145 F.3d 114, 117 (2d Cir.1998); *see United States v. Crispo,* 306 F.3d 71, 86 (2d Cir.2002) (applying this rule to a criminal appeal); Fed. R.App. P. 28(b).

VII. CUMULATIVE EFFECT

[44] Fell contends that even if none of the alleged errors warrants reversal, the cumulative effect of the government's misconduct and the district court's erroneous admission of evidence rendered the proceedings fundamentally unfair. It is well-settled in this circuit that the effect of multiple errors in a single trial may cast such doubt on the fairness of the proceedings that a new trial is warranted, even if no single error requires reversal. *United States v. Rahman,* 189 F.3d 88, 145 (2d Cir.1999); *see also United States v. Salameh,* 152 F.3d 88, 157 (2d Cir.1998).

[45] Nonetheless, not every error-whether alone or in combination with others-warrants a new trial. *Cf. Delaware v. Van Arsdall,* 475 U.S. 673, 681, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) ("[T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one."). As we have discussed, the trial conduct challenged by Fell either was not improper, was not prejudicial, or fails plain error review. The district court's evidentiary rulings were thoughtful and meticulous; none approached an abuse of its broad discretion. Because considered singly, none of the errors claimed by Fell undermine our confidence in the fairness of the proceeding, we similarly conclude that, given the care and soundness with which this trial was conducted, "the cumulative error doctrine finds no foothold in this appeal," *Sampson,* 486 F.3d at 51. We now turn to Fell's remaining challenges.

VIII. OVERLAP OF AGGRAVATING FACTORS

[46] During the penalty phase, the district court instructed the jury to consider three statutory aggravating factors and four non-statutory aggravating factors, as well as nineteen mitigating factors. Fell argues that three of the non-statutory aggravating factors substantially overlapped because they rest on the same factual predicate-that Fell intentionally participated***234** in the death of King. He maintains that by finding this fact, the jury could more easily find aggravating factors and then more easily find that those factors outweighed the mitigating factors presented by Fell. Accordingly, Fell contends, the overlap of aggravating factors necessarily skewed the jury's decision-making in favor of the death penalty. We disagree.

The factors in question are:

(1) Donald Fell participated in the abduction of Teresca King to facilitate his es-

factors are used in the penalty phase, a reviewing court must re-weigh the factors and perform a harmless error analysis. *Id.* Applying this analysis, the *McCullah* court found that two sets of aggravating factors were duplicative because in each of them, "while the factors are not identical per se, [one] factor necessarily subsumes the [other] factor." *Id.* at 1111.

Three years after the Tenth Circuit's decision in *McCullah,* the issue of duplicative aggravating factors was considered by the Supreme Court in *Jones v. United States,* 527 U.S. 373, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999), a case that reviewed a Fifth Circuit decision applying *McCullah.* The Fifth Circuit had found that two of the aggravating factors charged by the government were unconstitutionally duplicative. The Supreme Court declined to decide whether the Tenth Circuit's double-counting theory was either valid or appropriately applied by the Fifth Circuit. *Id.* at 398-99, 119 S.Ct. 2090. Instead, the Court stated that "[w]e have never before held that aggravating factors could be duplicative so as to render them constitutionally invalid.... What we have said is that the weighing process may be impermissibly skewed if the sentencing jury considers an invalid factor." *Id.* at 398 (citing *Stringer,* 503 U.S. at 232, 112 S.Ct. 1130). Assuming for the sake of argument that the Tenth Circuit's theory in *McCullah* applied in *Jones,* the Court found that the two non-statutory aggravating factors at issue-(I) the victim's "young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas" and (ii) the victim's "personal characteristics and the effect of the instant offense on [her] family"-were not duplicative. *Jones,* 527 U.S. at 378 n. 3, 119 S.Ct. 2090. Instead, "at best, certain evidence was relevant to two different aggravating factors." *Id.* at 399-400, 119 S.Ct. 2090. The Court also noted that "any risk that the weighing process would be skewed was eliminated by the District Court's instruction" to the jury that it should weigh the value of each factor rather than counting the number of factors on each side. *Id.*[FN26]

FN26. Currently, the circuit courts are split as to whether duplicative aggravating factors are unconstitutional and as to the meaning of the Supreme Court's decision in *Jones.* The Fourth and Ninth Circuits have aligned with the Tenth Circuit and adopted their own variations of the rule in *McCullah. See Allen v. Woodford,* 395 F.3d 979, 1012-13 (9th Cir.2005) (finding that it was unconstitutional for the court and the prosecutor to present the defendant's prior crimes as the heart of three different aggravating factors); *United States v. Tipton,* 90 F.3d 861, 900 (4th Cir.1996) ("We agree with the *McCullah* court that ... a submission ... that permits and results in cumulative findings of more than one of the [statutory aggravating factors] is constitutional error."). In contrast, the Eighth Circuit has rejected the duplicative aggravating factor theory when applied to the FDPA, *see Purkey,* 428 F.3d at 762, and the Fifth Circuit has withdrawn its support of the double-counting theory in light of *Jones, see United States v. Robinson,* 367 F.3d 278, 292-93 (5th Cir.2004) ("Although our case law once [supported the theory], the Supreme Court recently admonished that it does not support that theory of review.")

IX. SUFFICIENCY OF THE INDICTMENT

[49] Fell next complains that the government was required to charge the non-statutory aggravating factors in the indictment and that its failure to do so violates the Fifth Amendment's Indictment Clause. [FN27] Four courts of appeals have considered***237** the issue of whether non-statutory aggravators must be submitted to a grand jury and included in an indictment, and all four have held that the FDPA does not expressly include this requirement. *See United States v. LeCroy,* 441 F.3d 914, 922 (11th Cir.2006), *cert. denied,* --- U.S. ----, 127 S.Ct. 2096, 167 L.Ed.2d 816 (2007); *Purkey,* 428 F.3d at 749-50, *cert. denied,* 549 U.S. 975, 127 S.Ct. 433, 166 L.Ed.2d 307 (2006); *United States v. Bourgeois,* 423 F.3d 501, 507-08 (5th Cir.2005), *cert. denied,* 547 U.S. 1132, 126 S.Ct. 2020, 164 L.Ed.2d 786 (2006); *United States v. Higgs,* 353 F.3d 281, 298 (4th Cir.2003), *cert. denied,* 543 U.S. 999, 125 S.Ct. 627, 160 L.Ed.2d 456 (2004).

FN27. Fell contends that he raised this issue pretrial and it was denied, citing the district court's September 2002 order, 217 F.Supp.2d at 483-84. It appears, however, that the precise issue the district court addressed in that order was whether the FDPA *precluded* the government from including aggravating factors in a grand jury indictment and was thus facially unconstitutional. *See id.* The district court held that the statute suffered from no such constitutional infirmity. *See id.*; *Fell,* 360 F.3d at 138. All courts of appeals to have considered that argument have likewise rejected it. *See Sampson,* 486 F.3d at 21.

Fell, relying on *Cunningham v. California,* 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007), *Ring v. Arizona,* and related Supreme Court precedents, urges us to reach a different conclusion. In *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the Supreme Court emphasized that "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact-no matter how the State labels it-must be found by a jury beyond a reasonable doubt." *Ring,* 536 U.S. at 602, 122 S.Ct. 2428 (citing *Apprendi,* 530 U.S. at 482-83, 120 S.Ct. 2348). Two years later, in *Ring,* the Supreme Court held that an aggravating factor rendering a defendant death-eligible "operate[s] as the functional equivalent of an element of a greater offense" and, therefore, must be found by a jury. *Id.* at 609, 122 S.Ct. 2428 (internal quotation marks and citation omitted).

[50] Although *Ring* said nothing regarding the Indictment Clause of the Fifth Amendment, some courts of appeals have interpreted the decision as applying with equal force at the indictment stage as at the penalty stage of a trial. Accordingly, several circuits, including our own, require the government to charge statutory aggravating factors under the FDPA in the indictment. *See, e.g., Quinones,* 313 F.3d at 53 n. 1 (noting that, pursuant to *Ring v. Arizona,* "statutory aggravating factors ... must now be alleged in the indictment and found by a jury in capital cases"); *see also Bourgeois,* 423 F.3d at 507; *Brown,* 441 F.3d at 1367 (collecting cases).

Here, the district court noted that the government "implicitly conceded" that the Fifth Amendment requires that statutory aggravating factors be charged in the indictment when, following *Ring,* it obtained

gravating factors beyond a reasonable doubt. Regardless, the FDPA requires only that the jury sentencing Fell find mental culpability and at least one statutory aggravator, both charged in the superseding indictment, before finding him "eligible" for the death penalty. *See* 18 U.S.C. § 3593(e). Whether or not Fell *should* be sentenced to death was a calculation made by the jury based on a variety of statutory and non-statutory considerations. Accordingly, the factors that Fell's jury assessed when determining the permissibility of the death penalty in his case did not change the maximum sentence authorized under the statute. We find that the government's failure to include the non-statutory aggravating factors in the indictment did not violate the Fifth Amendment.

X. CONSTITUTIONALITY OF THE FDPA

[51] On appeal, Fell renews his claim that the FDPA violates the Fifth and Sixth Amendments by requiring in a single penalty phase, not governed by the Federal ***239** Rules of Evidence, the presentation of prejudicial evidence relevant to determining whether a defendant should be sentenced to death at the same time that the jury makes findings regarding the "gateway" factors allowing his statutory eligibility for the death penalty. This argument is necessarily predicated on the facial unconstitutionality of the FDPA, a premise that we rejected in an earlier opinion. *Fell,* 360 F.3d at 144. In any event, the presentation of victim impact and character evidence to the jury during Fell's sentencing hearing caused no prejudice.

After *Fell I,* the district court rejected numerous other constitutional challenges to the FDPA. *See Fell,* 372 F.Supp.2d at 753. Fell now renews his contention that the FDPA's bifurcated trial procedure violates the Fifth and Sixth Amendments. He claims that the procedure allows for the introduction of potentially prejudicial sentencing evidence relating to character, prior uncharged conduct, and victim impact at the same time that the government is attempting to prove death-eligibility factors-the elements of capital murder-beyond a reasonable doubt.

When a jury reaches the penalty phase, it often decides death eligibility *after* it hears "selection" evidence relating to whether the death penalty is appropriate. This approach may prejudice juror deliberations. *Ring* and its progeny suggest that the FDPA's aggravating factors should be proven to a jury in the same manner as the other elements of the crime. Writing for the majority in *Sattazahn v. Pennsylvania,* Justice Scalia explained that before *Ring,* "capital-sentencing proceedings were understood to be just that: *sentencing proceedings.* " 537 U.S. 101, 110, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003) (internal citation omitted). In contrast, after *Ring,* factors that make a defendant eligible for a death sentence are treated as "elements" of a crime. *Id.* at 111, 123 S.Ct. 732.

Fell contends that because these eligibility factors are considered elements of the crime, they should be subject to the same constitutional protections at trial, including the Sixth Amendment guarantee that the evidence against a defendant be proven beyond a reasonable doubt and be probative of an element of the crime. *See Ring,* 536 U.S. at 609, 122 S.Ct. 2428. In contrast, the victim impact evidence and character evidence constitutionally required for sentencing purposes can sometimes be unduly prejudicial, inflammatory, or irrelevant to guilt. Accordingly, "[m]uch of the

generally Blake v. *Carbone,* 489 F.3d 88, 100 (2d Cir.2007). We find no error in the district court's implementation of the FDPA's sentencing procedures.

[53] Regardless, Fell suffered no prejudice as a consequence of the manner in which the sentencing hearing was conducted. At sentencing, the government submitted three statutory aggravating factors, only one of which had to be found beyond a reasonable doubt to render Fell eligible for the death penalty: (1) "The death of Teresca King occurred during the commission of a kidnapping;" (2) "Donald Fell committed the offense in an especially heinous, cruel, or depraved manner in that it involved serious physical abuse to Teresca King;" and (3) "Donald Fell intentionally killed or attempted to kill more than one person in a single criminal episode." Fell did not contest factors one or three during the sentencing phase; given his confessed participation in the kidnapping and murder of Ms. King, it would have been hard to do so. Presented with two *uncontested* factors, and needing to find only one to deem Fell "death eligible," the jury, in our view, was unlikely to have been swayed by the additional "death-selection" evidence-mainly victim impact and character evidence-when deliberating on whether Fell was "death eligible." Accordingly, we conclude that Fell suffered no unfair prejudice resulting from the district court's implementation of the FDPA's sentencing procedures.

CONCLUSION

Chief Judge Sessions presided over this complicated and difficult trial with care, fairness, and an exemplary concern for the protection of Fell's rights. The judgment of the District Court is affirmed.

C.A.2 (Vt.),2008.

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348 F.3d 16, 62 Fed. R. Evid. Serv. 1032
(Cite as: 348 F.3d 16)

United States Court of Appeals,
First Circuit.
In re KEEPER OF THE RECORDS (GRAND JURY SUBPOENA ADDRESSED TO XYZ CORPORATION).
XYZ Corporation, Appellant,
v.
United States of America, Appellee.

Nos. 03-1726, 03-1784.
Heard Sept. 4, 2003.
Decided Oct. 22, 2003.

After corporation refused to produce documents requested by investigatory subpoena duces tecum issued by federal grand jury, on grounds that documents were shielded by attorney-client and work-product privileges, government moved to compel production. The United States District Court for the District of Massachusetts, William G. Young, Chief Judge, ordered corporation to produce documents, then cited corporation for contempt when it declined to do so. Corporation appealed. The Court of Appeals, Selya, Circuit Judge, held that: (1) as a matter of first impression, extrajudicial disclosure of attorney-client communications, not thereafter used by client to gain adversarial advantage in judicial proceedings, cannot work an implied waiver of all confidential communications on the same subject matter; (2) jurisdiction existed over appeals; (3) communications made during conference call were not confidential and were not subject to colorable claim of attorney-client privilege; (4) disclosures during conference call did not support implication of broad subject matter waiver of corporation's attorney-client privilege; and (5) corporation's pre-indictment proffers did not impliedly waive attorney-client privilege.

Reversed.

West Headnotes

[1] Contempt 93 ⚿66(1)

93 Contempt
93II Power to Punish, and Proceedings Therefor
93k66 Appeal or Error
93k66(1) k. Nature and Form of Remedy and Jurisdiction. Most Cited Cases

Federal Courts 170B ⚿556

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(C) Decisions Reviewable
170BVIII(C)1 In General
170Bk554 Nature, Scope and Effect of Decision
170Bk556 k. Discovery, Depositions, Witnesses or Affidavits. Most Cited Cases

Court of Appeals had jurisdiction over appeals in which corporation challenged order compelling production of documents requested by investigatory subpoena duces tecum that corporation had withheld based on attorney-client and work-product privileges, and order that cited corporation for contempt due to its failure to comply.

[2] Federal Courts 170B ⚿776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases

Federal Courts 170B ⚿823

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk823 k. Reception of Evidence. Most Cited Cases

Federal Courts 170B ⚿870.1

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)5 Questions of Fact, Verdicts and Findings
170Bk870 Particular Issues and Questions
170Bk870.1 k. In General. Most Cited Cases

On an appeal concerning a claim of privilege, the standard of review depends on the precise issue being litigated; Court of Appeals reviews rulings on questions of law de novo, findings of fact for clear error, and judgment calls-such as evidentiary determinations-for abuse of discretion.

[3] Federal Courts 170B ⚿763.1

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk763 Extent of Review Dependent on Nature of Decision Appealed from
170Bk763.1 k. In General. Most Cited Cases

Standard of review on appeal raising claim of privilege is not altered by the fact that the district court granted challenged motion without much elaboration of its thinking.

[4] Federal Courts 170B ⚿416

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk416 k. Evidence Law. Most Cited Cases

Federal common law governed question of whether corporation waived attorney-client privilege with respect to documents sought by investigatory subpoena duces tecum issued by federal grand jury.

[5] Grand Jury 193 ⚿36.3(2)

193 Grand Jury
193k36 Witnesses and Evidence
193k36.3 Grounds for Refusal to Appear, Testify, or Produce Evidence
193k36.3(2) k. Privilege. Most Cited Cases

Despite a grand jury's vaunted right to every man's evidence, it must respect a valid claim of privilege.

[6] Privileged Communications and Confidentiality 311H ⚿26

311H Privileged Communications and Confidentiality
311HI In General
311Hk24 Evidence
311Hk26 k. Presumptions and Burden of Proof. Most Cited Cases
(Formerly 410k222)

Party who invokes privilege bears the burden of establishing that it applies and has not been waived.

[7] Privileged Communications and Confidentiality 311H ⚿108

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk108 k. Absolute or Qualified Privilege. Most Cited Cases
(Formerly 410k198(1))

Attorney-client privilege is not limitless, and courts must take care to apply it only to the extent necessary to achieve its underlying goals.

[8] Privileged Communications and Confidentiality 311H ⚿112

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk112 k. Construction. Most Cited Cases
(Formerly 410k198(1))

Attorney-client privilege must be narrowly construed because it comes with substantial costs and stands as an obstacle of sorts to the search for truth.

[9] Privileged Communications and Confidentiality 311H ⚿102

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk102 k. Elements in General; Definition. Most Cited Cases
(Formerly 410k205, 410k198(1))

Attorney-client privilege protects only those communications that are confidential and are made for the purpose of seeking or receiving legal advice.

[10] Privileged Communications and Confidentiality 311H ⚿168

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk168 k. Waiver of Privilege. Most Cited Cases
(Formerly 410k219(3))

Attorney-client privilege may be waived, in that when otherwise privileged communications are disclosed to a third party, the disclosure destroys the confidentiality upon which the privilege is premised.

[11] Privileged Communications and Confidentiality 311H ⚿168

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk168 k. Waiver of Privilege. Most Cited Cases
(Formerly 410k219(3))

Conduct can serve to waive the attorney-client privilege by implication.

[12] Privileged Communications and Confidentiality 311H ⚿168

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk168 k. Waiver of Privilege. Most Cited Cases
(Formerly 410k219(3))

Attorney-client privilege is highly valued, and therefore courts should be cautious about finding implied waivers.

[13] Privileged Communications and Confidentiality 311H ⚿168

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege

311Hk168 k. Waiver of Privilege. Most Cited Cases
(Formerly 410k219(3))

Claims of implied waiver of attorney-client privilege must be evaluated in light of principles of logic and fairness, an evaluation which demands a fastidious sifting of the facts and a careful weighing of the circumstances.

[14] Privileged Communications and Confidentiality 311H ⚿156

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk156 k. Confidential Character of Communications or Advice. Most Cited Cases
(Formerly 410k205)

Outside counsel for corporation did not provide confidential advice during conference call involving corporation's officers, principals of corporation's co-venturer, and co-venturer's medical advisor, but rather merely helped to advocate corporation's position to co-venturer, and therefore communications made during call were not subject to colorable claim of attorney-client privilege.

[15] Privileged Communications and Confidentiality 311H ⚿102

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk102 k. Elements in General; Definition. Most Cited Cases
(Formerly 410k205)

Privileged Communications and Confidentiality 311H ⚿156

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk156 k. Confidential Character of Communications or Advice. Most Cited Cases
(Formerly 410k205)

For the attorney-client privilege to attach to a communication, the communication must have been made in confidence and for the purpose of securing or conveying legal advice, and the privilege evaporates the moment that confidentiality ceases to exist.

[16] Privileged Communications and Confidentiality 311H ⚿158

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk157 Communications Through or in Presence or Hearing of Others; Communications with Third Parties
311Hk158 k. In General. Most Cited Cases
(Formerly 410k206)

Presence of third parties is sufficient to undermine the confidentiality needed to establish that attorney-client privilege attached to a communication.

[17] Privileged Communications and Confidentiality 311H ⚿168

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk168 k. Waiver of Privilege. Most Cited Cases
(Formerly 410k219(3))

Any previously privileged information of corporation that was actually revealed during conference call involving corporation, its outside counsel, and its co-venturer

lost any veneer of attorney-client privilege by virtue of implied waiver resulting from lack of requisite confidentiality during call.

[18] Privileged Communications and Confidentiality 311H ⚿168

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk168 k. Waiver of Privilege. Most Cited Cases
(Formerly 410k219(3))

Waivers of attorney-client privilege by implication can sometimes extend beyond the matter actually revealed.

[19] Privileged Communications and Confidentiality 311H ⚿168

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk168 k. Waiver of Privilege. Most Cited Cases
(Formerly 410k219(3))

Extrajudicial disclosure of attorney-client communications, not thereafter used by client to gain adversarial advantage in judicial proceedings, cannot work an implied waiver of all confidential communications on the same subject matter.

[20] Grand Jury 193 ⚿36.3(2)

193 Grand Jury
193k36 Witnesses and Evidence
193k36.3 Grounds for Refusal to Appear, Testify, or Produce Evidence
193k36.3(2) k. Privilege. Most Cited Cases

Disclosures of confidential information that occurred during extrajudicial conference call between officers of corporation and principals of co-venturer, which concerned parties' efforts to reach joint business decision regarding marketing and withdrawal of neoteric medical device, did not support implication of broad subject matter waiver of corporation's attorney-client privilege, so as to sustain order compelling corporation to produce otherwise privileged documents relating to subject matter of call pursuant to grand jury's investigatory subpoena duces tecum, particularly when corporation made no subsequent use of call in any judicial proceeding.

[21] Privileged Communications and Confidentiality 311H ⚿168

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk168 k. Waiver of Privilege. Most Cited Cases
(Formerly 410k219(3))

If confidential information is revealed in an extrajudicial context and later reused in a judicial setting, the circumstances of the initial disclosure will not immunize the client against a claim of waiver of attorney-client privilege.

[22] Federal Courts 170B ⚿753

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk753 k. Questions Considered in General. Most Cited Cases

Court of Appeals would consider argument that corporation's pre-indictment proffers waived attorney-client privilege, even though district court did not reach issue, when parties had briefed issues, facts

pertaining to it were essentially uncontradicted, and an adjudication would expedite matters.

[23] Privileged Communications and Confidentiality 311H ⚿168

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk168 k. Waiver of Privilege. Most Cited Cases
(Formerly 410k219(3))

Corporation reasonably interpreted government's silence in face of corporation's repeated assertions of attorney-client privilege as acceptance of such reservations, and therefore corporation's pre-indictment proffers did not impliedly waive attorney-client privilege, particularly when government's silence encouraged and allowed disclosures to go forward, and government did not deny that it knew of oft-repeated privilege reservations. Restatement (Second) of Contracts § 69(1)(a).

***19** William F. Lee, with whom Robert D. Keefe, Stephen A. Jonas, Mark D. Selwyn, Hale and Dorr LLP, Richard G. Taranto, and Farr & Taranto were on brief, for appellant.

James E. Arnold, Trial Attorney, United States Department of Justice, with whom Michael K. Loucks, Chief, Health Care-Fraud Unit, and Michael J. Sullivan, United States Attorney, were on brief, for appellee.

Before SELYA, LIPEZ and HOWARD, Circuit Judges.

SELYA, Circuit Judge.

Although the attorney-client privilege may be the most venerable of the privileges for confidential communications, its accoutrements are not the most clearly delineated. These appeals, which require us to answer delicate questions concerning implied waivers of the privilege, bear witness to that point.

The appeals have their genesis in an investigatory subpoena duces tecum issued by a federal grand jury (we use the adjective "investigatory" because no indictments have yet eventuated from the grand jury probe). The subpoenaed party, a corporation, refused to produce certain of the requested documents on the ground that they were shielded by the attorney-client and work-product privileges. The government sought to compel production, contending that any attendant privilege had been waived. The district court, eschewing an evidentiary hearing, ordered the corporation to produce the documents and cited it for contempt when it declined to do so. These appeals-there are two because the corporation filed a notice of appeal after the court ordered production of the withheld documents and another after the court adjudged it in contempt-followed.

After careful consideration, we conclude that the record fails to support the lower court's finding of a broad subject matter waiver. Accordingly, we reverse the turnover order and vacate the contempt citation.

I. BACKGROUND

We start with an abbreviated account of the events leading to the turnover order. Consistent with the secrecy that typically attaches to grand jury matters, *see, e.g.*, Fed.R.Crim.P. 6(e), these appeals have gone forward under an order sealing the briefs, the parties' proffers, and other pertinent portions of the record. To preserve

that confidentiality, we use fictitious names for all affected parties and furnish only such background facts as are necessary to provide ambiance.

In the fall of 1998, XYZ Corporation (XYZ) began distributing a neoteric medical device. Soon after distribution began, XYZ learned that, on some occasions, the device was not functioning properly. It conducted an internal investigation and sought the advice of outside counsel to determine an appropriate course of action.

In fairly short order, XYZ made a preliminary decision to withdraw the device from the market (at least temporarily). Before doing so, however, XYZ's existing supply agreement obligated it to consult with its co-venturer, Smallco. Representatives of the two companies conferred telephonically. The participants in that discussion included two officers of XYZ, outside counsel for XYZ (Bernard Barrister), the principals of Smallco, and Smallco's***20** medical advisor.[FN1] During this conversation, which we shall hereafter refer to as "the call," Barrister advocated XYZ's position in the face of strong counter-arguments from the Smallco hierarchs (who wished to keep the device on the market). Unbeknownst to XYZ, Smallco recorded the call.

> FN1. There is some suggestion in the record that two other employees of XYZ were on the line during the call. We need not resolve this uncertainty as the presence or absence of these individuals would not affect our analysis.

The next day, XYZ contacted the Food and Drug Administration (the FDA) to discuss the emerging problems. A dialogue ensued. Less than one month after its initial contact with the FDA, XYZ voluntarily withdrew the device from the market.

The Department of Justice got wind of what had transpired and commenced an investigation into the distribution of the device. As part of this probe, a federal grand jury issued a subpoena requiring XYZ to produce an array of documents.[FN2] XYZ withheld certain of the documents, instead producing privilege logs indexing what had been retained and the claims of privilege applicable thereto. As early as April of 2001, the government requested XYZ to waive its claims of privilege. XYZ refused.

> FN2. The grand jury also caused subpoenas duces tecum to be served on Barrister and Barrister's law firm. Those subpoenas are not before us (although we note parenthetically that neither recipient has surrendered the documents).

In late 2001, the government obtained a tape recording of the call. The government thereafter asked XYZ for permission to audit the tape. XYZ replied that it would not seek to prevent the government from listening but admonished that this decision should not be viewed as a waiver of any privilege protecting other communications. The government agreed-in writing-to this condition. The investigation continued.

In February of 2002, federal prosecutors met with XYZ's new outside counsel to inform XYZ of the direction of their investigation. Pursuant to the request of a government attorney, XYZ's counsel authored two letters responding to concerns voiced at the February meeting. Each contained a footnote on the first page stating explicitly that the letter should not be construed as a waiver of the attorney-client or

work-product privileges.[FN3] Following this correspondence, representatives of XYZ again met with the prosecutors to discuss the possible indictment of XYZ and/or its officers. This meeting took place in May of 2002.

> FN3. The language, in its entirety, read:
>
> > We submit this letter pursuant to Rule 11(e)(6) of the Federal Rules of Criminal Procedure. This letter may not be used as evidence against [XYZ] or any subsidiary, affiliate, successor or assign, employee or agent, in any civil or criminal proceeding. This letter describes certain facts as we understand them from the record developed during the Government's investigation. It is not intended to, and should not be interpreted to, constitute admissions on behalf of [XYZ] or any related entities or persons. It also is not intended, and should not be construed, as any waiver of the attorney-client, the attorney work product, or any other applicable privilege.

In April of 2003-after persistently requesting a voluntary waiver of the attorney-client privilege for two full years-the government changed its tune. It repaired to the federal district court and filed a motion to compel production of the disputed documents. In its motion, the government argued in effect that XYZ already had waived the attorney-client privilege as ***21** to the most important documents described in the subpoena. The motion asserted that, during the call, Barrister had given legal advice in the presence of third parties and had disclosed legal advice previously provided to XYZ. In the government's view, this conduct effected a waiver of the attorney-client privilege as to all communications anent the marketing and withdrawal of the device for a period extending from August 12, 1998 to October 8, 1998. As a fallback, the government asseverated that XYZ had waived the attorney-client privilege by means of the pre-indictment presentations made in response to the prosecutors' requests. To close the circle, the government maintained that the work-product doctrine, if applicable at all, likewise had been waived.[FN4]

> FN4. In addition, the government claimed that the crime-fraud exception to the attorney-client and work-product privileges abrogated any protections that had not been waived. Because the district court did not reach this claim, we express no opinion on it. The government remains free, if it so chooses, to reassert this claim in the district court.

The district court, acting ex parte, granted the motion to compel. In a four-sentence order, the court ruled that XYZ had "waived its attorney-client privilege with respect to the subject matter of the [call]." When the government moved for an expedited hearing to clarify the order and XYZ sought reconsideration, the district court again acted summarily. Without either conducting an evidentiary hearing or entertaining argument, it ruled *ore sponte* that XYZ's waiver of the attorney-client privilege applied both retrospectively (i.e., to communications before the call relating to the "same matter") and prospectively (i.e., to communications after the call relating to the "same matter").

In its bench decision, the district court went well beyond the three-month waiver window envisioned by the government; it

declared, in effect, that the waiver was to operate without limit of time (indeed, the court noted, as to future communications, that the waiver would have effect "so long as people are talking about that same subject," and might apply up to the time of trial). The court exempted from the waiver any attorney-client communications about the waiver issue itself and provided guidance as to the scope of the waiver by referring to the "doctrine of completeness." The court declined to resolve any additional issues, stating that it would cross those bridges as the need arose.

[1] Notwithstanding the district court's order, XYZ refused to produce the documents. The district court held the corporation in contempt (thus brushing aside, inter alia, its claim of a work-product privilege), [FN5] but stayed further proceedings pending appellate review. We have jurisdiction over the ensuing appeals because XYZ subjected itself to a citation for contempt. *See In re Grand Jury Subpoenas,* 123 F.3d 695, 696-97 (1st Cir.1997).

> FN5. This implied dismissal of the work-product privilege was fully consistent with comments made by the court in the course of its earlier bench decision.

II. STANDARD OF REVIEW

[2][3] On an appeal concerning a claim of privilege, the standard of review depends on the precise issue being litigated. *See Cavallaro* [redacted]. *United States,* 284 F.3d 236, 245 (1st Cir.2002); *United States* [redacted]. *Mass. Inst. of Tech.,* 129 F.3d 681, 683 (1st Cir.1997). We review rulings on questions of law de novo, findings of fact for clear error, and judgment calls-such as evidentiary determinations-for abuse of discretion. *Cavallaro,* 284 F.3d at 245. The standard of review is not altered by the fact that the district court granted the ***22** motion without much elaboration of its thinking. *FDIC* [redacted]. *Ogden Corp.,* 202 F.3d 454, 460 (1st Cir.2000). "Although a lower court's elucidation of its reasoning invariably eases the appellate task, motions often are decided summarily.... [W]e are aware of no authority that would allow us automatically to vary the standard of review depending on whether a district court has taken the time to explain its rationale." *Id.*

[4] With these background principles in mind, we proceed to the merits. In undertaking that task, we are mindful that, on the facts of this case, the question whether XYZ has waived the attorney-client privilege is governed by federal common law. *United States* [redacted]. *Rakes,* 136 F.3d 1, 3 (1st Cir.1998).

III. ANALYSIS

[5][6] Despite a grand jury's vaunted right to every man's evidence, it must, nevertheless, respect a valid claim of privilege. *United States* [redacted]. *Calandra,* 414 U.S. 338, 346, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). But the party who invokes the privilege bears the burden of establishing that it applies to the communications at issue and that it has not been waived. *See State of Maine* [redacted]. *United States Dep't of the Interior,* 298 F.3d 60, 71 (1st Cir.2002); *United States* [redacted]. *Bollin,* 264 F.3d 391, 412 (4th Cir.2001). Thus, XYZ must carry the devoir of persuasion here.

[7][8] The attorney-client privilege is well-established and its rationale straightforward. By safeguarding communications between client and lawyer, the privilege encourages full and free discussion, better enabling the client to conform his conduct to the dictates of the law and to present legitimate claims and defenses if litigation ensues. *See Upjohn Co.* [redacted]. *United States,*

449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). Still, the privilege is not limitless, and courts must take care to apply it only to the extent necessary to achieve its underlying goals. *In re Grand Jury Subpoena (Custodian of Records, Newparent, Inc.),* 274 F.3d 563, 571 (1st Cir.2001). In other words, the attorney-client privilege must be narrowly construed because it comes with substantial costs and stands as an obstacle of sorts to the search for truth. *See United States v. Nixon,* 418 U.S. 683, 709-10, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

[9][10] The dimensions of the privilege itself are reasonably well honed. The privilege protects only those communications that are confidential and are made for the purpose of seeking or receiving legal advice. *See Bollin,* 264 F.3d at 412; *see also* 8 John Henry Wigmore, Evidence § 2292, at 554 (John T. McNaughton ed. 1961). The idea that the attorney-client privilege may be waived is a direct outgrowth of this well-established construction. When otherwise privileged communications are disclosed to a third party, the disclosure destroys the confidentiality upon which the privilege is premised. *See* 2 Paul R. Rice, Attorney-Client Privilege in the U.S. § 9:79, at 357 (2d ed. 1999).

[11] Waivers come in various sizes and shapes. The easy cases tend to be those of express waiver. *See, e.g., United States v. Lussier,* 71 F.3d 456, 462 (2d Cir.1995); *United States v. Kingston,* 971 F.2d 481, 490 (10th Cir.1992); *Catino v. Travelers Ins. Co.,* 136 F.R.D. 534, 536-37 (D.Mass.1991). The more difficult cases tend to involve implied waivers. While it is generally accepted that conduct can serve to waive the attorney-client privilege by implication, *see, e.g.,* Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 503.41 (Joseph M. McLaughlin ed.1997) (collecting cases), the case law does not offer much assistance as to how ***23** broadly such implied waivers sweep. Like most courts, this court has yet to develop a jurisprudence clarifying the scope of such implied waivers. *See United States v. Desir,* 273 F.3d 39, 45 (1st Cir.2001).

[12][13] In approaching these unanswered questions, we start with the unarguable proposition that the attorney-client privilege is highly valued. Accordingly, courts should be cautious about finding implied waivers. *See In re Grand Jury Proceedings,* 219 F.3d 175, 186 (2d Cir.2000). Claims of implied waiver must be evaluated in light of principles of logic and fairness. *See* 2 Rice, *supra* § 9:79, at 357. That evaluation demands a fastidious sifting of the facts and a careful weighing of the circumstances. *Desir,* 273 F.3d at 45-46. Considering the need for this precise, fact-specific tamisage, it is not surprising that the case law reveals few genuine instances of implied waiver. *See* 8 Wigmore, *supra* § 2327, at 635.

A. *The Call.*

[14] With these considerations in mind, we turn first to the government's contention that XYZ impliedly waived the attorney-client privilege when it "sought, obtained, and discussed legal advice" from Barrister in the presence of outsiders. Appellee's Br. at 26. The district court not only found such a waiver but also concluded that it extended, without limit of time, to all past and future communications on the subject matters discussed during the call. We think that the court erred as a matter of law in making these determinations.

[15][16] For the attorney-client privilege to attach to a communication, it must

have been made in confidence and for the purpose of securing or conveying legal advice. *See Cavallaro,* 284 F.3d at 245; *see also* 8 Wigmore, *supra* § 2292, at 554. The privilege evaporates the moment that confidentiality ceases to exist. With isthmian exceptions not pertinent here, the presence of third parties is sufficient to undermine the needed confidentiality. *See* 8 Wigmore, *supra* § 2311, at 601-03 & nn. 6-8 (collecting cases). So here: XYZ knew that third parties-representatives of Smallco-were participating in the call. Thus, it could not have had any expectation of confidentiality as to matters discussed therein. The lack of such an expectation shattered the necessary confidentiality. *See In re San Juan Dupont Plaza Hotel Fire Litig.,* 859 F.2d 1007, 1016 n. 6 (1st Cir.1988) ("Absent an expectation of confidentiality, none accrues.").

The short of it is that Barrister, regardless of his professional relationship with XYZ, did not provide confidential advice during the call but, rather, merely helped to advocate XYZ's position to its co-venturer. Consequently, the communications made during the call were not confidential (and, therefore, not subject to a colorable claim of privilege).

[17] The fact that no privilege attached to the call brings the government's waiver argument into sharper focus. It is crystal clear that any previously privileged information actually revealed during the call lost any veneer of privilege. *See, e.g., von Bulow [redacted]. von Bulow (In re von Bulow),* 828 F.2d 94, 102-03 (2d Cir.1987); *In re Sealed Case,* 676 F.2d 793, 817-18 (D.C.Cir.1982). XYZ does not contest the occurrence of such a waiver (indeed, it never listed the call on its privilege log). Rather, the bone of contention is whether that waiver had a ripple effect, i.e., whether it reached anything beyond that which was actually disclosed. We think not.

[18] There was no express waiver, so the question is one of implied waiver. It is well accepted that waivers by implication can sometimes extend beyond the matter ***24** actually revealed. *See, e.g., In re Grand Jury Proceedings,* 219 F.3d at 182-83; *Sedco Int'l, S.A. [redacted]. Cory,* 683 F.2d 1201, 1206 (8th Cir.1982). Such waivers are almost invariably premised on fairness concerns. *See von Bulow,* 828 F.2d at 101-03. As one respected treatise explains, "[t]he courts have identified a common denominator in waiver by implication: in each case, the party asserting the privilege placed protected information in issue for personal benefit through some affirmative act, and the court found that to allow the privilege to protect against disclosure of that information" would have been unfair to the opposing party. 3 Weinstein, *supra* § 503.41[1]. *See also Sedco,* 683 F.2d at 1206 (noting that courts have found waiver by implication when a client (i) testifies concerning portions of an attorney-client communication, (ii) places the attorney-client relationship itself at issue, or (iii) asserts reliance on an attorney's advice as an element of a claim or defense).

A paradigmatic example of this phenomenon is a case involving an advice of counsel defense. When such a defense is raised, the pleader puts the nature of its lawyer's advice squarely in issue, and, thus, communications embodying the subject matter of the advice typically lose protection. *See, e.g., United States [redacted]. Bilzerian,* 926 F.2d 1285, 1292 (2d Cir.1991). Implying a subject matter waiver in such a case ensures fairness because it disables litigants from using the attorney-client priv-

ilege as both a sword and a shield. Were the law otherwise, the client could selectively disclose fragments helpful to its cause, entomb other (unhelpful) fragments, and in that way kidnap the truth-seeking process.

[19] Virtually every reported instance of an implied waiver extending to an entire subject matter involves a judicial disclosure, that is, a disclosure made in the course of a judicial proceeding. *See von Bulow,* 828 F.2d at 103 (collecting cases). This uniformity is not mere happenstance; it exists because such a limitation makes eminently good sense. Accordingly, we hold, as a matter of first impression in this circuit, that the extrajudicial disclosure of attorney-client communications, not thereafter used by the client to gain adversarial advantage in judicial proceedings, cannot work an implied waiver of all confidential communications on the same subject matter. *Accord von Bulow,* 828 F.2d at 102-03; *Yankee Atomic Elec. Co. v. United States,* 54 Fed. Cl. 306, 316 (2002).

The rationale behind our holding is self-evident. When an attorney participates in an extrajudicial meeting or negotiation, his participation alone does not justify implying a broad subject matter waiver of the attorney-client privilege. There is a qualitative difference between offering testimony at trial or asserting an advice of counsel defense in litigation, on the one hand, and engaging in negotiations with business associates, on the other hand. In the former setting, the likelihood of prejudice looms: once a litigant chooses to put privileged communications at issue, only the revelation of all related exchanges will allow the truth-seeking process to function unimpeded. In the latter scenario, however, such concerns are absent. The party has introduced its lawyer into the negotiations, but that act, in and of itself, does nothing to cause prejudice to the opposition or to subvert the truth-seeking process. Furthermore, a rule that would allow broad subject matter waivers to be implied from such communications would provide perverse incentives: parties would leave attorneys out of commercial negotiations for fear that their inclusion would later force wholesale disclosure of confidential information. This would strike at the heart of the attorney-client relationship-and ***25** would do so despite the absence of any eclipsing reason for the implication of a waiver. Where a party has not thrust a partial disclosure into ongoing litigation, fairness concerns neither require nor permit massive breaching of the attorney-client privilege.[FN6] *See In re Grand Jury Proceedings,* 219 F.3d at 188-89 (finding no broad waiver when disclosure occurred in grand jury testimony and government did not show sufficient prejudice).

> FN6. Nothing in this opinion is intended to suggest that extrajudicial disclosures can never work an implied waiver of anything beyond that which actually was disclosed. But such cases will be rare, and the scope of any ensuing waiver will be narrow. *See von Bulow,* 828 F.2d at 102 n. 1. For today, it suffices that the government has neither argued for a narrow waiver nor identified any particular document to which such a waiver might extend. *See United States v. Zannino,* 895 F.2d 1, 17 (1st Cir.1990) (explaining that arguments not made in a party's briefs need not be considered).

[20] Viewed against this backdrop, the district court's turnover order cannot be

sustained. Although plotting the precise line that separates judicial disclosures from extrajudicial disclosures sometimes can be difficult, no such difficulties are presented here. The call took place entirely outside the judicial context. The parties to it were co-venturers bent on ironing out wrinkles and reaching a joint business decision. Given these facts, it would be fanciful to suggest that the disclosures cited by the government were made in anticipation of litigation.

That gets the grease from the goose. Because the call was plainly extrajudicial, the district court erred in using it as a fulcrum for the implication of a broad subject matter waiver of the attorney-client privilege. *See von Bulow,* 828 F.2d at 103; *Electro Scientific Indus. v. Gen. Scanning, Inc.,* 175 F.R.D. 539, 543-44 (N.D.Cal.1997).

[21] The government argues that even extrajudicial disclosures should be given broad scope when the waiving party seeks later to use that disclosure to its advantage. We agree in part: if confidential information is revealed in an extrajudicial context and later reused in a judicial setting, the circumstances of the initial disclosure will not immunize the client against a claim of waiver. *See Electro Scientific,* 175 F.R.D. at 544 (explaining that a past extrajudicial disclosure will not cause any prejudice in subsequent litigation as long as the disclosing party "does not try to use [the disclosure] in this litigation"); *cf. United States v. Workman,* 138 F.3d 1261, 1263-64 (8th Cir.1998) (finding subject matter waiver after client placed attorney's advice in issue in court case). The key is that the subsequent disclosure, *on its own,* would suffice to waive the privilege. Here, however, XYZ has not made use of the call in any judicial proceeding.[FN7]

> FN7. To the extent that the government implies that XYZ used the call in its pre-indictment proffers, that argument fails for the reasons discussed in Part III(B), *infra.*

At the risk of carting coal to Newcastle, we add that a *prospective* waiver will very rarely be warranted in extrajudicial disclosure cases. Courts have generally allowed prospective waivers in discrete and limited situations, almost invariably involving advice of counsel defenses. *See, e.g., Minn. Specialty Crops, Inc. v. Minn. Wild Hockey Club,* 210 F.R.D. 673, 679 (D.Minn.2002); *Chiron Corp. v. Genentech, Inc.,* 179 F.Supp.2d 1182, 1187 (E.D.Cal.2001). Every case the government cites in support of the district court's imposition of a prospective waiver involves precisely this scenario. *See Minn. Specialty Crops,* 210 F.R.D. at 679 (finding a prospective waiver effected "by the adoption of [an] advice-of-***26** counsel defense"); *Chiron Corp.,* 179 F.Supp.2d at 1188 (same); *Gabriel Capital, L.P. v. Natwest Finance, Inc.,* No. 99-Civ.-10488, 2001 WL 1132050, at *1 (S.D.N.Y. Sept. 21, 2001) (same); *Dunhall Pharms., Inc. v. Discus Dental, Inc.,* 994 F.Supp. 1202, 1209 n. 3 (C.D.Cal.1998) (finding subject matter waiver throughout the time period of alleged patent infringement when putative infringer asserted advice of counsel defense); *see also Glenmede Trust Co. v. Thompson,* 56 F.3d 476, 486 (3d Cir.1995) (finding broad waiver where advice of counsel defense had been asserted); *Abbott Labs. v. Baxter Travenol Labs., Inc.,* 676 F.Supp. 831, 832 (N.D.Ill.1987) (same).

Enforcing a prospective waiver in such a case makes sense: once a litigant puts the legal advice given to him at issue, the op-

posing party should be entitled to all the information on that same subject regardless of when it was compiled. This ensures that a litigant is not able to present only selected bits of the story and thus distort the truth-seeking process. The case at hand is not one in which an advice of counsel defense has been asserted-indeed, there is no pending proceeding to serve as a vehicle for such a defense-and no such ends would be served by implying a broad prospective waiver.

B. *Presentations to the Government.*

[22] Our odyssey is not yet finished. Even though the district court did not reach the issue, the government invites us to consider, as an alternative basis on which to uphold the turnover order, its argument that XYZ's pre-indictment proffers waived the attorney-client privilege. *See Intergen N.V. v. Grina,* 344 F.3d 134, 142 (1st Cir.2003) [slip op. at 13] (explaining that the court of appeals can affirm a judgment on any ground made manifest by the record). The parties have briefed this issue, the facts pertaining to it are essentially uncontradicted, and an adjudication will expedite matters. These factors convince us to accept the government's invitation.

Many years ago, Justice Holmes warned that those who deal with the government must turn square corners. *Rock Island, Ark. & La. R.R. Co. v. United States,* 254 U.S. 141, 143, 41 S.Ct. 55, 65 L.Ed. 188 (1920). That advice cuts both ways: those who deal with the government have a right to expect fair treatment in return. The principle that the government must turn square corners in dealing with its constituents is dispositive here.

The facts are these. At the time the government filed the motion to compel, it had been engaged in discussions with XYZ for over two years. During that span, the government repeatedly had requested that XYZ waive the attorney-client privilege vis-à-vis communications concerning the device's withdrawal from the market, and XYZ steadfastly had refused. When the government sought permission to audit the tape recording of the call, XYZ agreed on the express condition that leave "was not to be viewed as a waiver of any applicable privilege protecting other communications." The government acceded to this condition.

In February of 2002, government attorneys met with XYZ's outside counsel to discuss the threatened indictment of the corporation and/or its officers. The government acknowledges that it solicited a response from XYZ in hopes of gaining information so that an indictment, if one eventuated, would be based on a fully informed account of the product-withdrawal decision.

Initially, this solicitation went unheeded. In late April, however, the government wrote to XYZ's outside counsel, formally identifying the corporation as a target of ***27** the grand jury investigation. That letter apparently got XYZ's attention. The next month, its counsel responded to the government's earlier request. This epistle, dated May 10, 2002, began with a clear and explicit statement, quoted *supra* note 3, that nothing contained therein should be deemed a waiver of the attorney-client privilege. The letter set forth various reasons why the government should forgo an indictment. It contained only one glancing mention of an attorney-client communication-a reference to the call (a communication to which the attorney-client privilege never attached). In all events, the government never replied either to this let-

ter or to the privilege reservation contained therein.

The May 10 letter advised the prosecutors that XYZ's counsel would be sending additional material within the next few weeks in order to complete the response that the government had solicited. As promised, XYZ's counsel sent a follow-up letter eleven days later. This missive contained the same privilege reservation (again conspicuously displayed on the first page). In the body of the letter, counsel discussed communications between XYZ and the FDA during September of 1998 (some of which involved Barrister). Once again, the privilege reservation evoked no response.

Both of counsel's letters referred to an anticipated meeting with the government. That meeting occurred on May 22, 2002. As the first order of business, XYZ's counsel renewed the privilege reservation, stating that any disclosures made during the meeting should not be interpreted as waiving the attorney-client privilege. The government's representatives received this announcement in stony silence. XYZ's presentation proved fruitless and the colloquy between the parties apparently ground to a halt. That was the state of affairs when the government endeavored to subpoena the disputed documents.

[23] The government now claims that these presentations resulted in a waiver of the attorney-client privilege as to the subjects discussed therein. But the circumstances, and particularly the government's own conduct, belie that claim. XYZ was careful to condition each and every disclosure on a clearly stated privilege reservation. The government did not raise the slightest question when these reservations were stated, but, rather, kept the dialogue going and invited additional disclosures. In the circumstances of this case, we think that XYZ reasonably interpreted the government's silence as an acceptance of the reservations. *Cf. McGurn v. Bell Microprods., Inc.,* 284 F.3d 86, 90 (1st Cir.2002) (stating that silence can serve as acceptance of a condition when the offeree, despite having a reasonable opportunity to reject the condition, takes the benefit of the offer without saying anything); Restatement (Second) of Contracts § 69(1)(a) (similar).

To be sure, the government now says that XYZ, if it wanted to guarantee preservation of the attorney-client privilege, should have secured a written agreement to that effect. In the absence of such a step, the government suggests, the unilaterally imposed privilege reservation was impuissant. This argument lacks force.

As we have said, in some cases silence can be the basis of acceptance. *See, e.g., McGurn,* 284 F.3d at 90. In this case, the undisputed facts show that the government knew of XYZ's intention to operate under a privilege reservation from the time that it first secured a tape recording of the call. It unquestionably accepted the reservation at that time. XYZ then repeated the reservation on the occasion of each of the three succeeding pre-indictment presentations ***28** (two written and one oral). The government voiced no objection to the privilege reservation at any of these times. Its silence encouraged (indeed, allowed) the disclosures to go forward.

Here, moreover, the government does not deny that it knew of the oft-repeated privilege reservations. Hence, the government's long delay in raising a claim of waiver is itself an indication of such knowledge. *See Akamai Techs., Inc. v. Digital Island, Inc.,* No. C-00-3509CW, 2002 WL

1285126, at *6 (N.D.Cal. May 30, 2002) (finding privilege reservation valid, in part because opposition waited eight months after supposed waiver before seeking to compel production of documents). In turn, the government's ready acceptance of the proffers' benefits, notwithstanding its knowledge of the privilege reservations, makes its current position untenable. *Cf. 3 A's Towing Co. v. P & A. Well Serv., Inc.*, 642 F.2d 756, 758 n. 3 (5th Cir.1981) (finding ratification where delay in repudiating was long and failure to repudiate was "accompanied by acts indicating approval ... such as receiving and retaining the benefits").

In short, the privilege reservations were not unilaterally imposed, but, rather, were accepted by the government's consistent course of conduct. That course of conduct signaled clearly the government's intention to acquiesce in the privilege reservations. We conclude, therefore, that the reservations were fully effective here. Having lured XYZ into making a series of proffers, the government cannot now be allowed to contradict that reasonable understanding by arguing, after the fact, that it never acceded to the reservations. *Cf. United States v. Tierney,* 760 F.2d 382, 388 (1st Cir.1985) ("Having one's cake and eating it, too, is not in fashion in this circuit.").

Although we ground this result in equitable principles, it also comports with sound policy. Arm's-length negotiations between the government and private parties, in advance of an indictment, aid the truth-seeking process. Such negotiations are to everybody's advantage. They give potential defendants an opportunity to explain away suspicious circumstances, give the government an opportunity to avoid embarrassing and wasteful mistakes, and give the public a greater likelihood of a just result. Requiring the government to turn square corners in such negotiations will make potential defendants more willing to deal with the government in the future. Conversely, refusing to hold the government to such a standard will send a signal to future litigants to negotiate with the government only at their peril. That is not a message that we wish to send-nor is it one that would serve the government's interests.

In a perfect world, of course, XYZ would have secured a written acknowledgment of its **privilege** reservation in advance of each and every disclosure. But XYZ did secure one such written acknowledgment, and its failure to do so on subsequent occasions is clearly outweighed by two facts: (i) it repeatedly set forth its position, and (ii) the government failed to question the **privilege** reservation in a timely manner. Under the circumstances of this case, we find that the proffers were made in the course of ongoing **plea negotiations**; that XYZ explicitly reserved all claims of attorney-client **privilege** with respect thereto; that the government effectively acquiesced in these reservations; and that the government is bound by them. Consequently, XYZ reserved the attorney-client **privilege** by means of its pre-indictment presentations.

IV. CONCLUSION

***29** We need go no further.[FN8] We hold that XYZ's extrajudicial disclosure did not give rise, by implication, to a broad subject matter waiver. We further hold that the government's seeming acquiescence in XYZ's privilege reservations precludes any claim that XYZ's pre-indictment presentations worked a waiver of any applicable privilege. Accordingly, we reverse the or-

der appealed from, vacate the contempt citation, and remand to the district court for further proceedings not inconsistent herewith.

> FN8. In view of the fact that the attorney-client privilege remains intact, we need not address the work-product doctrine. Nor do we need to reach the government's contention that the inadequate detail on the privilege logs resulted in a waiver. If this is a line of attack that the government wishes to pursue, the district court should consider it in the first instance.

Reversed.

C.A.1 (Mass.),2003.
In re Keeper of Records (Grand Jury Subpoena Addressed to XYZ Corp.)
348 F.3d 16, 62 Fed. R. Evid. Serv. 1032

END OF DOCUMENT

95 S.Ct. 2160
422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 141, 20 Fed.R.Serv.2d 547
(Cite as: 422 U.S. 225, 95 S.Ct. 2160)

Supreme Court of the United States
UNITED STATES, Petitioner,
v.
Robert Lee NOBLES.

No. 74-634.
Argued April 23, 1975.
Decided June 23, 1975.

Defendant was convicted in the United States District Court for the Central District of California of bank robbery and the Court of Appeals, 501 F.2d 146, affirmed in part, reversed in part, and remanded, and certiorari was granted. The Supreme Court, Mr. Justice Powell, held that refusal to permit defense investigator to testify about his interviews with prosecution witnesses when defense counsel stated he did not intend to produce investigator's report for submission to be prosecution for inspection at completion of the investigator's testimony did not violate defendant's Fifth Amendment privilege against compulsory self-incrimination; that criminal discovery rule is addressed only to pretrial discovery and imposed no constraint on district court's power to condition impeachment testimony of defense witness on production of relevant portions of his report; that the qualified privilege derived from the attorney work-product doctrine was waived with respect to matters covered in investigator's testimony and was not available to prevent disclosure of the report; and that it was within the court's discretion to assure that jury would hear the full testimony of the investigator rather than a truncated portion favorable to defendant, and court's preclusion sanction did not deprive defendant of rights to compulsory process and cross-examination.

Reversed.

Mr. Justice White and Mr. Justice Rehnquist joined in parts of the court's opinion.

Opinion following reversal, 522 F.2d 1274.

Mr. Justice White filed an opinion concurring in the judgment and in parts of the court's opinion, in which Mr. Justice Rehnquist joined.

Mr. Justice Douglas took no part in the decision of the case.

West Headnotes

[1] Criminal Law 110 ⚿1028

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1028 k. Presentation of Questions in General. Most Cited Cases

That testimony of defense investigator regarding statements previously obtained from prosecution witnesses would not have constituted an impeachment of statements of one witness within contemplation of trial court's order precluding investigator's testimony unless copy of investigator's report was submitted to prosecution for inspection at completion of investigator's testimony could not be urged as ground for reversal of trial court's order where defense counsel failed to develop at trial the issue whether the testimony constituted impeachment.

compulsory self-incrimination is a personal one and adheres basically to the person, not to information that may incriminate him. U.S.C.A.Const. Amend. 5.

[7] Witnesses 410 ⚿297(1)

410 Witnesses
410III Examination
410III(D) Privilege of Witness
410k297 Self-Incrimination
410k297(1) k. In General. Most Cited Cases

Constitutional guarantee against self-incrimination protects only against forced individual disclosure of a testimonial or communicative character. U.S.C.A.Const. Amend. 5.

[8] Criminal Law 110 ⚿393(1)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k393 Compelling Self-Incrimination
110k393(1) k. In General. Most Cited Cases

Fact that statements of key prosecution witnesses were elicited by a defense investigator on defendant's behalf did not convert statements into defendant's personal communications, and Fifth Amendment privilege against self-incrimination was not violated by order excluding testimony of the investigator as to statements obtained from the witnesses unless investigator's contemporaneous report was submitted to prosecution for inspection at completion of the investigator's testimony. Fed.Rules Crim.Proc. rule 16, 18 U.S.C.A.; U.S.C.A.Const. Amend. 5.

[9] Criminal Law 110 ⚿393(1)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k393 Compelling Self-Incrimination
110k393(1) k. In General. Most Cited Cases

Fifth Amendment privilege against compulsory self-incrimination, being personal to the defendant, does not extend to the testimony or statements of third parties called as witnesses at trial. U.S.C.A.Const. Amend. 5.

[10] Criminal Law 110 ⚿661

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k661 k. Necessity and Scope of Proof. Most Cited Cases

Fact that provision in criminal discovery rule, imposing duty to notify opposing counsel or court of additional materials previously requested or inspected that are subject to discovery or inspection under the rule, may have some effect on parties' conduct during trial does not convert rule into a general limitation on court's inherent power to control evidentiary matters. Fed.Rules Crim.Proc. rules 16, 16(a)(2), (b, c, g), 18 U.S.C.A.

[11] Criminal Law 110 ⚿661

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k661 k. Necessity and Scope of Proof. Most Cited Cases

The incorporation of the Jencks Act limitation on pretrial right of discovery provided by criminal rule does not convert the rule into a general limitation on the trial

110XX Trial
110XX(A) Preliminary Proceedings
110k627.5 Discovery Prior to and Incident to Trial
110k627.5(6) k. Work Product. Most Cited Cases

Privilege derived from the work product doctrine is not absolute but may be waived. Fed.Rules Crim.Proc. rule 16(b, c), 18 U.S.C.A.; Fed.Rules Civ.Proc. rule 26(b)(3), 28 U.S.C.A.

[18] Criminal Law 110 ⚿627.5(6)

110 Criminal Law
110XX Trial
110XX(A) Preliminary Proceedings
110k627.5 Discovery Prior to and Incident to Trial
110k627.5(6) k. Work Product. Most Cited Cases

Defense counsel, by electing to present as a witness investigator who had interviewed key prosecution witnesses, waived work product privilege with respect to matters covered in investigator's testimony. Fed.Rules Crim.Proc. rule 16(b, c), 18 U.S.C.A.; Fed.Rules Civ.Proc. rule 26(b)(3), 28 U.S.C.A.

[19] Criminal Law 110 ⚿627.5(6)

110 Criminal Law
110XX Trial
110XX(A) Preliminary Proceedings
110k627.5 Discovery Prior to and Incident to Trial
110k627.5(6) k. Work Product. Most Cited Cases

Witnesses 410 ⚿271(1)

410 Witnesses
410III Examination
410III(B) Cross-Examination
410k271 Cross-Examination as to Writings
410k271(1) k. In General. Most Cited Cases

When counsel necessarily makes use throughout trial of notes, documents and other internal materials prepared to present adequately his client's case and relies on the materials in examining witnesses, there normally is no waiver of work product privilege, but where counsel attempts to make a testimonial use of these materials the normal rules of evidence come into play with respect to cross-examination and production of documents. Fed.Rules Crim.Proc. rule 16(b, c), 18 U.S.C.A.; Fed.Rules Civ.Proc. rule 26(b)(3), 28 U.S.C.A.

[20] Criminal Law 110 ⚿627.5(6)

110 Criminal Law
110XX Trial
110XX(A) Preliminary Proceedings
110k627.5 Discovery Prior to and Incident to Trial
110k627.5(6) k. Work Product. Most Cited Cases

Defendant can no more advance work product doctrine to sustain a unilateral testimonial use of work product materials than he could elect to testify in his own behalf and thereafter assert his Fifth Amendment privilege to resist cross-examination on matters reasonably related to those brought out in direct examination. U.S.C.A.Const. Amend. 5.

[21] Criminal Law 110 ⚿1852

110 Criminal Law
110XXXI Counsel
110XXXI(B) Right of Defendant to Counsel

of investigator's testimony was proper method of assuring compliance with order and did not deprive defendant of rights to compulsory process and cross-examination. U.S.C.A.Const. Amend. 6.

[24] Witnesses 410 ⚿2(1)

410 Witnesses
410I In General
410k2 Right of Accused to Compulsory Process
410k2(1) k. In General. Most Cited Cases

Sixth Amendment right to compulsory process does not confer right to present testimony free from the legitimate demands of the adversarial system and is not a justification for presentation of what might have been a half-truth. U.S.C.A.Const. Amend. 6.

[25] Witnesses 410 ⚿391

410 Witnesses
410IV Credibility and Impeachment
410IV(D) Inconsistent Statements by Witness
410k390 Competency of Evidence of Inconsistent Statements in General
410k391 k. Oral Statements, and Examination of Impeaching Witnesses. Most Cited Cases

Fact that trial court excluded testimony of defense investigator in advance when defense counsel stated he would not make investigator's report available for inspection at conclusion of investigator's testimony, rather than receive the investigator's testimony and thereafter charge jury to disregard it when counsel refused to produce the report, had no constitutional significance.

[26] Criminal Law 110 ⚿483

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k482 Examination of Experts
110k483 k. In General. Most Cited Cases

Criminal Law 110 ⚿1152.19(7)

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1152 Conduct of Trial in General
110k1152.19 Counsel
110k1152.19(7) k. Arguments and Statements by Counsel. Most Cited Cases
(Formerly 110k1154)

Criminal Law 110 ⚿1153.12(3)

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1153 Reception and Admissibility of Evidence
110k1153.12 Opinion Evidence
110k1153.12(3) k. Admissibility. Most Cited Cases
(Formerly 110k1153(1))

Criminal Law 110 ⚿2063

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2061 Control of Argument by Court
110k2063 k. Discretion of Court in Controlling Argument. Most Cited Cases

ness, waived the privilege with respect to matters covered in his testimony. Pp. 2169-2171.

5. It was within the District Court's discretion to assure that the jury would hear the investigator's full testimony rather than a truncated portion favorable to respondent, and the court's ruling, contrary to respondent's contention, did not deprive him of the Sixth Amendment rights to compulsory process and cross-examination. That Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system and cannot be invoked as a justification for presenting what might have been a half-truth. Pp. 2171-2172.

501 F.2d 146, reversed.

Paul L. Friedman, Washington, D.C., for petitioner.

Nicholas R. Allis, Los Angeles, Cal., for respondent.

***227** Mr. Justice POWELL delivered the opinion of the Court.

In a criminal trial, defense counsel sought to impeach the credibility of key prosecution witnesses by testimony of a defense investigator regarding statements previously obtained from the witnesses by the investigator. The question presented here is whether in these circumstances a federal trial court may compel the defense to reveal the relevant portions of the investigator's report for the prosecution's use in cross-examining him. The United States Court of Appeals for the Ninth Circuit concluded that it cannot. 501 F.2d 146. We granted certiorari, 419 U.S. 1120, 95 S.Ct. 801, 42 L.Ed.2d 819 (1975), and now reverse.

I

Respondent was tried and convicted on charges arising from an armed robbery of a federally insured bank. The only significant evidence linking him to the crime was the identification testimony of two witnesses, a bank teller and a salesman who was in the bank during the robbery.[FN1] Respondent offered an alibi but, as the Court of Appeals recognized, 501 F.2d, at 150, his strongest defense centered around attempts to discredit these eyewitnesses. Defense efforts to impeach them gave rise to the events that led to this decision.

> FN1. The only other evidence introduced against respondent was a statement made at the time of arrest in which he denied that he was Robert Nobles and subsequently stated that he knew that the FBI had been looking for him.

****2165** In the course of preparing respondent's defense, an investigator for the defense interviewed both witnesses and preserved the essence of those conversations in a written report. When the witnesses testified for the prosecution, respondent's counsel relied on the report in conducting their cross-examination. Counsel asked the bank ***228** teller whether he recalled having told the investigator that he had seen only the back of the man he identified as respondent. The witness replied that he did not remember making such a statement. He was allowed, despite defense counsel's initial objection, to refresh his recollection by referring to a portion of the investigator's report. The prosecutor also was allowed to see briefly the relevant portion of the report.[FN2] The witness thereafter testified that although the report indicated that he told the investigator he had seen only respondent's back, he in fact had

> ent does not, and in view of the failure to develop the issue at trial could not, urge this as a ground for reversal. Nor does respondent maintain that the initial disclosure of the bank teller's statement sufficed to satisfy the court's order. We therefore consider each of the two alleged statements in the report to be impeaching statements that would have been subject to disclosure if the investigator had testified about them.

**2166 The Court of Appeals for the Ninth Circuit while acknowledging that the trial court's ruling constituted a 'very limited and seemingly judicious restriction,' 501 F.2d, at 151, nevertheless considered it reversible *230 error. Citing United States v. Wright, 160 U.S.App.D.C. 57, 68, 489 F.2d 1181, 1192 (1973), the court found that the Fifth Amendment prohibited the disclosure condition imposed in this case. The court further held that Fed.Rule Crim.Proc. 16, while framed exclusively in terms of pretrial discovery, precluded prosecutorial discovery at trial as well. 501 F.2d, at 157; accord, United States v. Wright, supra, at 66-67, 489 F.2d, at 1190-1191. In each respect, we think the court erred.

II

The dual aim of our criminal justice system is 'that guilt shall not escape or innocence suffer,' Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). To this end, we have placed our confidence in the adversary system, entrusting to it the primary responsibility for developing relevant facts on which a determination of guilt or innocence can be made. See United States v. Nixon, 418 U.S. 683, 709, 94 S.Ct. 3090, 3108, 41 L.Ed.2d 1039 (1974); Williams v. Florida, 399 U.S. 78, 82, 90 S.Ct. 1893, 1896, 26 L.Ed.2d 446 (1970); Elkins v. United States, 364 U.S. 206, 234, 80 S.Ct. 1437, 1454, 4 L.Ed.2d 1669 (1960) (Frankfurter, J., dissenting).

[2][3][4] While the adversary system depends primarily on the parties for the presentation and exploration of relevant facts, the judiciary is not limited to the role of a reference or supervisor. Its compulsory processes stand available to require the presentation of evidence in court or before a grand jury. United States v. Nixon, supra; Kastigar v. United States, 406 U.S. 441, 443-444, 92 S.Ct. 1653, 1655-1656, 32 L.Ed.2d [illegible] (1972); Murphy v. Waterfront Comm'n, 378 U.S. 52, 93-94, 84 S.Ct. 1594, 1610-1611, 12 L.Ed.2d 678 (1964) (White, J., concurring). As we recently observed in United States v. Nixon, supra, 418 U.S., at 709, 94 S.Ct., at 3108:

> 'We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both *231 fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.'

Decisions of this Court repeatedly have recognized the federal judiciary's inherent power to require the prosecution to pro-

case.

*233 III

A

The Court of Appeals concluded that the Fifth Amendment renders criminal discovery 'basically a one-way street.' 501 F.2d at 154. Like many generalizations in constitutional law, this one is too broad. The relationship between the accused's Fifth Amendment rights and the prosecution's ability to discover materials at trial must be identified in a more discriminating manner.

[6][7] The Fifth Amendment privilege against compulsory self-incrimination is an 'intimate and personal one,' which protects 'a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation.' Couch v. United States, 409 U.S. 322, 327, 93 S.Ct. 611, 615, 34 L.Ed.2d 548 (1973); see also Bellis v. United States, 417 U.S. 85, 90-91, 94 S.Ct. 2179, 2184-2185, 40 L.Ed.2d 678 (1974); United States v. White, 322 U.S. 694, 698, 64 S.Ct. 1248, 1251, 88 L.Ed. 1542 (1944). As we noted in Couch, supra, 409 U.S., at 328, 93 S.Ct., at 616, the 'privilege is a personal privilege: it adheres basically to the person, not to information that may incriminate him.' FN7

FN7. 'The purpose of the relevant part of the Fifth Amendment is to prevent compelled self-incrimination, not to protect private information. Testimony demanded of a witness may be very private indeed, but unless it is incriminating and protected by the Amendment or unless protected by one of the evidentiary privileges, it must be disclosed.' Maness v. Meyers, 419 U.S. 449, 473-474, 95 S.Ct. 584, 598, 42 L.Ed.2d 574 (1975) (White, J., concurring in result). Moreover, the constitutional guarantee protects only against forced individual disclosure of a 'testimonial or communicative nature,' Schmerber v. California, 384 U.S. 757, 761, 86 S.Ct. 1826, 1830, 16 L.Ed.2d 908 (1966); see also United States v. Wade, 388 U.S. 218, 222, 87 S.Ct. 1926, 1929, 18 L.Ed.2d 1149 (1967); Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967).

**2168 [8] In this instance disclosure of the relevant portions of the defense investigator's report would not impinge on the fundamental values protected by the Fifth Amendment. The court's order was limited to statements *234 allegedly made by third parties who were available as witnesses to both the prosecution and the defense. Respondent did not prepare the report, and there is no suggestion that the portions subject to the disclosure order reflected any information that he conveyed to the investigator. The fact that these statements of third parties were elicited by a defense investigator on respondent's behalf does not convert them into respondent's personal communications. Requiring their production from the investigator therefore would not in any sense compel respondent to be a witness against himself or extort communications from him.

[9] We thus conclude that the Fifth Amendment privilege against compulsory self-incrimination, being personal to the defendant, does not extend to the testimony or statements of third parties called as witnesses at trial. The Court of Appeals' reliance on this constitutional guarantee as a bar to the disclosure here ordered was misplaced.

express a contrary intent. It only restricts the defendant's right of pretrial discovery in a manner that reconciles that provision with the Jencks Act limitation on the trial court's discretion over evidentiary matters. It certainly does not convert Rule 16 into a general limitation on the trial court's broad discretion as to evidentiary questions at trial. Cf. Giles v. Maryland, 386 U.S. 66, 101, 87 S.Ct. 793, 810, 17 L.Ed.2d 737 (1967) (Fortas, J., concurring in judgment). [FN10] We conclude, therefore, that Rule 16 imposes no constraint on the District Court's power to condition the impeachment testimony of respondent's witness on the production of the relevant portions of his investigative report. In extending the Rule into the trial context, the Court of Appeals erred.

FN10. We note also that the commentators who have considered Rule 16 have not suggested that it is directed to the court's control of evidentiary questions arising at trial. See, e.g., Nakell, Criminal Discovery for the Defense and the Prosecution-the Developing Constitutional Considerations, 50 N.C.L.Rev. 437, 494-514 (1972); Rezneck, The New Federal Rules of Criminal Procedure, 54 Geo.L.J. 1276, 1279, 1282 n. 19 (1966); Note, Prosecutorial Discovery Under Proposed Rule 16, 85 Harv.L.Rev. 994 (1972).

IV

[13] Respondent contends further that the work-product doctrine exempts the investigator's report from disclosure at trial. While we agree that this doctrine applies to criminal litigation as well as civil, we find its protection unavailable in this case.

[14] The work-product doctrine, recognized by this Court of Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), reflects the strong 'public policy underlying the orderly prosecution ***237** and defense of legal claims.' Id., at 510, 67 S.Ct., at 393; see also id., at 514-515, 67 S.Ct., at 395-396 (Jackson, J., concurring). As the Court there observed:

'Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways-aptly though roughly telrmed by the Circuit Court of Appeals in this case as the 'Work product of the lawyer.' Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop****2170** in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of

Federal Rules of Civil Procedure, see Rule 26(b)(3), and in Rule 16 of the Criminal Rules as well, see Rules 16(b) and (c); cf. E. Cleary, McCormick on Evidence 208 (2d ed. 1972).

[17][18][19][20][21] The privilege derived from the work-product doctrine is not absolute. Like other qualified privileges, it may be waived. Here respondent sought to adduce the testimony of the investigator and contrast his recollection of the contested statements with that of the prosecution's witnesses. Respondent, by electing to present the investigator as a witness, waived the privilege with respect to matters covered in his **2171 testimony.[FN14] Respondent*240 can no more advance the work-product doctrine to sustain a unilateral testimonial use of work-product materials than he could elect to testify in his own behalf and thereafter assert his Fifth Amendment privilege to resist cross-examination on matters reasonably related to those brought out in direct examination. See, e.g., McGautha [redacted]. California, 402 U.S. 183, 215, 91 S.Ct. 1454, 1471, 28 L.Ed.2d 711 (1971).[FN15]

FN14. What constitutes a waiver with respect to work-product materials depends, of course, upon the circumstances. Counsel necessarily makes use throughout trial of the notes, documents, and other internal materials prepared to present adequately his client's case, and often relies on them in examining witnesses. When so used, there normally is no waiver. But where, as here, counsel attempts to make a testimonial use of these materials the normal rules of evidence come into play with respect to cross-examination and production of documents.

FN15. We cannot accept respondent's contention that the disclosure order violated his Sixth Amendment right to effective assistance of counsel. This claim is predicated on the assumption that disclosure of a defense investigator's notes in this and similar cases will compromise counsel's ability to investigate and prepare the defense case thoroughly. Respondent maintains that even the limited disclosure required in this case will impair the relationship of trust and confidence between client and attorney and will inhibit other members of the 'defense team' from gathering information essential to the effective preparation of the case. See American Bar Association Project on Standards for Criminal Justice, The Defense Function s 3.1(a) (App.Draft 1971). The short answer is that the disclosure order resulted from respondent's voluntary election to make testimonial use of his investigator's report. Moreover, apart from this waiver, we think that the concern voiced by respondent fails to recognize the limited and conditional nature of the court's order.

[22] Finally, our [redacted] examination of the record persuades us that the District Court properly exercised its discretion in this instance. The court authorized no general 'fishing expedition' into the defense files or indeed even into the defense investigator's report. Cf. United States [redacted]. Wright, 160 U.S.App.D.C. 57, 489 F.2d 1181

peals for the Ninth Circuit is therefore reversed.

Judgment reversed.

Mr. Justice DOUGLAS took no part in the consideration or decision of this case.

Mr. Justice WHITE, with whom Mr. Justice REHNQUIST joins, concurring.

I concur in the judgment and in Parts II, III, and [redacted] of the opinion of the Court. I write only because of misgivings about the meaning of Part IV of the opinion. The Court appears to have held in Part IV of its opinion only that whatever protection the defense investigator's notes of his interviews with witnesses might otherwise have had, that protection would have been lost when the investigator testified about those interviews. With this I agree also. It seems to me more sensible, however, to decide what protection these notes had in the first place before reaching the 'waiver' issue. Accordingly, and because I do not believe that the work-product ***243** doctrine of Hickman [redacted] Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), can be extended wholesale from its historic role as a limitation on the nonevidentiary material which may be the subject of pretrial discovery to an unprecedented role as a limitation on the trial judge's power to compel production of evidentiary matter at trial, I add the following.

I

Up until now the work-product doctrine of Hickman [redacted] Taylor, supra, has been viewed almost exclusively as a limitation on the ability of a party to obtain pretrial discovery. It has not been viewed as a 'limitation on the trial court's broad discretion as to evidentiary questions at trial.' Ante, at 2169. The problem discussed in Hickman [redacted] Taylor arose precisely because, in addition to accelerating the time when a party could obtain evidentiary matter from his adversary,[FN1] the new Federal Rules of Civil Procedure greatly expanded the nature of the material subject to pretrial disclosure.[FN2] ***244** Under the Rules, a ****2173** party was, for the first time, entitled to know in advance his opponent's evidence and was entitled to obtain from his opponent nonprivileged 'information as to the existence or whereabouts of facts' relevant to a case even though the 'information' was not itself evidentiary. Hickman [redacted] Taylor, supra, 329 U.S., at 501, 67 S.Ct., at 389. Utilizing these Rules, the plaintiff in Hickman [redacted] Taylor sought discovery of statements obtained by defense counsel from witnesses to the events relevant to the lawsuit, not for evidentiary use but only 'to help prepare himself to examine witnesses and to make sure that he ha(d) overlooked nothing.' 329 U.S., at 513, 67 S.Ct., at 395 (emphasis added). In concluding that these statements should not be produced, the Court treated the matter entirely as one involving the plaintiff's entitlement to pretrial discovery under the new Federal Rules,[FN3] and carefully limited its opinion accordingly. The relevant Rule in the Court's view, Rule 26, on its face required production of the witness statements unless they were privileged. Nonetheless, the Court expressly stated that the request for witness statements was to be denied 'not because the subject matter is privileged' (although noting that a work-product 'privilege' applies in England, 329 U.S., at 510, 67 S.Ct., at 393) as that concept was used in the Rules, but because the request 'falls outside the arena of discovery.' Id., at 510, 67 S.Ct., at 393 (emphasis added). The Court stated that it is essential that a lawyer work with a certain degree of privacy, and concluded that the effect of giving one lawyer's work (particularly his strategy, legal theories,

329 U.S., at 515, 67 S.Ct., at 395.[FN4]

FN4. Mr. Justice Jackson also emphasized that the witness statements involved in Hickman [redacted] Taylor were neither evidence nor privileged. Id., at 516, 67 S.Ct., at 396. Indeed, most of the material described by the Court as falling under the work-product umbrella does not qualify as evidence. A lawyer's mental impressions are almost never evidence and out-of-court statements of witnesses are generally inadmissible hearsay. Such statements become evidence only when the witness testifies at trial, and are then usually impeachment evidence only. This case, of course, involves a situation in which the relevant witness was to testify and thus presents the question-not involved in Hickman [redacted] Taylor-whether prior statements should be disclosed under the trial judge's power over evidentiary matters at trial.

***246 **2174** Since Hickman [redacted] Taylor, supra, Congress, the cases, and the commentators have uniformly continued to view the 'work product' doctrine solely as a limitation on pretrial discovery and not as a qualified evidentiary privilege. In 1970, Congress became involved with the problem for the first time in the civil area. It did so solely by accepting a proposed amendment to Fed.Rule Civ.Proc. 26, which incorporated much of what the Court held in Hickman [redacted] Taylor, supra, with respect to pretrial discovery. See Advisory Committee's explanatory statement, 28 U.S.C. App., p. 7778; 48 F.R.D. 487. In the criminal area, Congress has enacted 18 U.S.C. s 3500 and accepted Fed.Rule Crim.Proc. 16(c). The former prevents pretrial discovery of witness statements from the Government; the latter prevents pretrial discovery of witness statements from the defense. Neither limits the power of the trial court to order production as evidence of prior statements of witnesses who have testified at trial.[FN5]

FN5. In n. 13 of its opinion, the Court cites Fed.Rule Crim.Proc. 16(c), as containing the work-product rule. In n. 10, the Court correctly notes that Rule 16(c) is not 'directed to the court's control of evidentiary questions arising at trial.' It seems to me that this supplies a better ground for the Court's decision that 'waiver.'

With the exception of materials of the type discussed in Part II, infra, research has uncovered no application of the work-product rule in the lower courts since Hickman to prevent production of evidence-impeaching or ***247** otherwise-at trial;[FN6] and there are several examples of cases rejecting such an approach.[FN7]

FN6. The majority does cite one case, In re Terkeltoub, 256 F.Supp. 683 (SDNY 1966), in which the court referred to the work-product doctrine in preventing the Government from inquiring of a lawyer before the grand jury whether he had participated in suborning perjury of a prospective witness while preparing a criminal case for trial. In any event, a grand jury investigation is in some respects similar to pretrial discovery. Compare In re Grand Jury Proceedings (Duffy [redacted] United States), 473 F.2d 840 (CA8 1973), with Schwimmer [redacted] United States, 232 F.2d 855 (CA8), cert. denied, 352 U.S. 833, 77 S.Ct. 48, 1

made by its witnesses on the same subject matter as their testimony. The Governmentargued, ***249** inter alia, that production would violate the "legitimate interest that each party-including the Government-has in safeguarding the privacy of its files." 353 U.S., at 670, 77 S.Ct., at 1014. The Court held against the Government. The Court said that to deny disclosure of prior statements which might be used to impeach the witnesses was to 'deny the accused evidence relevant and material to his defense,' id., at 667, 77 S.Ct., at 1013 (emphasis added). Also rejected as unrealistic was any rule which would require the defendant to demonstrate the impeachment value of the prior statements before disclosure, [FN8] and the Court held that entitlement to disclosure for use in cross-examination is 'established when the reports are shown to relate to the testimony of the witness.' Id., at 669, 77 S.Ct., at 1014. Thus, not only did the Court reject the notion that there was a 'work product' limitation on the trial judge's discretion to order production of evidentiary matter at trial, but it was affirmatively held that prior statements of a witness on the subject of his testimony are the kind of evidentiary matter to which an adversary is entitled.

> FN8. The Court in Jencks quoted the language of Mr. Chief Justice Marshall in United State [redacted]. Burr, 25 Fed.Cas., No. 14,694, pp. 187, 191 (Va.1807):
>
> "Now, if a paper be in possession of the opposite party, what statement of its contents or applicability can be expected from the person who claims its production, he not precisely knowing its contents?" 353 U.S., at 668 n. 12, 77 S.Ct., at 1013.

Indeed, even in the pretrial discovery area in which the work-product rule does apply, work-product notions have been thought insufficient to prevent discovery of evidentiary and impeachment material. In Hickman [redacted] Taylor, 329 U.S., at 511, 67 S.Ct., at 394, the Court stated:

'We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and nonprivileged***250** ****2176** facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration.' (Emphasis added.)

Mr. Justice Jackson, in concurring, was even more explicit on this point. See supra, at 2173. Pursuant to this language, the lower courts have ordered evidence to be turned over pretrial even when it came into being as a result of the adversary's efforts in preparation for trial.[FN9] A member of a defense team who witnesses an out-of-court statement of someone who later testifies at trial in a contradictory fashion becomes at that moment a witnesss to a relevant and admissible event, and the cases cited above would dictate disclosure of any reports he ***251** may have written about the event. [FN10] Since prior statements are inadmissible hearsay until the witness testifies, there is no occasion for ordering reports of such statements produced as evidence pretrial. However, some courts have ordered witness statements produced pretrial in the likelihood that they will become

of his case. We need not, however, undertake here to delineate the scope of the doctrine at trial, for in this instance it is clear that the defense waived such right as may have existed to invoke its protections.' Ante, at 2170.

> As noted above, the important question is not when the document in issue is created or even when it is to be produced. The important question is whether the document is sought for evidentiary or impeachment purposes or whether it is sought for preparation purposes only. Of course, a party should not be able to discover his opponent's legal memoranda or statements of witnesses not called whether his request is at trial or before trial. Insofar as such a request is made under the applicable discovery rules, it is within the rule of Hickman [redacted]. Taylor even though made at trial. Insofar as the request seeks to invoke the trial judge's discretion over evidentiary matters at trial, the rule of Hickman [redacted]. Taylor is unnecessary, since no one could ever suggest that legal memoranda or hearsay statements are evidence. If this is all the majority means by the above-quoted language, I agree.

***252 **2177** II

In one of its aspects, the rule of Hickman [redacted]. Taylor, supra, has application to evidentiary requests at trial. Both the majority and the concurring opinions in Hickman [redacted]. Taylor were at pains to distinguish between production of statements written by the witness and in the possession of the lawyer, and those statements which were made orally by the witness and written down by the lawyer. Production and use of oral statements written down by the lawyer would create a substantial risk that the lawyer would have to testify.[FN13] The majority said that this would 'make the attorney much less an officer ***253** of the court and much more an ordinary witness.' 329 U.S. at 513, 67 S.Ct., at 394. Mr. Justice Jackson, in concurring, stated:

> FN13. If the witness does not acknowledge making an inconsistent statement to the lawyer-even though the lawyer recorded it-the cross-examiner may not offer the document in evidence without at least calling the lawyer as a witness to authenticate the document and otherwise testify to the prior statement.

'Every lawyer dislikes to take the witness stand and will do so only for grave reasons. This is partly because is is not his role; he is almost invariably a poor witness. But he steps out of professional character to do it. He regrets it; the profession discourages it. But the practice advocated here is one which would force him to be a witness, not as to what he has seen or done but as to other witnesses' stories, and not because he wants to do so but in self-defense.' Id., at 517, 67 S.Ct., at 396.

The lower courts, too, have frowned on any practice under which an attorney who tries a case also testifies as a witness, and trial attorneys have been permitted to testify only in certain circumstances.[FN14]

> FN14. United States [redacted]. Porter, 139 U.S.App.D.C. 19, 429 [redacted] F.2d 203 (1970); United States [redacted]. Fiorillo, 376 F.2d 180 (CA2 1967); Gajewski [redacted]. United States, 321 F.2d 261 (CA8 1963), cert. den., 375 U.S. 968, 84 S.Ct. 486, 11 L.Ed.2d 416 (1964); United States [redacted]. [redacted], 476 F.2d 733 (CA3 1973); Travel-

> sensible to treat preparation by an attorney and an investigator alike. However, the policy against lawyers testifying applies only to the lawyer who tries the case.

U.S.Cal. 1975.
U.S. v. Nobles
422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 141, 20 Fed.R.Serv.2d 547

END OF DOCUMENT

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 08/14/2007

COURTNEY WILD was interviewed in West Palm Beach, Florida, regarding a federal investigation involving the sexual exploitation of minors. After being advised of the identity of the interviewing agents and the nature of the interview, WILD provided the following information:

In 2003 or 2004 WILD was introduced to JEFFREY EPSTEIN for the purpose of providing him with personal massages. WILD was approached at a party by a female she believed was named CHARLISE. She described the female as having [illegible] and taller. The female was later [illegible]IO. ANDRIANO told WILD and WILD's [illegible]y could make money by providing massag[illegible] WILD that she could provide the mass[illegible]f. WILD, who was fifteen years ol[illegible] to turning sixteen when she first me[illegible]LD's first contact with EPSTEIN, she [illegible]rned eighteen.

ANDRIAN[illegible]'s residence in Palm Beach by taxi. Ai[illegible]ne. Once at the residence, ANDRIA[illegible] entered the room wearing only a rob[illegible]he robe, both ANDRIANO and WILD [illegible]e. Both ANDRIANO and WILD had remov[illegible] only in their underwear. EPSTEI[illegible]ce alone with WILD, EPSTEIN began to ma[illegible]able. After EPSTEIN climaxed th[illegible]eved that ANDRIANO had mentioned EPSTE[illegible] during the massage but she was still very surp[illegible] when he masturbated. EPSTEIN paid WILD $200.00. EPSTEIN did not touch WILD during that massage. WILD departed EPSTEIN's residence with two men that worked for EPSTEIN. They drove WILD to a Shell Gas Station located near Okeechobee Boulevard and the Florida Turnpike.

Previously provided to Cassell + Edwards

These are elsewhere in file

Prior to departing the residence, WILD provided her telephone number to one of EPSTEIN's assistants, ELEJANDRA (PHONETIC). WILD described her as a very pretty Hispanic female in her early twenties, with long brown hair, and approximately 5'5" to 5'6" tall. WILD stated that SARAH KELLEN, another of EPSTEIN's assistants, or EPSTEIN would usually contact her. KELLEN would telephone and ask if she was available or if she had any other

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Investigation on 08/07/2007 at West Palm Beach, Florida

File # 31E-MM-108062 Date dictated 08/07/2007

by SA E. Nesbitt Kuyrkendall
SA Jason R. Richards

girls she could bring. When EPSTEIN telephoned, he usually asked for WILD to come over. According to WILD, EPSTEIN's house telephone number began with the digits 655. She would call sometimes and leave a message. WILD stated that when they telephoned her they would inform her of when they would be coming back to town and if she might have anyone new. WILD did not believe that EPSTEIN ever really liked her.

WILD traveled to the EPSTEIN's residence during 2003 and 2004 over twenty five times. WILD believed that she provided EPSTEIN with approximately 10-15 massages. EPSTEIN initially started out touching WILD's breasts but gradually the massages became more sexual. EPSTEIN would instruct WILD on how and what to do during the massages. He would request WILD to rub his chest and nipples. WILD stated that on approximately two occasions, EPSTEIN asked that WILD remove her underwear and provide the massage nude. WILD complied. WILD stated that EPSTEIN would make her feel that she had the option to do what she wanted.

During one massage, WILD stated that she had been giving EPSTEIN a massage for approximately 30-40 minutes when instead of EPSTEIN turning over to masturbate, EPSTEIN brought another female into the massage area. WILD described the female as a beautiful blonde girl, a "Cameron Diaz" type, 19 years of age, bright blue eyes, and speaking with an accent. EPSTEIN had WILD straddle the female on the massage table. EPSTEIN wanted WILD to touch the females breast. According to WILD, EPSTEIN "pleasured" the female while WILD was straddled on top of the female. WILD stated she could hear what she believed to be a vibrator. WILD said for EPSTEIN it was all about pleasuring the female. After the female climaxed, EPSTEIN patted WILD on the shoulder and she removed herself from the table. The female got up from the table and went into the spa/sauna. EPSTEIN commented to WILD that in a few minutes the female would realize what had just happened to her. WILD received $200.00.

WILD advised the interviewing agents that EPSTEIN had used a back massager on her vagina. EPSTEIN asked her first if he could use the massager on her. WILD stated that she had held her breath when EPSTEIN used the back massager on her. WILD stated that at no time during any of the massages had EPSTEIN caused her to climax.

During another massage, WILD believed by this time she was seventeen, EPSTEIN placed his hand on WILD's vagina, touching

WILD's clitoris. WILD was uncomfortable and told him to stop. EPSTEIN complied. WILD stated that the incident freaked her out. WILD stated that EPSTEIN was upset because she was upset. WILD never return to the residence. WILD stated that she did not deal with EPSTEIN anymore after that incident.

EPSTEIN gave both WILD and MILLER each a book entitled "Massage for Dummies". They received the books on the same visit. EPSTEIN also commented how strong WILD's hands were when it came to her providing his massages.

On another occasion, WILD mentioned to EPSTEIN that she was looking at a car, a Toyota Corolla. EPSTEIN provided WILD with $600.00 - $700.00. WILD stated that EPSTEIN gave her the money after the incident with the other female.

According to WILD, EPSTEIN would ask her to bring him other girls. WILD, who started dancing at strip clubs when she was 16, brought girls from the club as well as from other sources. WILD stated she brought girls from fifteen years of age to twenty-five years of age. WILD stated that EPSTEIN would get frustrated with her if she did not have new females for him. On one instance, EPSTEIN hung up on her because she could not provide him with anyone new. WILD stated that EPSTEIN's preference was short, little, white girls. WILD stated that EPSTEIN was upset when one of the other girls brought a black girl. WILD stated that EPSTEIN did not want black girls or girls with tatoos.

WILD stated that one of the girls she stayed with on occasion, AMY FOREMAN, also started providing EPSTEIN with massages. A telephone number for FOREMAN was (561)718-1924. WILD said that her family resides in Wellington, Florida, possibly Crestwood. WILD also stayed with JACLYN REGOLI during this same time period. However, REGOLI never went to EPSTEIN's house or provided him with massages. REGOLI has a Yacht Club address.

Another girl that WILD had taken to EPSTEIN's residence was LAUREN Last Name Unknown(LNU). According to WILD, EPSTEIN liked LAUREN LNU a lot. WILD said that she was never a favorite of EPSTEIN. EPSTEIN offered WILD $300.00 to bring LAUREN LNU. LAUREN LNU was a couple years younger than WILD. WILD believed that she was either 16 or 17 when she first went to EPSTEIN's residence. WILD said that LAUREN LNU went 2-3 times but that she did not want any part of it after that. WILD believes she could identify LAUREN LNU if she saw her photograph. WILD also stated that LAUREN LNU at

one time attended PALM BEACH CENTRAL HIGH SCHOOL. WILD also believed that they had met through a group of friends while attending PACE - a dropout prevention school.

WILD mentioned another girl by the name of COURTNEY LANGLEY. EPSTEIN distinguished the two "COURTNEYS" by referring to LANGLEY as COURTNEY ICE CREAM. LANGLEY worked at an ice cream shop. WILD stated that she did not like LANGLEY and that LANGLEY was a storyteller and a bad liar. WILD stated that LANGLEY never really wanted to go to EPSTEIN's residence but she went anyway.

WILD said that she had not taken a good look at EPSTEIN's penis. WILD explained that it seemed like he would always try and hide his penis. WILD stated that EPSTEIN never asked her for sex.

WILD started dancing when she was sixteen at PLATINUM SHOWGIRLS. The owner, MATT BARROW, let her dance. WILD has also worked at CURVES CABARET located off of Old Boynton in Boynton Beach, Florida.

WILD used illegal drugs during the years she provided EPSTEIN with massages. WILD said that EPSTEIN tried to provide her with advice regarding controlled substances.

WILD stated that she met with EPSTEIN's attorneys, BOB MEYERS and a unidentified female(UF), at the ALE HOUSE RESTAURANT. WILD met with them after she contacted KELLEN, who confirmed that they were really working for EPSTEIN. WILD stated that KELLEN also talked of her twin boys and stated that she was living in Manhattan. WILD found out that MEYERS and the UF are employed by RHM INVESTIGATIONS. They asked a lot of questions. They specifically asked about LANGLEY and a GINA LNU. WILD reiterated her dislike for LANGLEY.

WILD also informed the interviewing agents that she had spoken to MILLER she believed before the fourth of July. MILLER told WILD that she had met with investigators and that they had videoed her.

WILD confirmed her association to the following telephone numbers:

Old cellular number - (561)856-2617
Possibly an old cellular number - (561)503-0858
REGOLI's telephone number - (561)202-0188

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 02/08/2008

On Thursday, January 31, 2008, COURTNEY WILD met with Assistant United States Attorney MARIE VILLAFANA, UNITED STATES ATTORNEY'S OFFICE (USAO) and Attorney MYESHA K. BRADEN, UNITED STATES DEPARTMENT OF JUSTICE(DOJ), CRIMINAL DIVISION. Also present at the meeting were Special Agents E. NESBITT KUYRKENDALL and JASON R. RICHARDS, FEDERAL BUREAU OF INVESTIGATION. The meeting was arranged pursuant to a federal investigation regarding the sexual exploitation of minors. During the course of the meeting, WILD provided the following additional or clarifying information not previously documented in earlier FD-302s:

JEFFREY EPSTEIN and his assistants, SARAH and ADRIANA(identified as SARAH KELLEN and ADRIANA MUCINSKA) would contact WILD to set up appointments for EPSTEIN's massages. According to WILD, MUCINSKA would call and say that EPSTEIN was on a flight and inquire about scheduling work for WILD.

Life was not going well for WILD during the time she was providing EPSTEIN with massages. WILD was buying and taking drugs, i.e. Xanax, Lorcets, and Percosets. WILD said that she stayed on pills. WILD explained that she wanted to feel numb. WILD stopped attending school at age fifteen. Her parents were addicted to crack and cocaine. Prior to her parent's drug use, WILD was in the band, a cheerleader, and a straight "A" student. WILD played the trumpet for the school band. When her parent's drug habits got bad, things went downhill, they lost everything.

WILD became a dancer the day before her sixteenth birthday at PLATINUM SHOWGIRLS. She worked there for six months, up until the employer found out she was underage. Later, WILD, worked for PALATINUM GOLD which she did for 6 months. WILD stopped seeing EPSTEIN during that time.

WILD stated that she brought up to twenty, twenty-five, or thirty different girls. WILD said all of the girls but maybe ten of them were underage. Some of the females WILD brought for EPSTEIN were dancers. WILD said that EPSTEIN did not care for all of the girls she brought to him. WILD explained that EPSTEIN did not care for some of the dancers, the older females, and the females with tattoos.

Investigation on 01/31/2008 at West Palm Beach, Florida

File # 31E-MM-108062 Date dictated 01/31/2008

by SA E. Nesbitt Kuyrkendall
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WILD said that during the massages EPSTEIN would push further and further regarding the sexual activity. According to WILD, EPSTEIN never asked, "is this okay," he would just see how far one would let him go.

WILD recalled seeing sculptures of naked women and lots of pictures of kids in the library.

WILD stated that everybody thought Epstein was a neurologist.

WILD also stated that KELLEN has twin boys.

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 10/04/2007

SHAWNA LANE RIVERA, date of birth 06/17/1988, Social Security Account Number 593-70-9393, telephone number (561)689-4717, was contacted telephonically regarding a federal investigation involving the sexual exploitation of minors. After being advised of the identity of the interviewing agent and the nature of the interview, RIVERA stated that she would not provide any information regarding JEFFREY EPSTEIN. The interviewing agent provided RIVERA with FBI contact information. RIVERA was informed to contact the FBI should she decide to cooperate with authorities.

It should be noted that RIVERA had an active warrant with the State of Florida for failure to appear regarding an arrest for shoplifting.

Investigation on 10/02/2007 at West Palm Beach, Florida (telephonically)

File # 31E-MM-108062 Date dictated 10/02/2007

by SA E. Nesbitt Kuyrkendall

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 05/30/2008

Pursuant to a federal investigation regarding the sexual exploitation of minors, Shawna Lane Rivera was interviewed by the Federal Bureau of Investigation (FBI). After being advised of the identity of the interviewing agents and purpose of the interview, Rivera voluntarily provided the following information:

Rivera met Jeffrey Epstein when she was 14 or 15 years old. Rivera repeated eighth grade several times and was attending Jeaga Middle School during the time period she met Epstein. She estimated that she went to Epstein's residence approximately 25 times from the age of 14 or 15 until the age of 16 or 17. Rivera was introduced to Epstein by her friend Tatum Miller. Rivera met Miller at a middle school in Jupiter, Florida, but they did not become friends until later when they lived near each other in West Palm Beach, Florida. While talking to each other at the Sticks and Stones Bar, now known as Victory Billiards, Miller asked Rivera if she wanted to give a guy a massage and make easy money. Rivera declined Miller's initial invitation but later went to Epstein's Palm Beach residence with Miller. Miller told Rivera that she would have to get naked during the massage and that Epstein would touch her.

Rivera first visited Epstein's residence by traveling there by taxi cab with Miller. Rivera believed they went to Epstein's residence during the summer. Rivera and Miller were led by Sarah Last Name Unknown (LNU), upstairs, through a bedroom and into an area that had two showers. There were nude pictures throughout the residence. Rivera noticed there were no faces shown on the nude pictures at the residence. Epstein walked into the room a short time later wearing a towel. Miller began removing her clothes and Epstein told Rivera, "You can undress." Miller and Rivera were both naked and began massaging Epstein together. Miller later left the room and Epstein gave her $200.00. Rivera stated that when Miller left the room it seemed planned. Rivera believed Miller was given the money because she brought Rivera to Epstein. When Rivera was alone with Epstein, he requested her to rub his chest and squeeze his nipples as he masturbated to ejaculation. Epstein touched Rivera's chest and stomach area as he masturbated. Epstein got in the shower after he ejaculated. Rivera was paid $200.00 by Epstein and he told her he had fun.

Investigation on 05/28/2008 at West Palm Beach, FL

File # 31E-MM-108062 Date dictated 05/30/2008

by SA E. Nesbitt Kuyrkendall
SA Jason R. Richards

Epstein asked for her telephone number and she wrote it down on a notepad that had his name printed on it.

During their conversation, Epstein asked Rivera who she lived with, if she had a boyfriend and he asked her age. Miller silently mouthed to Rivera, "don't lie," when Epstein asked Rivera's age. Rivera told Epstein her true age which she believed was 14 or 15. At a later contact, Epstein asked Rivera about her birthday. Rivera told Epstein she was 16, which was about a year older than her true age. Epstein replied by telling her it was ok and he did not care how old she was. Epstein told Rivera that he did not like girls that were older than 18 years old.

Epstein told Rivera that when he first saw Miller he really liked her and that he "fucked her." Epstein told Rivera that he no longer wanted Miller to come to his residence because she was pregnant. Miller brought many other girls to Epstein including Rivera's cousin, Amanda Marsh. Marsh went to Epstein's residence once when she was approximately 20 years old. Epstein did not like her and did not want her brought again. Rivera added that Marsh was a heavy drug user. Miller also introduced Virginia Last Name Unknown (LNU), aka Jenny to Epstein. Virginia LNU was younger than Rivera and visited Epstein's residence one time. Virginia LNU had a Spanish last name and was described as short with long brown hair, freckles and light colored eyes. Virginia LNU attended Okeeheelee Middle School. Virginia LNU went to Epstein's residence prior to Rivera's first contact with him. During one of their conversations, Epstein asked Rivera, "Do you know that girl Jenny that Tatum brought?" At the conclusion of the interview, Rivera directed the interviewing agents to Virginia LNU's residence, 2319 Avenue Barcelona Este, located in the Tavares Cove trailer park.

Rivera was usually paid $200.00 to $300.00 for the sessions with Epstein. She was given $100.00 one time for no reason. Rivera was usually contacted telephonically by Sarah LNU to make arrangements to go to Epstein's residence. Sarah LNU would call a day or two ahead of their scheduled arrival in Palm Beach. Epstein also called Rivera occasionally from his Palm Beach residence. Another female, named Natasha, Natalia or Nadia LNU, who was described as tall with straight brown hair and having an unknown accent, also set appointments for Rivera to be with Epstein. Sometimes Epstein's massage equipment was already in place when Rivera arrived at Epstein's residence and other times

she had to get the massage table out of a closet and lotions out of a dresser drawer.

During one of Rivera's visits to Epstein's residence, Epstein offered to pay her $400.00 for oral sex or $500 to $600 for sexual intercourse, Rivera declined both. Rivera also declined a later request by Epstein to have sexual intercourse. Epstein masturbated all but one or two of the occasions Rivera was with him.

Rivera did not engage in oral sex or sexual intercourse with Epstein. Rivera advised that Epstein had fondled her breasts and legs and digitally penetrated her vagina. Epstein also used a white vibrating device directly on her vagina during one of her visits. Epstein asked Rivera if she liked it when he touched her. Rivera has touched Epstein's penis and described it as bigger at the top than at the bottom. Rivera also stated Epstein has a hairy chest.

Rivera traveled to Epstein's residence by herself after her first meeting with Epstein. She primarily traveled to the residence by taxi. Epstein, Sarah LNU or the aforementioned girl with the unknown accent paid Rivera's taxi cab fares.

Rivera was aware that her friend, Courtney Wild, had been to Epstein's residence. Wild previously lived with Rivera at Rivera's grandmother's house. Courtney went to Epstein's residence prior to Rivera's first contact with him. Wild was also friends with Miller. Rivera advised that she met with private investigators for Epstein's attorneys and that the same investigators had contacted Wild. The private investigators inquired about Rivera's age when she was with Epstein and how much money she was paid by Epstein. They also asked Rivera about her drug use. The private investigators revisited Rivera a few moths ago and she asked them to leave. Rivera has also observed them driving by her residence in a sport utility vehicle.

Rivera was a marijuana user but she did not use drugs during her visits to Epstein's residence. Rivera did not use Xanax and cocaine until later in her life. At age 17, Rivera crashed her grandmother's car and her grandmother pressed charges. Rivera was ordered to a drug program at Milton Girls Juvenile Residential Facility in Milton, Florida. Rivera stated she was in the drug program for 5 months, one week and 3 days.

Epstein offered to pay an extra $100.00 to Rivera if she brought additional girls to him. Epstein asked Rivera to provide a massage to Sarah LNU but the massage never took place.

Rivera advised that her former home telephone number was 561-686-6693 and her former cellular telephone number was 561-352-4951.

Rivera believes Epstein should be prosecuted for his actions.

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 08/14/2007

COURTNEY WILD was interviewed in West Palm Beach, Florida, regarding a federal investigation involving the sexual exploitation of minors. After being advised of the identity of the interviewing agents and the nature of the interview, WILD provided the following information:

In 2003 or 2004 WILD was introduced to JEFFREY EPSTEIN for the purpose of providing him with personal massages. WILD was approached at a party by a female she believed was named CHARLISE. She described the female as having brown hair and taller. The female was later identified as CAROLYN ANDRIANO. ANDRIANO told WILD and WILD's friend, TATUM MILLER, that they could make money by providing massages to EPSTEIN. ANDRIANO told WILD that she could provide the massages with her clothes on or off. WILD, who was fifteen years old, believed that she was close to turning sixteen when she first met EPSTEIN. However, during WILD's first contact with EPSTEIN, she told him that she had just turned eighteen.

ANDRIANO and WILD traveled to EPSTEIN's residence in Palm Beach by taxi. ANDRIANO was pregnant at the time. Once at the residence, ANDRIANO took WILD upstairs. EPSTEIN entered the room wearing only a robe. Once EPSTEIN had removed the robe, both ANDRIANO and WILD provided EPSTEIN with a massage. Both ANDRIANO and WILD had removed their clothing and remained only in their underwear. EPSTEIN asked ANDRIANO to leave. Once alone with WILD, EPSTEIN began to masturbate. WILD was uncomfortable. After EPSTEIN climaxed the massage was over. WILD believed that ANDRIANO had mentioned EPSTEIN might masturbate during the massage but she was still very surprised when he masturbated. EPSTEIN paid WILD $200.00. EPSTEIN did not touch WILD during that massage. WILD departed EPSTEIN's residence with two men that worked for EPSTEIN. They drove WILD to a Shell Gas Station located near Okeechobee Boulevard and the Florida Turnpike.

Prior to departing the residence, WILD provided her telephone number to one of EPSTEIN's assistants, ELEJANDRA (PHONETIC). WILD described her as a very pretty Hispanic female in her early twenties, with long brown hair, and approximately 5'5" to 5'6" tall. WILD stated that SARAH KELLEN, another of EPSTEIN's assistants, or EPSTEIN would usually contact her. KELLEN would telephone and ask if she was available or if she had any other

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Investigation on 08/07/2007 at West Palm Beach, Florida

File # 31E-MM-108062 Date dictated 08/07/2007

by SA E. Nesbitt Kuyrkendall
SA Jason R. Richards

girls she could bring. When EPSTEIN telephoned, he usually asked for WILD to come over. According to WILD, EPSTEIN's house telephone number began with the digits 655. She would call sometimes and leave a message. WILD stated that when they telephoned her they would inform her of when they would be coming back to town and if she might have anyone new. WILD did not believe that EPSTEIN ever really liked her.

WILD traveled to the EPSTEIN's residence during 2003 and 2004 over twenty five times. WILD believed that she provided EPSTEIN with approximately 10-15 massages. EPSTEIN initially started out touching WILD's breasts but gradually the massages became more sexual. EPSTEIN would instruct WILD on how and what to do during the massages. He would request WILD to rub his chest and nipples. WILD stated that on approximately two occasions, EPSTEIN asked that WILD remove her underwear and provide the massage nude. WILD complied. WILD stated that EPSTEIN would make her feel that she had the option to do what she wanted.

During one massage, WILD stated that she had been giving EPSTEIN a massage for approximately 30-40 minutes when instead of EPSTEIN turning over to masturbate, EPSTEIN brought another female into the massage area. WILD described the female as a beautiful blonde girl, a "Cameron Diaz" type, 19 years of age, bright blue eyes, and speaking with an accent. EPSTEIN had WILD straddle the female on the massage table. EPSTEIN wanted WILD to touch the females breast. According to WILD, EPSTEIN "pleasured" the female while WILD was straddled on top of the female. WILD stated she could hear what she believed to be a vibrator. WILD said for EPSTEIN it was all about pleasuring the female. After the female climaxed, EPSTEIN patted WILD on the shoulder and she removed herself from the table. The female got up from the table and went into the spa/sauna. EPSTEIN commented to WILD that in a few minutes the female would realize what had just happened to her. WILD received $200.00.

WILD advised the interviewing agents that EPSTEIN had used a back massager on her vagina. EPSTEIN asked her first if he could use the massager on her. WILD stated that she had held her breath when EPSTEIN used the back massager on her. WILD stated that at no time during any of the massages had EPSTEIN caused her to climax.

During another massage, WILD believed by this time she was seventeen, EPSTEIN placed his hand on WILD's vagina, touching

WILD's clitoris. WILD was uncomfortable and told him to stop. EPSTEIN complied. WILD stated that the incident freaked her out. WILD stated that EPSTEIN was upset because she was upset. WILD never return to the residence. WILD stated that she did not deal with EPSTEIN anymore after that incident.

EPSTEIN gave both WILD and MILLER each a book entitled "Massage for Dummies". They received the books on the same visit. EPSTEIN also commented how strong WILD's hands were when it came to her providing his massages.

On another occasion, WILD mentioned to EPSTEIN that she was looking at a car, a Toyota Corolla. EPSTEIN provided WILD with $600.00 - $700.00. WILD stated that EPSTEIN gave her the money after the incident with the other female.

According to WILD, EPSTEIN would ask her to bring him other girls. WILD, who started dancing at strip clubs when she was 16, brought girls from the club as well as from other sources. WILD stated she brought girls from fifteen years of age to twenty-five years of age. WILD stated that EPSTEIN would get frustrated with her if she did not have new females for him. On one instance, EPSTEIN hung up on her because she could not provide him with anyone new. WILD stated that EPSTEIN's preference was short, little, white girls. WILD stated that EPSTEIN was upset when one of the other girls brought a black girl. WILD stated that EPSTEIN did not want black girls or girls with tatoos.

WILD stated that one of the girls she stayed with on occasion, AMY FOREMAN, also started providing EPSTEIN with massages. A telephone number for FOREMAN was (561)718-1924. WILD said that her family resides in Wellington, Florida, possibly Crestwood. WILD also stayed with JACLYN REGOLI during this same time period. However, REGOLI never went to EPSTEIN's house or provided him with massages. REGOLI has a Yacht Club address.

Another girl that WILD had taken to EPSTEIN's residence was LAUREN Last Name Unknown(LNU). According to WILD, EPSTEIN liked LAUREN LNU a lot. WILD said that she was never a favorite of EPSTEIN. EPSTEIN offered WILD $300.00 to bring LAUREN LNU. LAUREN LNU was a couple years younger than WILD. WILD believed that she was either 16 or 17 when she first went to EPSTEIN's residence. WILD said that LAUREN LNU went 2-3 times but that she did not want any part of it after that. WILD believes she could identify LAUREN LNU if she saw her photograph. WILD also stated that LAUREN LNU at

one time attended PALM BEACH CENTRAL HIGH SCHOOL. WILD also believed that they had met through a group of friends while attending PACE - a dropout prevention school.

WILD mentioned another girl by the name of COURTNEY LANGLEY. EPSTEIN distinguished the two "COURTNEYS" by referring to LANGLEY as COURTNEY ICE CREAM. LANGLEY worked at an ice cream shop. WILD stated that she did not like LANGLEY and that LANGLEY was a storyteller and a bad liar. WILD stated that LANGLEY never really wanted to go to EPSTEIN's residence but she went anyway.

WILD said that she had not taken a good look at EPSTEIN's penis. WILD explained that it seemed like he would always try and hide his penis. WILD stated that EPSTEIN never asked her for sex.

WILD started dancing when she was sixteen at PLATINUM SHOWGIRLS. The owner, MATT BARROW, let her dance. WILD has also worked at CURVES CABARET located off of Old Boynton in Boynton Beach, Florida.

WILD used illegal drugs during the years she provided EPSTEIN with massages. WILD said that EPSTEIN tried to provide her with advice regarding controlled substances.

WILD stated that she met with EPSTEIN's attorneys, BOB MEYERS and a unidentified female(UF), at the ALE HOUSE RESTAURANT. WILD met with them after she contacted KELLEN, who confirmed that they were really working for EPSTEIN. WILD stated that KELLEN also talked of her twin boys and stated that she was living in Manhattan. WILD found out that MEYERS and the UF are employed by RHM INVESTIGATIONS. They asked a lot of questions. They specifically asked about LANGLEY and a GINA LNU. WILD reiterated her dislike for LANGLEY.

WILD also informed the interviewing agents that she had spoken to MILLER she believed before the fourth of July. MILLER told WILD that she had met with investigators and that they had videoed her.

WILD confirmed her association to the following telephone numbers:

Old cellular number - (561)856-2617
Possibly an old cellular number - (561)503-0858
REGOLI's telephone number - (561)202-0188

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 02/08/2008

On Thursday, January 31, 2008, COURTNEY WILD met with Assistant United States Attorney MARIE VILLAFANA, UNITED STATES ATTORNEY'S OFFICE (USAO) and Attorney MYESHA K. BRADEN, UNITED STATES DEPARTMENT OF JUSTICE(DOJ), CRIMINAL DIVISION. Also present at the meeting were Special Agents E. NESBITT KUYRKENDALL and JASON R. RICHARDS, FEDERAL BUREAU OF INVESTIGATION. The meeting was arranged pursuant to a federal investigation regarding the sexual exploitation of minors. During the course of the meeting, WILD provided the following additional or clarifying information not previously documented in earlier FD-302s:

JEFFREY EPSTEIN and his assistants, SARAH and ADRIANA(identified as SARAH KELLEN and ADRIANA MUCINSKA) would contact WILD to set up appointments for EPSTEIN's massages. According to WILD, MUCINSKA would call and say that EPSTEIN was on a flight and inquire about scheduling work for WILD.

Life was not going well for WILD during the time she was providing EPSTEIN with massages. WILD was buying and taking drugs, i.e. Xanax, Lorcets, and Percosets. WILD said that she stayed on pills. WILD explained that she wanted to feel numb. WILD stopped attending school at age fifteen. Her parents were addicted to crack and cocaine. Prior to her parent's drug use, WILD was in the band, a cheerleader, and a straight "A" student. WILD played the trumpet for the school band. When her parent's drug habits got bad, things went downhill, they lost everything.

WILD became a dancer the day before her sixteenth birthday at PLATINUM SHOWGIRLS. She worked there for six months, up until the employer found out she was underage. Later, WILD worked for PALATINUM GOLD which she did for 6 months. WILD stopped seeing EPSTEIN during that time.

WILD stated that she brought up to twenty, twenty-five, or thirty different girls. WILD said all of the girls but maybe ten of them were underage. Some of the females WILD brought for EPSTEIN were dancers. WILD said that EPSTEIN did not care for all of the girls she brought to him. WILD explained that EPSTEIN did not care for some of the dancers, the older females, and the females with tattoos.

Investigation on 01/31/2008 at West Palm Beach, Florida

File # 31E-MM-108062 Date dictated 01/31/2008

by SA E. Nesbitt Kuyrkendall
SA Jason R. Richards

WILD said that during the massages EPSTEIN would push further and further regarding the sexual activity. According to WILD, EPSTEIN never asked, "is this okay," he would just see how far one would let him go.

WILD recalled seeing sculptures of naked women and lots of pictures of kids in the library.

WILD stated that everybody thought Epstein was a neurologist.

WILD also stated that KELLEN has twin boys.

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 10/04/2007

SHAWNA LANE RIVERA, date of birth 06/17/1988, Social Security Account Number 593-70-9393, telephone number (561)689-4717, was contacted telephonically regarding a federal investigation involving the sexual exploitation of minors. After being advised of the identity of the interviewing agent and the nature of the interview, RIVERA stated that she would not provide any information regarding JEFFREY EPSTEIN. The interviewing agent provided RIVERA with FBI contact information. RIVERA was informed to contact the FBI should she decide to cooperate with authorities.

It should be noted that RIVERA had an active warrant with the State of Florida for failure to appear regarding an arrest for shoplifting.

Investigation on 10/02/2007 at West Palm Beach, Florida (telephonically)

File # 31E-MM-108062 Date dictated 10/02/2007

by SA E. Nesbitt Kuyrkendall

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 05/30/2008

Pursuant to a federal investigation regarding the sexual exploitation of minors, Shawna Lane Rivera was interviewed by the Federal Bureau of Investigation (FBI). After being advised of the identity of the interviewing agents and purpose of the interview, Rivera voluntarily provided the following information:

Rivera met Jeffrey Epstein when she was 14 or 15 years old. Rivera repeated eighth grade several times and was attending Jeaga Middle School during the time period she met Epstein. She estimated that she went to Epstein's residence approximately 25 times from the age of 14 or 15 until the age of 16 or 17. Rivera was introduced to Epstein by her friend Tatum Miller. Rivera met Miller at a middle school in Jupiter, Florida, but they did not become friends until later when they lived near each other in West Palm Beach, Florida. While talking to each other at the Sticks and Stones Bar, now known as Victory Billiards, Miller asked Rivera if she wanted to give a guy a massage and make easy money. Rivera declined Miller's initial invitation but later went to Epstein's Palm Beach residence with Miller. Miller told Rivera that she would have to get naked during the massage and that Epstein would touch her.

Rivera first visited Epstein's residence by traveling there by taxi cab with Miller. Rivera believed they went to Epstein's residence during the summer. Rivera and Miller were led by Sarah Last Name Unknown (LNU), upstairs, through a bedroom and into an area that had two showers. There were nude pictures throughout the residence. Rivera noticed there were no faces shown on the nude pictures at the residence. Epstein walked into the room a short time later wearing a towel. Miller began removing her clothes and Epstein told Rivera, "You can undress." Miller and Rivera were both naked and began massaging Epstein together. Miller later left the room and Epstein gave her $200.00. Rivera stated that when Miller left the room it seemed planned. Rivera believed Miller was given the money because she brought Rivera to Epstein. When Rivera was alone with Epstein, he requested her to rub his chest and squeeze his nipples as he masturbated to ejaculation. Epstein touched Rivera's chest and stomach area as he masturbated. Epstein got in the shower after he ejaculated. Rivera was paid $200.00 by Epstein and he told her he had fun.

Investigation on 05/28/2008 at West Palm Beach, FL

File # 31E-MM-108062 Date dictated 05/30/2008

by SA E. Nesbitt Kuyrkendall
SA Jason R. Richards

Epstein asked for her telephone number and she wrote it down on a notepad that had his name printed on it.

During their conversation, Epstein asked Rivera who she lived with, if she had a boyfriend and he asked her age. Miller silently mouthed to Rivera, "don't lie," when Epstein asked Rivera's age. Rivera told Epstein her true age which she believed was 14 or 15. At a later contact, Epstein asked Rivera about her birthday. Rivera told Epstein she was 16, which was about a year older than her true age. Epstein replied by telling her it was ok and he did not care how old she was. Epstein told Rivera that he did not like girls that were older than 18 years old.

Epstein told Rivera that when he first saw Miller he really liked her and that he "fucked her." Epstein told Rivera that he no longer wanted Miller to come to his residence because she was pregnant. Miller brought many other girls to Epstein including Rivera's cousin, Amanda Marsh. Marsh went to Epstein's residence once when she was approximately 20 years old. Epstein did not like her and did not want her brought again. Rivera added that Marsh was a heavy drug user. Miller also introduced Virginia Last Name Unknown (LNU), aka Jenny to Epstein. Virginia LNU was younger than Rivera and visited Epstein's residence one time. Virginia LNU had a Spanish last name and was described as short with long brown hair, freckles and light colored eyes. Virginia LNU attended Okeeheelee Middle School. Virginia LNU went to Epstein's residence prior to Rivera's first contact with him. During one of their conversations, Epstein asked Rivera, "Do you know that girl Jenny that Tatum brought?" At the conclusion of the interview, Rivera directed the interviewing agents to Virginia LNU's residence, 2319 Avenue Barcelona Este, located in the Tavares Cove trailer park.

Rivera was usually paid $200.00 to $300.00 for the sessions with Epstein. She was given $100.00 one time for no reason. Rivera was usually contacted telephonically by Sarah LNU to make arrangements to go to Epstein's residence. Sarah LNU would call a day or two ahead of their scheduled arrival in Palm Beach. Epstein also called Rivera occasionally from his Palm Beach residence. Another female, named Natasha, Natalia or Nadia LNU, who was described as tall with straight brown hair and having an unknown accent, also set appointments for Rivera to be with Epstein. Sometimes Epstein's massage equipment was already in place when Rivera arrived at Epstein's residence and other times

she had to get the massage table out of a closet and lotions out of a dresser drawer.

During one of Rivera's visits to Epstein's residence, Epstein offered to pay her $400.00 for oral sex or $500 to $600 for sexual intercourse, Rivera declined both. Rivera also declined a later request by Epstein to have sexual intercourse. Epstein masturbated all but one or two of the occasions Rivera was with him.

Rivera did not engage in oral sex or sexual intercourse with Epstein. Rivera advised that Epstein had fondled her breasts and legs and digitally penetrated her vagina. Epstein also used a white vibrating device directly on her vagina during one of her visits. Epstein asked Rivera if she liked it when he touched her. Rivera has touched Epstein's penis and described it as bigger at the top than at the bottom. Rivera also stated Epstein has a hairy chest.

Rivera traveled to Epstein's residence by herself after her first meeting with Epstein. She primarily traveled to the residence by taxi. Epstein, Sarah LNU or the aforementioned girl with the unknown accent paid Rivera's taxi cab fares.

Rivera was aware that her friend, Courtney Wild, had been to Epstein's residence. Wild previously lived with Rivera at Rivera's grandmother's house. Courtney went to Epstein's residence prior to Rivera's first contact with him. Wild was also friends with Miller. Rivera advised that she met with private investigators for Epstein's attorneys and that the same investigators had contacted Wild. The private investigators inquired about Rivera's age when she was with Epstein and how much money she was paid by Epstein. They also asked Rivera about her drug use. The private investigators revisited Rivera a few moths ago and she asked them to leave. Rivera has also observed them driving by her residence in a sport utility vehicle.

Rivera was a marijuana user but she did not use drugs during her visits to Epstein's residence. Rivera did not use Xanax and cocaine until later in her life. At age 17, Rivera crashed her grandmother's car and her grandmother pressed charges. Rivera was ordered to a drug program at Milton Girls Juvenile Residential Facility in Milton, Florida. Rivera stated she was in the drug program for 5 months, one week and 3 days.

Epstein offered to pay an extra $100.00 to Rivera if she brought additional girls to him. Epstein asked Rivera to provide a massage to Sarah LNU but the massage never took place.

Rivera advised that her former home telephone number was 561-686-6693 and her former cellular telephone number was 561-352-4951.

Rivera believes Epstein should be prosecuted for his actions.

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 08/14/2007

COURTNEY WILD was interviewed in West Palm Beach, Florida, regarding a federal investigation involving the sexual exploitation of minors. After being advised of the identity of the interviewing agents and the nature of the interview, WILD provided the following information:

In 2003 or 2004 WILD was introduced to JEFFREY EPSTEIN for the purpose of providing him with personal massages. WILD was approached at a party by a female she believed was named CHARLISE. She described the female as having brown hair and taller. The female was later identified as CAROLYN ANDRIANO. ANDRIANO told WILD and WILD's friend, TATUM MILLER, that they could make money by providing massages to EPSTEIN. ANDRIANO told WILD that she could provide the massages with her clothes on or off. WILD, who was fifteen years old, believed that she was close to turning sixteen when she first met EPSTEIN. However, during WILD's first contact with EPSTEIN, she told him that she had just turned eighteen.

ANDRIANO and WILD traveled to EPSTEIN's residence in Palm Beach by taxi. ANDRIANO was pregnant at the time. Once at the residence, ANDRIANO took WILD upstairs. EPSTEIN entered the room wearing only a robe. Once EPSTEIN had removed the robe, both ANDRIANO and WILD provided EPSTEIN with a massage. Both ANDRIANO and WILD had removed their clothing and remained only in their underwear. EPSTEIN asked ANDRIANO to leave. Once alone with WILD, EPSTEIN began to masturbate. WILD was uncomfortable. After EPSTEIN climaxed the massage was over. WILD believed that ANDRIANO had mentioned EPSTEIN might masturbate during the massage but she was still very surprised when he masturbated. EPSTEIN paid WILD $200.00. EPSTEIN did not touch WILD during that massage. WILD departed EPSTEIN's residence with two men that worked for EPSTEIN. They drove WILD to a Shell Gas Station located near Okeechobee Boulevard and the Florida Turnpike.

Prior to departing the residence, WILD provided her telephone number to one of EPSTEIN's assistants, ELEJANDRA (PHONETIC). WILD described her as a very pretty Hispanic female in her early twenties, with long brown hair, and approximately 5'5" to 5'6" tall. WILD stated that SARAH KELLEN, another of EPSTEIN's assistants, or EPSTEIN would usually contact her. KELLEN would telephone and ask if she was available or if she had any other

girls she could bring. When EPSTEIN telephoned, he usually asked for WILD to come over. According to WILD, EPSTEIN's house telephone number began with the digits 655. She would call sometimes and leave a message. WILD stated that when they telephoned her they would inform her of when they would be coming back to town and if she might have anyone new. WILD did not believe that EPSTEIN ever really liked her.

WILD traveled to the EPSTEIN's residence during 2003 and 2004 over twenty five times. WILD believed that she provided EPSTEIN with approximately 10-15 massages. EPSTEIN initially started out touching WILD's breasts but gradually the massages became more sexual. EPSTEIN would instruct WILD on how and what to do during the massages. He would request WILD to rub his chest and nipples. WILD stated that on approximately two occasions, EPSTEIN asked that WILD remove her underwear and provide the massage nude. WILD complied. WILD stated that EPSTEIN would make her feel that she had the option to do what she wanted.

During one massage, WILD stated that she had been giving EPSTEIN a massage for approximately 30-40 minutes when instead of EPSTEIN turning over to masturbate, EPSTEIN brought another female into the massage area. WILD described the female as a beautiful blonde girl, a "Cameron Diaz" type, 19 years of age, bright blue eyes, and speaking with an accent. EPSTEIN had WILD straddle the female on the massage table. EPSTEIN wanted WILD to touch the females breast. According to WILD, EPSTEIN "pleasured" the female while WILD was straddled on top of the female. WILD stated she could hear what she believed to be a vibrator. WILD said for EPSTEIN it was all about pleasuring the female. After the female climaxed, EPSTEIN patted WILD on the shoulder and she removed herself from the table. The female got up from the table and went into the spa/sauna. EPSTEIN commented to WILD that in a few minutes the female would realize what had just happened to her. WILD received $200.00.

WILD advised the interviewing agents that EPSTEIN had used a back massager on her vagina. EPSTEIN asked her first if he could use the massager on her. WILD stated that she had held her breath when EPSTEIN used the back massager on her. WILD stated that at no time during any of the massages had EPSTEIN caused her to climax.

During another massage, WILD believed by this time she was seventeen, EPSTEIN placed his hand on WILD's vagina, touching

WILD's clitoris. WILD was uncomfortable and told him to stop. EPSTEIN complied. WILD stated that the incident freaked her out. WILD stated that EPSTEIN was upset because she was upset. WILD never return to the residence. WILD stated that she did not deal with EPSTEIN anymore after that incident.

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WILD said that she had not taken a good look at EPSTEIN's penis. WILD explained that it seemed like he would always try and hide his penis. WILD stated that EPSTEIN never asked her for sex.

WILD started dancing when she was sixteen at PLATINUM SHOWGIRLS. The owner, MATT BARROW, let her dance. WILD has also worked at CURVES CABARET located off of Old Boynton in Boynton Beach, Florida.

WILD used illegal drugs during the years she provided EPSTEIN with massages. WILD said that EPSTEIN tried to provide her with advice regarding controlled substances.

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WILD also informed the interviewing agents that she had spoken to MILLER she believed before the fourth of July. MILLER told WILD that she had met with investigators and that they had videoed her.

WILD confirmed her association to the following telephone numbers:

Old cellular number - (561)856-2617
Possibly an old cellular number - (561)503-0858
REGOLI's telephone number - (561)202-0188

WILD said that during the massages EPSTEIN would push further and further regarding the sexual activity. According to WILD, EPSTEIN never asked, "is this okay," he would just see how far one would let him go.

WILD recalled seeing sculptures of naked women and lots of pictures of kids in the library.

WILD stated that everybody thought Epstein was a neurologist.

WILD also stated that KELLEN has twin boys.

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 10/04/2007

SHAWNA LANE RIVERA, date of birth 06/17/1988, Social Security Account Number 593-70-9393, telephone number (561)689-4717, was contacted telephonically regarding a federal investigation involving the sexual exploitation of minors. After being advised of the identity of the interviewing agent and the nature of the interview, RIVERA stated that she would not provide any information regarding JEFFREY EPSTEIN. The interviewing agent provided RIVERA with FBI contact information. RIVERA was informed to contact the FBI should she decide to cooperate with authorities.

It should be noted that RIVERA had an active warrant with the State of Florida for failure to appear regarding an arrest for shoplifting.

Investigation on 10/02/2007 at West Palm Beach, Florida (telephonically)

File # 31E-MM-108062 Date dictated 10/02/2007

by SA E. Nesbitt Kuyrkendall

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 05/30/2008

Pursuant to a federal investigation regarding the sexual exploitation of minors, Shawna Lane Rivera was interviewed by the Federal Bureau of Investigation (FBI). After being advised of the identity of the interviewing agents and purpose of the interview, Rivera voluntarily provided the following information:

Rivera met Jeffrey Epstein when she was 14 or 15 years old. Rivera repeated eighth grade several times and was attending Jeaga Middle School during the time period she met Epstein. She estimated that she went to Epstein's residence approximately 25 times from the age of 14 or 15 until the age of 16 or 17. Rivera was introduced to Epstein by her friend Tatum Miller. Rivera met Miller at a middle school in Jupiter, Florida, but they did not become friends until later when they lived near each other in West Palm Beach, Florida. While talking to each other at the Sticks and Stones Bar, now known as Victory Billiards, Miller asked Rivera if she wanted to give a guy a massage and make easy money. Rivera declined Miller's initial invitation but later went to Epstein's Palm Beach residence with Miller. Miller told Rivera that she would have to get naked during the massage and that Epstein would touch her.

Rivera first visited Epstein's residence by traveling there by taxi cab with Miller. Rivera believed they went to Epstein's residence during the summer. Rivera and Miller were led by Sarah Last Name Unknown (LNU), upstairs, through a bedroom and into an area that had two showers. There were nude pictures throughout the residence. Rivera noticed there were no faces shown on the nude pictures at the residence. Epstein walked into the room a short time later wearing a towel. Miller began removing her clothes and Epstein told Rivera, "You can undress." Miller and Rivera were both naked and began massaging Epstein together. Miller later left the room and Epstein gave her $200.00. Rivera stated that when Miller left the room it seemed planned. Rivera believed Miller was given the money because she brought Rivera to Epstein. When Rivera was alone with Epstein, he requested her to rub his chest and squeeze his nipples as he masturbated to ejaculation. Epstein touched Rivera's chest and stomach area as he masturbated. Epstein got in the shower after he ejaculated. Rivera was paid $200.00 by Epstein and he told her he had fun.

Investigation on 05/28/2008 at West Palm Beach, FL

File # 31E-MM-108062 Date dictated 05/30/2008

by SA E. Nesbitt Kuyrkendall
SA Jason R. Richards

Epstein asked for her telephone number and she wrote it down on a notepad that had his name printed on it.

During their conversation, Epstein asked Rivera who she lived with, if she had a boyfriend and he asked her age. Miller silently mouthed to Rivera, "don't lie," when Epstein asked Rivera's age. Rivera told Epstein her true age which she believed was 14 or 15. At a later contact, Epstein asked Rivera about her birthday. Rivera told Epstein she was 16, which was about a year older than her true age. Epstein replied by telling her it was ok and he did not care how old she was. Epstein told Rivera that he did not like girls that were older than 18 years old.

Epstein told Rivera that when he first saw Miller he really liked her and that he "fucked her." Epstein told Rivera that he no longer wanted Miller to come to his residence because she was pregnant. Miller brought many other girls to Epstein including Rivera's cousin, Amanda Marsh. Marsh went to Epstein's residence once when she was approximately 20 years old. Epstein did not like her and did not want her brought again. Rivera added that Marsh was a heavy drug user. Miller also introduced Virginia Last Name Unknown (LNU), aka Jenny to Epstein. Virginia LNU was younger than Rivera and visited Epstein's residence one time. Virginia LNU had a Spanish last name and was described as short with long brown hair, freckles and light colored eyes. Virginia LNU attended Okeeheelee Middle School. Virginia LNU went to Epstein's residence prior to Rivera's first contact with him. During one of their conversations, Epstein asked Rivera, "Do you know that girl Jenny that Tatum brought?" At the conclusion of the interview, Rivera directed the interviewing agents to Virginia LNU's residence, 2319 Avenue Barcelona Este, located in the Tavares Cove trailer park.

Rivera was usually paid $200.00 to $300.00 for the sessions with Epstein. She was given $100.00 one time for no reason. Rivera was usually contacted telephonically by Sarah LNU to make arrangements to go to Epstein's residence. Sarah LNU would call a day or two ahead of their scheduled arrival in Palm Beach. Epstein also called Rivera occasionally from his Palm Beach residence. Another female, named Natasha, Natalia or Nadia LNU, who was described as tall with straight brown hair and having an unknown accent, also set appointments for Rivera to be with Epstein. Sometimes Epstein's massage equipment was already in place when Rivera arrived at Epstein's residence and other times

she had to get the massage table out of a closet and lotions out of a dresser drawer.

During one of Rivera's visits to Epstein's residence, Epstein offered to pay her $400.00 for oral sex or $500 to $600 for sexual intercourse, Rivera declined both. Rivera also declined a later request by Epstein to have sexual intercourse. Epstein masturbated all but one or two of the occasions Rivera was with him.

Rivera did not engage in oral sex or sexual intercourse with Epstein. Rivera advised that Epstein had fondled her breasts and legs and digitally penetrated her vagina. Epstein also used a white vibrating device directly on her vagina during one of her visits. Epstein asked Rivera if she liked it when he touched her. Rivera has touched Epstein's penis and described it as bigger at the top than at the bottom. Rivera also stated Epstein has a hairy chest.

Rivera traveled to Epstein's residence by herself after her first meeting with Epstein. She primarily traveled to the residence by taxi. Epstein, Sarah LNU or the aforementioned girl with the unknown accent paid Rivera's taxi cab fares.

Rivera was aware that her friend, Courtney Wild, had been to Epstein's residence. Wild previously lived with Rivera at Rivera's grandmother's house. Courtney went to Epstein's residence prior to Rivera's first contact with him. Wild was also friends with Miller. Rivera advised that she met with private investigators for Epstein's attorneys and that the same investigators had contacted Wild. The private investigators inquired about Rivera's age when she was with Epstein and how much money she was paid by Epstein. They also asked Rivera about her drug use. The private investigators revisited Rivera a few moths ago and she asked them to leave. Rivera has also observed them driving by her residence in a sport utility vehicle.

Rivera was a marijuana user but she did not use drugs during her visits to Epstein's residence. Rivera did not use Xanax and cocaine until later in her life. At age 17, Rivera crashed her grandmother's car and her grandmother pressed charges. Rivera was ordered to a drug program at Milton Girls Juvenile Residential Facility in Milton, Florida. Rivera stated she was in the drug program for 5 months, one week and 3 days.

Epstein offered to pay an extra $100.00 to Rivera if she brought additional girls to him. Epstein asked Rivera to provide a massage to Sarah LNU but the massage never took place.

Rivera advised that her former home telephone number was 561-686-6693 and her former cellular telephone number was 561-352-4951.

Rivera believes Epstein should be prosecuted for his actions.