New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
Web address: http://www.nylj.com
VOLUME 239—NO. 2 THURSDAY, JANUARY 3, 2008 ALM

HOWARD W. GOLDSTEIN



CORPORATE CRIME

Work Product Privilege And the Grand Jury

Much has been written over the last few years on the subject of the attorney-client and work product privileges and, in particular, whether the government can, in effect, "penalize" a party for not waiving privilege in the context of an ongoing criminal investigation. The controversy has played itself out in both the courts and Congress, with legislation to protect privilege recently passing in the House.

Somewhat lost in all of the controversy, however, is the fact that a grand jury investigation is perhaps the least conducive context in which to raise a privilege claim. A recent Second Circuit decision illustrates this point.

In *In re Grand Jury Subpoena Dated July 6, 2005*,[1] the appellant, a former mortgage broker, was the subject of a grand jury investigation in the Eastern District of New York. Appellant and his attorney met with the prosecution team twice without the benefit of a proffer agreement. At the second meeting, appellant disclosed that, on the advice of his attorney, he had secretly recorded conversations about real estate transactions with another mortgage broker. Not surprisingly, the prosecutor stated that he would issue a grand jury subpoena for the recordings. The appellant's attorney asserted Fifth Amendment, attorney-client and work product privilege claims with respect to the recordings, and the government did not ask appellant any questions about the recorded conversations.

On the government's motion to compel compliance with the subsequently issued grand jury subpoena, Judge Garaufis of the Eastern District of New York rejected the appellant's Fifth Amendment and attorney-client privilege claims. As to the work product claim, the district court directed supplemental briefing. In response, the appellant submitted an ex parte affirmation from his attorney and a brief asserting that the recordings were "opinion" work product. The government conceded that the recordings were work product, but argued that they were only "fact" work product and that they were subject to production because the government had demonstrated "substantial need" and an inability "to obtain equivalent evidence by other means." The district court, noting that the appellant had failed to submit the recordings for in camera review, sustained the government's positions and ordered production of the recordings to the grand jury.

Fact vs. Opinion Work Product

On appeal, the Second Circuit affirmed the district court, beginning its opinion by noting two uncontroversial and, in this instance, case determinative propositions: (1) "the party invoking the privilege bears a heavy burden of establishing its applicability"; and (2) the court of Appeals "reviews the district court's ruling on a work product claim for abuse of discretion."[2] The court then rejected appellant's claim that because the conversations had taken place at his attorney's direction and in accordance with his instructions, and because the topics discussed would reveal his attorney's thought processes, the recordings were "opinion" work product. The court concluded that the appellant's arguments were "'mere[ly] conclusory or ipse dixit assertions'" and, as such, did not satisfy the appellant's "'heavy burden'" of establishing that the recordings in fact disclosed counsel's legal strategies.[3] Critical to the court's determination was the appellant's failure to submit the recordings for in camera review, which "would have permitted the district court, in the first instance, to assess whether disclosure of the materials would have, indeed, revealed counsel's legal strategies," and whether "there were portions of the recording that were entitled to only fact work product protection and portions that were entitled to opinion work product protection."[4] Given this failure, the court concluded that "[t]he district court did not abuse its discretion in concluding that the recordings were entitled to protection as fact work product," a point that had been conceded by the government.[5]

Because of the appellant's failure of proof and the abuse of discretion standard of appellate review, the court did not have to address the more interesting question whether the appellant's conversation with the broker could be afforded opinion work product protection in whole or in part. Though a weaker claim than one asserted with regard to an attorney's notes and memoranda of a witness interview,[6] the argument that an attorney's thoughts could be revealed in an otherwise factual conversation is not entirely without precedent. In *In re Grand Jury Subpoenas Dated March 19, 2002 and Aug. 2, 2002*, the Second Circuit recognized, in the grand jury context, a narrow "selection and compilation" work product privilege which would protect from disclosure counsel's creation of a subset of documents from a broader universe of otherwise unprotected documents already in the hands of a litigation adversary.[7] Although not precisely analogous, the underlying premise of this type of privilege claim—that counsel's thought processes can be revealed by the way certain facts are organized, stressed and shaped—appears potentially applicable to the counsel directed conversations in *In re Grand Jury Subpoena*.[8]

Need and Exhaustion

Having sustained the district court's conclusion that appellant's recordings of his conversations with the mortgage broker were entitled only to the qualified protection applicable to fact work product, the Second Circuit next turned to the question whether the government had overcome that protection. The court stated that it was "clear that the work product doctrine applies to grand jury proceedings, but arguably less clear what

Howard W. Goldstein *is a partner at Fried, Frank, Harris, Shriver & Jacobson.* **Ashkan Mojdehi,** *an associate at the firm, provided research assistance in the preparation of this article.*

species of work product protection a court should apply."[9] Noting that neither Rule 26(b)(3) of the Federal Rules of Civil Procedure nor Rule 16(b)(2) of the Federal Rules of Criminal Procedure is applicable to grand jury proceedings, the court nonetheless recognized that the role of the work product protection "in assuring the proper functioning of the criminal justice system is even more vital [than its role in civil cases]."[10] It then stated that the test applied in the Second Circuit is that "a grand jury is entitled to fact work product when the government shows that the grand jury has a 'substantial need' for the materials and that it has 'exhausted other means of obtaining the relevant information it seeks.'"[11]

Applying that test, the court first held that the government had demonstrated "substantial need." The government had argued that it needed the recordings "to provide the grand jury with evidence it requires to determine the roles that brokers, including Appellant and Broker, played in the alleged fraud, and that the recordings will assist the grand jury in determining whether these individuals committed federal crimes."[12] The court accepted the government's argument with very little discussion, articulating only the grand jury's broad powers to collect evidence, its need for access to "the data it needs to decide whether it should return an indictment," and the court's conclusion that "[h]ere, that data clearly includes the recordings."[13]

The court then turned to the question whether the government had demonstrated that it had exhausted other means of obtaining the information. The government argued that it had met its burden because the recordings were a unique record of the conversations between the appellant and the other mortgage broker and were not subject to contradiction or memory issues. The appellant, on the other hand, argued that the government should have questioned him or the other broker about the conversations. The court rejected the appellant's arguments, concluding that "there [was] no way to recreate the discussions between Appellant and Broker, which provide insight into Broker's role in the real estate transactions under grand jury review."[14]

The court's conclusions on the issues of substantial need and exhaustion are noteworthy for several reasons. First, the court quickly rejected the appellant's attempt to draw a distinction between the recordings—which the appellant claimed were not discoverable—and the conversations themselves, and excused the government's failure even to pose a single question to appellant about the conversations after he invoked the attorney-client privilege. Even accepting the court's conclusion that the distinction urged by the appellant was not "a real one," why shouldn't the government be faulted for failing to take the extra step of probing the extent to which the appellant, represented at the interview by counsel, intended to shield the conversations (after all, the appellant was found not to have carried his burden on the opinion work product issue because he relied on an affidavit from counsel without taking the extra step of making an in camera submission)? The court observed that "[t]o require otherwise would force prosecutors to choose between their duty to respect attorney-client privilege and the requirement to exhaust other means of obtaining information."[15] But it would have done no such thing. Determining the contours of a represented subject's privilege claim does no disrespect to the privilege, and certainly bears no resemblance to the "assault" on privilege for which prosecutors recently have been so roundly criticized.

Second, because the government made no attempt to question the appellant or the broker about the conversations, no one knows whether either of them would have testified about the conversations or exercised their Fifth Amendment privilege. But even if the Fifth had been invoked, prosecutors routinely have to make decisions whether to immunize grand jury witnesses in order to obtain information, and the cases make it far from clear whether the government can carry its burden of demonstrating exhaustion of other means simply by showing that a witness invoked his Fifth Amendment privilege.[16]

Surely the government in 'Grand Jury Subpoena' established it would be nice for the grand jury to have the recordings; but nice and essential are two very different things.

Third, while recognizing the grand jury context in citing the "right to every man's evidence,"[17] the court glossed over that context in addressing substantial need. The *Hickman v. Taylor*[18] principle incorporated by the Second Circuit in criminal matters permits discovery of work product when it is "essential to the preparation of one's case."[19] But what is "essential" in the grand jury context? In *In re Grand Jury Subpoena Dated Oct. 22, 2001*,[20] the court recognized a difference between "need" in the context of trial testimony, where corroboration is important, and need in the context of grand jury testimony, where the issue is simply establishing probable cause. And the government routinely relies in the grand jury on witness testimony that is not corroborated by recordings and is subject to contradiction. Surely the government in *Grand Jury Subpoena* established it would be nice for the grand jury to have the recordings; but nice and essential are two very different things.

Conclusion

The court in *Grand Jury Subpoena* may have reached the right result, but its opinion fails to grapple with some of the difficult issues inherent in the case. Perhaps that was a product of the court's apparent view that appellant brought his legal position on himself: "Appellant could have initially shielded these recordings by simply keeping quiet about them."[21] That observation certainly is true.[22] But it is somewhat astonishing. Appellant should hardly be faulted for concluding that being less than fully candid with the government was not an optimal strategy.

1. *In re Grand Jury Subpoena Dated July 6, 2005*, No. 05-6891-cv, 2007 WL 4355122, at *1 (2d Cir. Nov. 16, 2007) (hereinafter "*Grand Jury Subpoena*").
2. Id. at *2.
3. Id. at *3, quoting from *In re Grand Jury Subpoena Dated Jan. 4, 1984*, 750 F.2d 223, 225 (2d Cir. 1984).
4. Id.
5. Id.
6. See *In re Grand Jury Subpoena Dated Nov. 9, 1979*, 484 F.Supp. 1099, 1104 (SDNY 1980) (surreptitious recording of conversation between counsel and individuals under investigation).
7. 318 F.3d 379, 386-87 (2d Cir. 2003). In that case, the work product claim also failed because it was based solely on the submission of "conclusory" ex parte affidavits. Id. at 386. See also *Gould Inc. v . Mitsui Min. & Smelting Co.*, 825 F.2d 676, 680 (2d Cir. 1987) ("selection and compilation" work product recognized but claim not sustained); *Sporck v. Peil*, 759 F.2d 312 (3d Cir.), cert. denied, 474 U.S. 903 (1985).
8. The court's opinion does not reveal the extent to which this argument was made, if at all.
9. *Grand Jury Subpoena*, n. 1, supra, at *4.
10. Id., quoting from *In re Grand Jury Proceedings*, 219 F.3d 175, 190 (2d Cir. 2000).
11. Id., quoting from *In re Grand Jury Proceedings*, 219 F.3d 175, 192 (2d Cir. 2000).
12. Id.
13. Id. at *5.
14. Id. at *6.
15. Id. at *5.
16. See, e.g., *In re Grand Jury (Impounded)*, 138 F.3d 978, 983 (3d Cir. 1998) (concurring opinion that "one need not waive the protections embedded in the Fifth Amendment in order to preserve a work product privilege); *In re John Doe Corp.*, 675 F.2d 482, 492-93 (2d Cir. 1982) (ordering production of interview notes of immunized witness where witness' memory was hazy and other witnesses invoked Fifth Amendment privilege); *In re Grand Jury Subpoena Dated Dec. 19, 1978*, 599 F.2d 504, 513 (2d Cir. 1979) (substantial need not established by government's need to make immunity decisions); *In re Grand Jury Proceedings*, 2001 WL 1167497, at *20-22 (SDNY 2001) (court does not reach question whether government power to grant immunity to witness negates substantial need where one witness was already immunized and had not been questioned on matters at issue).
17. *Grand Jury Subpoena*, n. 1, supra, at *4.
18. 329 U.S. 495 (1947).
19. *Grand Jury Subpoena*, n. 1, supra, at *4, quoting from *Hickman v. Taylor*, n. 18, supra, 329 U.S. at 511.
20. 282 F.3d 156, 161 (2d Cir. 2002).
21. *Grand Jury Subpoena*, n. 1, supra, at *6.
22. If appellant were indicted, Federal Rule of Criminal Procedure 16(b)(2) would bar disclosure of the recordings.

Reprinted with permission from the January 3, 2008 edition of the New York Law Journal © 2008 ALM Properties, Inc. All rights reserved. Further duplication without permission is prohibited. For information, contact 212-545-6111 or visit **www.almreprints.com.** # 070-01-08-0002