In re FTC

United States District Court for the Southern District of New York

April 19, 2001, Decided ; April 19, 2001, Filed

Misc. No. M18-304 (RJW)

Reporter
2001 U.S. Dist. LEXIS 5059 *; 50 Fed. R. Serv. 3d (Callaghan) 139; 2001-1 Trade Cas. (CCH) P73,288

IN RE APPLICATION OF THE FEDERAL TRADE COMMISSION FOR AN ORDER COMPELLING AVRETT FREE & GINSBERG TO COMPLY WITH A SUBPOENA FOR DOCUMENTARY MATERIAL

Disposition: [*1] FTC's motion to compel production of documents granted and Avrett's motion for protective order denied.

Core Terms

advertising, common interest, attorney-client, attorneys, documents, communications, legal interest, advice, waived, confidential, parties, legal strategy, confidences, campaign

Case Summary

Procedural Posture

Petitioner, the Federal Trade Commission (FTC), moved pursuant to Fed. R. Civ. P. 37(a) and 45(c)(2)(B), for an order directing respondent advertising agency to comply with a subpoena issued in connection with a pending action, involving respondent's client. Respondent cross-moved for a protective order pursuant to Fed. R. Civ. P. 26(c), claiming an attorney-client privilege.

Overview

In the underlying pending action, the FTC alleged that respondent's client made false and unsubstantiated claims to consumers about its product, a purported treatment for cellulitis. During the product campaign, respondent did not employ its own in-house regulatory counsel. Although respondent did not have its own counsel for regulatory matters, it asserted that the draft advertisements requested by the FTC were protected by the attorney-client privilege because respondent and its client had a common legal interest in the product's advertising campaign. The FTC countered that respondent had no standing to assert the attorney-client privilege and that the common interest rule did not apply here. The court agreed, finding that respondent's and its client's concerns about the consequences of failing to comply with applicable laws and regulations was simply not enough to transform their mutual commercial interest in the advertising campaign into a coordinated legal strategy. Thus, the common interest rule did not apply.

Outcome

Petitioner's motion to compel production of documents was granted, and respondent's motion for protective order was denied.

LexisNexis® Headnotes

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

Evidence > Privileges > Attorney-Client Privilege > Scope

Legal Ethics > Client Relations > Duties to

Client > Duty of Confidentiality

Evidence > Privileges > Attorney-Client Privilege > General Overview

HN1[] **Discovery, Privileged Communications**

The attorney-client privilege generally forbids an attorney from disclosing confidential communications that pass in the course of professional employment from client to lawyer. Furthermore, the burden of establishing the existence of the attorney-client privilege always rests on the party asserting it. The party must establish the relationship of attorney and client, a communication by the client relating to the subject matter upon which professional advice is sought, and the confidentiality of the expression for which the protection is claimed.

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

Evidence > Privileges > Attorney-Client Privilege > Waiver

Evidence > Privileges > Attorney-Client Privilege > General Overview

HN2[] **Discovery, Privileged Communications**

The joint defense privilege, more commonly known as the common interest rule, is an extension of the attorney-client privilege. This rule does not provide an independent basis for establishing the existence of an attorney-client relationship. Rather, it is an exception to the general rule that the privilege is waived when confidential information is communicated to a third party. If the third party and the client share a common legal interest, the rule applies and the privilege is not waived.

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

HN3[] **Discovery, Privileged Communications**

The key to whether an attorney/client relationship existed is the intent of the client and whether he reasonably understood the communications to be confidential.

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

HN4[] **Discovery, Privileged Communications**

The common interest doctrine applies when multiple persons are represented by the same attorney. In that situation, communications made to the shared attorney to establish a defense strategy remain privileged as to the rest of the world. In addition, the common interest rule serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel.

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

HN5[] **Discovery, Privileged Communications**

A community of interest exists among different persons or separate corporations where they have an identical legal interest. The key consideration is that the nature of the interest be identical, not similar, and be legal, not solely commercial. The fact that there may be an overlap of a commercial and legal interest for a third party does not negate the effect of the legal interest in establishing a community of interest. What is important is not whether the parties theoretically share similar interests but rather whether they demonstrate actual cooperation toward a common legal goal.

Civil Procedure > ... > Discovery > Privileged

Communications > General Overview

HN6[] **Discovery, Privileged Communications**

Under the common interest rule, only communications made in the course of an ongoing legal enterprise, and intended to further the enterprise, are protected. However, it is not necessary that there be actual litigation in progress for the common interest rule to apply. The parties among whom information is shared must have a common legal interest - they must have demonstrated cooperation in formulating a common legal strategy. The rule does not encompass a joint business strategy which happens to include as one of its elements a concern about litigation.

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

HN7[] **Discovery, Privileged Communications**

As in all communications allegedly privileged under the attorney-client relationship, a claim resting on the common interest rule requires a showing that the communication in question was given in confidence and that the client reasonably understood it to be so given.

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

HN8[] **Discovery, Privileged Communications**

The common interest rule is limited to confidences shared by one party with the attorneys of another party, not confidences shared with a party's attorneys, and then with another party.

Judges: Robert J. Ward, U. S. D. J.

Opinion by: Robert J. Ward

Opinion

MEMORANDUM DECISION AND ORDER

Petitioner, the Federal Trade Commission ("FTC"), moves pursuant to Rules 37(a) and 45(c)(2)(B), Fed. R. Civ. P., for an order directing a New York advertising agency, Avrett Free & Ginsberg ("Avrett") to comply with a subpoena issued in connection with *Federal Trade Comm'n v. Rexall Sundown, Inc.*, No. 00 Civ. 7016 (S.D. Fla. filed July 19, 2000), an action pending in the United States District Court for the Southern District of Florida. Avrett cross-moves for a protective order pursuant to Rule 26(c), Fed. R. Civ. P., claiming an attorney-client privilege. For the following reasons, the FTC's motion to compel is granted and Avrett's motion for a protective order is denied.

BACKGROUND

In the Florida litigation, the FTC alleges that Rexall Sundown, Inc. ("Rexall") made false and unsubstantiated claims to consumers about Cellasene, a purported treatment for cellulitis. The FTC and Rexall are currently in the fact discovery phase of the litigation. *See* Declaration of Stacy A. [*2] Feuer ("Feuer Decl.") P 3. Avrett is a non-party that served as Rexall's advertising agency for Cellasene, preparing print, radio, and television advertising for the product. *See id.* P 4. During the Cellasene campaign, Avrett did not employ its own in-house regulatory counsel.

Deborah Shur Trinker has been employed as Rexall's Vice President of Regulatory Affairs and Assistant General Counsel, with primary responsibility for assuring that Rexall product labeling, packaging, marketing, and advertising are in full compliance with all statutory and regulatory requirements. *See* Declaration of Deborah Shur Trinker ("Trinker Decl.") PP 2-3. While employed by Rexall, Ms. Trinker reviewed advertising materials prepared by Avrett for a variety of products. She discussed with Avrett legal issues associated with draft advertising materials and advised Avrett on the general legal parameters for

advertising dietary supplements. In addition, she advised Avrett about the potential legal objections that television networks might have concerning advertisements. Her objective was to facilitate the preparation of non-misleading, substantiated, and lawful advertisements, and to minimize the creation [*3] of materials that would be rejected for legal reasons. *See id.* P 5.

Thomas James, Avrett's Executive Group Account Director, stated that, as a general policy, Avrett forwarded draft advertising material to its clients for the purpose of review by the clients' attorneys. Avrett relied on the advice of its clients' attorneys to ensure that all legal and regulatory requirements were met. This advice typically took the form of annotations and modifications made by the clients' attorneys directly on draft advertising material. Avrett maintained these drafts in strict confidence. *See* Declaration of Thomas James ("James Decl.") P 3.

In the case of Cellasene in particular, Ms. Trinker stated that Avrett and Rexall worked collaboratively to produce truthful and substantiated advertising. Ms. Trinker communicated her input to Rexall and Avrett through the modification of Avrett's draft advertisements. *See* Trinker Decl. P 6. She conducted her review to assure that all legal and regulatory requirements were met. In addition, once the FTC investigation into Cellasene began on April 12, 1999, when the FTC issued the first of several Civil Investigative Demands on Rexall, Ms. Trinker [*4] had the additional objective of minimizing Rexall's exposure to liability in litigation with the FTC. *See id.* PP 7, 9.

On January 26, 2001, the FTC served Avrett with a Subpoena for the Production of Documentary Material, issued by the United States District Court for the Southern District of New York. *See* Feuer Decl. P 5. Shortly before the deadline for Avrett to produce responsive documents, an attorney representing Rexall, Edward F. Glynn, asked whether the FTC would consent to Avrett's withholding of certain documents on the basis of the attorney-client privilege. The FTC declined and informed Mr. Glynn that Rexall would have to seek judicial intervention to prevent the production of the documents. *See id.* P 6. Rexall did not do so. *See id.* P 7.

On February 28, Avrett produced approximately 722 pages of documents, but withheld fifteen documents, each a draft advertisement containing Ms. Trinker's handwritten notes. Avrett asserted that these documents were protected by the attorney-client privilege. *See id.* P 8. The FTC and Avrett consulted one another in a failed effort to resolve the dispute about these fifteen documents. *See id.* PP 9-10. This proceeding [*5] followed.

DISCUSSION

Although Avrett did not have its own counsel for regulatory matters, it asserts that the draft advertisements requested by the FTC are protected by the attorney-client privilege because Avrett and Rexall had a common legal interest in the Cellasene advertising campaign. The FTC counters that Avrett has no standing to assert the attorney-client privilege and that the common interest rule does not apply here.

"***HN1***[↑] The attorney-client privilege generally forbids an attorney from disclosing confidential communications that pass in the course of professional employment from client to lawyer." *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989). Furthermore, the burden of establishing the existence of the attorney-client privilege always rests on the party asserting it. *See id.* at 244. The party must establish the relationship of attorney and client, a communication by the client relating to the subject matter upon which professional advice is sought, and the confidentiality of the expression for which the protection is claimed. *See id.* at 243.

HN2[↑] The joint defense privilege, more commonly known as the common [*6] interest rule, is an extension of the attorney-client privilege.

See id. This rule does not provide an independent basis for establishing the existence of an attorney-client relationship. Rather, it is an exception to the general rule that the privilege is waived when confidential information is communicated to a third party. If the third party and the client share a common legal interest, the rule applies and the privilege is not waived. *See, e.g., Strougo v. BEA Assocs.*, 199 F.R.D. 515, 2001 U.S. Dist. LEXIS 3816, 2001 WL 332922, at *3 (S.D.N.Y. 2001); *United States v. Agnello*, 135 F. Supp. 2d 380, 2001 U.S. Dist. LEXIS 3633, 2001 WL 310423, at *1 (E.D.N.Y. 2001); *United States v. United Techs. Corp.*, 979 F. Supp. 108, 111 (D. Conn. 1997).

The first obstacle Avrett faces in invoking the attorney-client privilege and the common interest rule is that it has not established that it had an attorney-client relationship with Ms. Trinker. "***HN3***[⬆] The key, of course, to whether an attorney/client relationship existed is the intent of the client and whether he reasonably understood the [communications] to be confidential." *United States v. Dennis*, 843 F.2d 652, 657 (2d Cir. 1988). [*7] Although Avrett produced an affidavit describing its general policy of working with its clients' attorneys, it has not established that it intended Ms. Trinker to act as its attorney, or that it reasonably understood its communications with her to be confidential.

Instead of presenting evidence that may show that Avrett had an attorney-client relationship with Ms. Trinker, Avrett argues that it had such a relationship by virtue of its common interest with Rexall. This argument fails because the common interest rule is not an independent source of the attorney-client privilege, as Avrett attempts to use it. Avrett has not cited, and the Court has not found, a single case applying the common interest rule in such circumstances. [1] In any event, the Court is not convinced that Avrett and Rexall shared a common legal interest in the Cellasene advertising campaign.

[*8] At its core, "***HN4***[⬆] the common interest doctrine applies when multiple persons are represented by the same attorney. In that situation, communications made to the shared attorney to establish a defense strategy remain privileged as to the rest of the world." *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 446 (S.D.N.Y. 1995) (citations omitted). In addition, the common interest rule "serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel." *Schwimmer*, 892 F.2d at 243 (citations omitted). The latter situation has been described as follows:

> ***HN5***[⬆] A community of interest exists among different persons or separate corporations where they have an identical legal interest . . . . The key consideration is that the nature of the interest be identical, not similar, and be legal, not solely commercial. The fact that there may be an overlap of a commercial and legal interest for a third party does not negate the effect of the legal interest in establishing a community [*9] of interest.

Strougo, 199 F.R.D. 515, 2001 U.S. Dist. LEXIS 3816, *8-9, 2001 WL 332922, at *3 (citations omitted). "What is important is not whether the parties theoretically share similar interests but rather whether they demonstrate actual cooperation toward a common legal goal." *North River Ins. Co. v. Columbia Cas. Co.*, 1995 U.S. Dist. LEXIS 53, No. 90 Civ. 2518, 1995 WL 5792, at *4 (S.D.N.Y. Jan. 5, 1995).

HN6[⬆] Only communications made in the course of an ongoing legal enterprise, and intended to

[1] Rexall is Ms. Trinker's client, and therefore, is the only entity in a position to assert the common interest rule. In other words, if the FTC sought to discover from Rexall confidences between Rexall and Ms. Trinker on the ground that disclosure to Avrett waived the attorney-client privilege, Rexall would be in a position to argue that it had a common legal interest with Avrett. However, Rexall is not a party to this proceeding.

further the enterprise, are protected. *See Schwimmer*, 892 F.2d at 243. However, it is not necessary that there be actual litigation in progress for the common interest rule to apply. *See id.* at 244. The parties among whom information is shared must have a common legal interest - they must have demonstrated cooperation in formulating a common legal strategy. *See Bank Brussels Lambert*, 160 F.R.D. at 447. The rule "does not encompass a joint business strategy which happens to include as one of its elements a concern about litigation." *Id.*

HN7[] As in all communications allegedly privileged under the attorney-client relationship, "a claim resting on the common interest rule requires [*10] a showing that the communication in question was given in confidence and that the client reasonably understood it to be so given." *See Schwimmer*, 892 F.2d at 244. Finally, the Second Circuit has warned that expansions of the attorney-client privilege under the common interest rule should be "cautiously extended." *United States v. Weissman*, 195 F.3d 96, 100 (2d Cir. 1999).

Avrett places great reliance on *In re Jenny Craig, Inc.*, No. 9260 (F.T.C. May 16, 1994) (attached to Avrett's reply brief as Exhibit A). In that case, the FTC sought documents from Jenny Craig Inc.'s ("JCI") advertising agency, J. Walter Thompson ("JWT"). The documents at issue contained handwritten attorneys' notes, memos to clients, and handwritten "interlineation" by attorneys on advertisements, drafts, and scripts. JWT agreed to provide legal review of JCI's proposed advertisements to ensure that they were in full compliance with the law. After an FTC investigation commenced against JCI, JCI sought legal litigation-related advice from JWT's in-house counsel and JCI's own outside counsel. The parties' respective attorneys consulted one another about the FTC investigation.

[*11] The FTC argued that the attorney-client privilege was waived when JWT and JCI sent each other the relevant documents. Rejecting this argument, the Administrative Law Judge found that the parties had a common interest: first, JWT's attorneys communicated with JCI's attorneys to discuss JCI's legal strategy in response to the FTC investigation; second, JWT had a legal interest in JCI advertisements because advertising agencies may be subject to FTC enforcement proceedings. Therefore, JWT and JCI could both use the same attorney work product without waiving the attorney-client privilege.

Several cases rejecting an application of the common interest rule are instructive in demonstrating the limited scope of the rule. In *Walsh v. Northrop Grumman Corp.*, 165 F.R.D. 16 (E.D.N.Y. 1996), an employee of Salomon Brothers was asked in a deposition to reveal discussions between Salomon and Northrop Grumman. Salomon asserted the common interest rule as to information which Salomon obtained from its attorneys to defeat the contention that disclosure of the information to Northrop waived the privilege. *See id.* at 18. The court rejected an application of the rule [*12] in those circumstances. First, the court believed that ***HN8***[] the common interest rule is limited to confidences shared by one party with the attorneys of another party, not confidences shared with a party's attorneys, and then with another party. *See id.* Second, Salomon was advising Northrop on financial and other business strategies, and although there was plainly a mutual concern about possible litigation, "that does not transform their common interest and enterprise into a legal, as opposed to commercial, matter." *Id.* at 19.

In *Bank Brussels Lambert, supra*, the company, a member of a banking consortium, circulated a letter from its attorney among other members of the banking group. The letter concerned the viability of a potential transaction and included a concern about possible litigation. When the banking consortium subsequently brought suit, the defendants sought to obtain the letter, claiming that its disclosure to the bank group waived the attorney-client privilege. The court held that the banks had no common legal

strategy:

> While each member shared a concern about the threat of shareholder litigation, there is no evidence that they [*13] formulated a joint legal strategy to deal with the possibility. Coudert Brothers [Bank Brussel Lambert's counsel], for example, represented only BBL and was not retained to represent the Bank Group as a whole or any of its other members. Nor is there any suggestion that counsel from that firm coordinated its legal efforts with attorneys for any other Bank Group member.

160 F.R.D. at 448.

The present case most closely resembles those cases where courts have recognized that a business strategy which happens to include a concern about litigation is not a ground for invoking the common interest rule. The Court does not dispute that Ms. Trinker's handwritten notes on Avrett's draft advertisements constitute legal advice. In addition, it is clear that both Avrett and Rexall were concerned about the consequences of failing to comply with applicable law and regulations. However, this is simply not enough to transform their mutual commercial interest in the Cellasene advertising campaign into a coordinated legal strategy. Ms. Trinker reviewed Avrett's draft advertisements for the purpose of determining their legality because Avrett and Rexall had a financial interest [*14] in seeing that the Cellasene advertising campaign was not blocked by legal obstacles. Avrett and Rexall's joint enterprise was commercial and an element of making that enterprise succeed was ensuring that advertisements were compliant. While Avrett received legal advice from Ms. Trinker that presumably assured Avrett that it would not be subject to legal action based on the advertisements, this benefit was ancillary to the business relationship.

In addition, the Court is not swayed by the fact that Avrett, as a general policy, relies on all of its clients' counsel for legal advice. An extension of the common interest rule for that reason would mean that Avrett has an attorney-client privilege with each and every one of its clients' counsel even though it has not retained any of them. The common interest rule, which must be construed narrowly, does not sanction such a result.

CONCLUSION

For the foregoing reasons, the FTC's motion to compel production of documents is granted and Avrett's motion for a protective order is denied.

It is so ordered.

Dated: New York, New York

April 19, 2001

Robert J. Ward

U. S. D. J.

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