STATE OF FLORIDA

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JACK SHREVE
PUBLIC COUNSEL

December 16, 1992

Steve Tribble, Director
Division of Records and Reporting
Florida Public Service Commission
101 East Gaines Street
Tallahassee, FL 32399-0850

Re: Docket No. 910163-TL

Dear Mr. Tribble:

Enclosed for filing in the above-captioned proceeding on behalf of the Citizens of the State of Florida are the original and 15 copies of Citizens' Tenth Motion to Compel and Request for In Camera Inspection of Documents and Expedited Decision with Supporting Memorandum of Law.

Please indicate the time and date of receipt on the enclosed duplicate of this letter and return it to our office.

Sincerely,

Janis Sue Richardson
Associate Public Counsel

Enclosure

ACK ✓
AFA ___
APP ___
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WAS ___
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Note:
14614-92 Affidavit of Need
14615-92 Employee Statement
14616-92 Mr. Cuthebertson's Notes
14617-92 D. Ward Deposition
These documents are in confidential files. -RAR

Supporting Memo
DOCUMENT NUMBER-DATE
14613 DEC 16 1992
FPSC-RECORDS/REPORTING

Inspection of Documents
DOCUMENT NUMBER-DATE
14612 DEC 16 1992
FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition on behalf of Citizens of the State of Florida to Initiate Investigation into the Integrity of Southern Bell Telephone and Telegraph Company's Repair Service Activities and Reports.	)	Docket No. 910163-TL
	)	Filed: December 16,1992

CITIZENS' MEMORANDUM OF LAW SUPPORTING THEIR TENTH MOTION TO COMPEL AND REQUEST FOR IN CAMERA INSPECTION OF DOCUMENTS

The Citizens of Florida ("Citizens"), by and through Jack Shreve, Public Counsel, file this memorandum of law supporting their tenth request for the Florida Public Service Commission ("Commission") to compel BellSouth Telecommunications, Inc., ("BellSouth") d/b/a/ Southern Bell Telephone and Telegraph Company to produce the statements of company employees/witnesses requested by Citizens on October 5, 1992, and to conduct an in camera inspection of these witnesses' statements and portions of documents withheld by BellSouth Telecommunications based on claims of attorney-client and work product privileges.

The Attorney-Client Privilege

1. While the attorney-client privilege applies to corporations, the extent of the privilege within the corporate context does not appear to have been settled in Florida. Fla.

Stat. § 90.502;[1] Ehrhardt, Florida Evidence § 502.3 (1992 ed.)

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[1] The relevant portions of section 90.502, Florida Statutes (1992 Supp.) provides:

> (1) For purposes of this section:
>
> (a) A "lawyer" is a person authorized or reasonably believed by the client to be authorized, to practice law in any state or nation.
>
> (b) A "client" is any person, public officer, corporation, association, or other organization or entity, either public or private, who consults a lawyer with the purpose of obtaining legal services or who is rendered legal services by a lawyer.
>
> (c) A communication between lawyer and client is "confidential" if it is not intended to be disclosed to third persons other than:
>
> 1. Those to whom disclosure is in furtherance of the rendition of legal services to the client.
>
> 2. Those reasonably necessary for the transmission of the communication.
>
> (2) A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client.
>
> (3) The privilege may be claimed by:
>
> (a) The client.
>
> . . . .
>
> (d) A successor, assignee, trustee in dissolution, or any similar representative of an organization, corporation, or association or other entity, either public or private, whether or not in existence.
>
> (e) The lawyer, but only on behalf of the client. The lawyer's authority to claim the privilege is presumed in the absence of

(stating that neither Florida case law nor statute clearly define the extent of the corporate privilege). In the absence of state case-law on point, Florida courts have turned to federal decisions as persuasive. Corry v. Meggs, 498 So. 2d 508, 510 (Fla. 1st DCA 1986), review denied, 506 So. 2d 1042 (Fla. 1987). However, federal decisions are of limited assistance as the federal privilege law is rooted in the common law and the privilege in Florida is statutory. Id. Because privileges hinder the search for truth, both federal and state courts narrowly construe privileges. See United States v. American Tel. & Tel. Co., 86 F.R.D. 603, 604 & n.1 (D.D.C. 1979). This has led federal courts to develop different tests for delimiting the attorney-client privilege in the corporate context.

2. Beginning with an observation by the U.S. Supreme Court in Hickman v. Taylor, 329 U.S. 495 (1947) that employee statements to company counsel fell outside the scope of the privilege as the employees were mere "witnesses," the federal courts constructed various tests[2] that were followed until the

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> contrary evidence.
>
> (4) There is no lawyer-client privilege under this section when:
>
> (a) The services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew was a crime or fraud.
>
> . . . .

[2] For a discussion of other tests and modifications developed by federal courts, see Sexton, A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege, 57 N.Y.U. L. Rev. 443, 454-56 (1982).

Court opted for a case-by-case approach in Upjohn Co. v. United States, 449 U.S. 383 (1981). One test, later rejected in Upjohn, was the "control group test". See City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D. Penn. 1962). Those top level employees entrusted with the decision-making authority for the corporation fell within the privilege, but lower-level employees did not. Id. at 485-86; accord Consolidation Coal Co. v. Bucyrus-Erie Co., 89 Ill.2d 103, 432 N.E.2d 250 (Ill. 1982) (adopting the control group test despite Upjohn). A second test, the "subject matter test," was proposed in Harper Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), aff'd by a divided court, 400 U.S. 348 (1971). A corporate employee of whatever rank fell within the privilege "if the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment." Id. at 491-92. The third test is a modified subject matter test proposed by the Eighth Circuit Court of Appeals in Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977). This test applied to an employees' communication if

> (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties;

> and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

Diversified Indus., Inc., 572 F.2d at 609. The U.S. District Court for the District of Columbia added a further modification. Only an employee statement that was "reasonably believed to be necessary to the decision-making process concerning a legal problem on which legal advice was sought" was privileged. In re Ampicillin Antitrust Litigation, [1978-1] Trade Reg. Rpt. (CCH) ¶ 62,043, 74,510 (D.D.C. 1978) (emphasis in original). Then the U.S. Supreme Court was presented an opportunity to choose a test in Upjohn Co. v. United States, 449 U.S. 391 (1981).

3. In Upjohn, the Board of Directors launched an internal investigation by their legal counsel into allegations that foreign subsidiaries were paying bribes to obtain business. Upjohn Co., 449 U.S. at 386. Questionnaires were mailed to all foreign general and area managers. Id. Counsel reviewed the questionnaires and interviewed the recipients of the questionnaires and other officers and employees. Id. at 387. The company then voluntarily submitted a preliminary report to the Securities and Exchange Commission disclosing certain questionable payments. Id. A copy was sent to the Internal Revenue Service, which immediately began an investigation. Id. Upjohn gave IRS investigators a list of all those employees interviewed and those who had responded to the questionnaire. Id. IRS investigators requested Upjohn to produce all the questionnaires and notes of all the interviews conducted by

corporate counsel. Id. at 387-88. Upjohn refused on the basis of attorney-client privilege and work product immunity. Id.

4. Stating that the purpose of the attorney-client privilege is to foster full and frank communication between the client and his attorney, the U.S. Supreme Court rejected the control group test in the corporate context as it is frequently lower-level employees who have the factual information on which the attorney formulates legal advice to those officers enabled to act for the company. Id. at 390-93. The Court reasoned that the narrow control group test hindered the corporate lawyer's role in advising the corporation on regulatory compliance. Id. at 392.

5. The Court then proceeded to apply the facts to a modified subject matter test.[3] The Court found that (1) the communications concerned matters within the scope of the employees duties, (2) the communications were made at the direction of corporate superiors for the purpose of securing legal advice on the question of illegal payments, (3) a cover letter informed the employees of the legal implications of the investigation and reiterated the company's policy prohibiting bribes, (4) the communications were considered highly confidential, and (5) were to remain confidential. Id. at 394-95.

6. The Court rejected the lower court's argument that an extensive privilege would create a broad "zone of silence" over

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[3] Following the Supreme Court's rejection of the control group test and adoption of a case-by-case approach, the district court noted that "[i]n Upjohn, the Supreme Court indicated it preferred a modified subject matter test." S.E.C., 518 F. Supp. at 681 n.9.

corporate affairs. Id. at 395. The Court reasoned that only communications, not facts, would be protected. Id. The Court noted that IRS investigators, who had possession of the names of the employees interviewed, were free to depose these employees and obtain the same relevant facts that were disclosed to the company counsel. Id. at 396.

7. The Supreme Court next addressed whether counsel's notes of the interviews were protected by the work product doctrine. IRS conceded that the doctrine applied to the notes, but argued that counsel's refusal to permit the employees to answer questions it considered irrelevant demonstrated sufficient need to overcome the privilege. Id. at 399. The Court declined to decide the issue on the grounds that the lower court had applied the wrong standard. Id. 401. Emphasizing that the notes were based on oral statements, the Court reasoned that those portions of the notes relating oral statements were then communications that were protected under the attorney-client privilege. Id. The remaining portions that revealed counsel's mental processes were then opinion work product for which a showing of need and undue hardship in obtaining a substantial equivalent is insufficient. Id.

8. Two factual distinctions separate the present controversy from the Upjohn case. First, BellSouth, unlike Upjohn, has refused to release the names of employees/witnesses interviewed by in-house counsel, thus preventing Public Counsel from obtaining the substantial equivalent by deposing these

witnesses.[4] The second factual difference between the present case and Upjohn is that BellSouth has not voluntarily made any report of its activities to the Commission. In fact, it concealed the fact that it had filed false schedule 11 reports until forced to respond to Public Counsel's interrogatory on the subject.[5] Further, its response to Citizens' interrogatory is only a partial revealing of the facts. BellSouth has conducted an internal audit of its Schedule 11 reports, which uncovered "significant adverse findings."[6]

9. The Court never anticipated that the privilege would be used to conceal the facts. Upjohn 449 U.S. at 395 ("The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney."). The Court distinguished between a privileged communication and a discoverable fact by quoting Philadelphia v. Westinghouse Electric Corporation, 205 F. Supp. 830, 831 (E.D. Pa. 1962):

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[4] The Commission upheld Public Counsel's right to the names of the employees interviewed in Order no. PSC-92-0339-FOF-TL, issued May 13, 1992. Southern Bell appealed that order to the Supreme Court of Florida. Southern Bell Tel. & Tel. Co. Petition for Review of Non-final Administrative Action, Case no. 80,004 (filed June 10, 1992) (decision pending).

[5] See Citizens' Motion to Impose a Penalty on Southern Bell Telephone and Telegraph Co. for Filing and Failing to Correct False Information Submitted to the Commission, filed on July 20, 1992 in Docket no. 910163-TL (decision pending) [hereinafter Citizens' Motion to Impose a Penalty].

[6] See Attachment A to Southern Bell Telephone and Telegraph Co. Opposition to Public Counsel's First Motion to Compel and Request for In Camera Inspection of Documents, Docket no. 920260-TL (May 15, 1992).

> [T]he protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.

Id. at 395-96; In re Alexander Grant & Co. Litigation, 110 F.R.D. 545 (S.D. Fla. 1986) (work product privilege does not apply to underlying facts discoverable through deposition); Brookings v. State, 495 So. 2d 135 (Fla. 1986) (holding that witness-client's testimony as to facts that were communicated to attorney did not waive privilege as only the communication, not the facts, were privileged).

10. In rejecting the Court of Appeals reasoning that to extend the attorney-client privilege beyond the control-group would create a broad "zone of silence" over corporate wrongdoing, the Court noted that this would not happen in cases such as Upjohn because an adversary would be in no worse position had the communications never been made to corporate counsel. Id. In other words, the facts could be uncovered through deposing identified witnesses and reviewing the corporation's preliminary report of its questionable practices.

11. The U.S. Supreme Court did not address the issue of the extent of the attorney-client or work product privileges in the factual circumstances involved in the present case. In Upjohn, the Court was dealing with a governmental agency that had access to discovering the facts through depositions of identified

witnesses and had a preliminary report disclosing questionable activities by the corporation on which to base further discovery. In the present case, Citizens have been denied the opportunity to depose persons with knowledge of the facts, and the Company has not filed any report of its activities with the Commission. Indeed, BellSouth has claimed that the facts uncovered in its own internal investigations, which uncovered "significant adverse findings" in its repair and rebate processes, are privileged and has refused to disclose them.[7]

12. The attorney-client privilege was not meant to provide a corporation with absolute immunity from disclosure of the facts, only to encourage full and frank communication between an attorney and his client. BellSouth has subverted the intention of the privilege to conceal not only witnesses' communications but the identity of the witnesses themselves. This was never intended by the U.S. Supreme Court in its Upjohn decision and was not addressed as it was never in issue. Unlike Upjohn, BellSouth has pursued a strategy of concealing, not only allegedly privileged communications, but also the facts from the agency

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[7] The company conducted five audits of its repair and rebate systems in 1991, which disclosed significant adverse findings. See Citizens'Motion to Impose Penalty, supra n.5; see also, Citizens' Motion to Compel BellSouth Telecommunications' Operations Manager -- Florida Internal Auditing Department -- Shirley T. Johnson, and BellSouth Telecommunications' Human Resource Operations Manager Dwane Ward, to Answer Deposition Questions and Motion to Strike the Affidavits of Shirley T. Johnson, Docket no. 910163-TL, (Oct. 23, 1992)(decision pending) [hereinafter Citizens' Motion to Compel Johnson and Ward to Answer Deposition Questions]

mandated with ensuring that it does not take advantage of its monopoly status to harm the citizens of this state.

Public Policy Dictates a Narrow Application of the Privilege

13. The critical difference between the U.S. Supreme Court's holding in Upjohn and a decision to be made on the facts of this case, is the genesis of the privilege. Privilege in federal courts is rooted in the common-law; privileges in Florida are statutory. Developing a test in Florida requires a balancing between competing legislative policies supporting the effective regulation of monopolies and the evidentiary privilege.

14. The policy behind the regulation of monopolies is the efficient provision of quality services at reasonable prices by guaranteeing a company a monopoly in exchange for regulatory oversight to ensure the protection of the public safety and welfare. See Fla. Stat. chs. 350 & 364 (1991). The Supreme Court of Florida noted that anti-monopoly statutes were created to prevent the deterioration of quality that results from monopolization of services. City Gas Co. v. Peoples Gas Sys. Inc., 182 So. 2d 429, 432 (Fla. 1965) (legislative grant of extensive regulatory authority to the Commission constituted an implied grant of jurisdiction over territorial agreements). In order to ensure that the degradation of service quality posed by the potential threat of monopoly status does not arise, the Legislature granted extensive investigative powers to the

Commission.[8] This broad grant of investigative power mandates a narrow definition of "client" for the attorney-client privilege.

15. In enacting the Evidence Code, the Legislature embraced a policy of liberal discovery. Fla. Stat. § 90.501 (1991). Except for statutory and constitutional privileges, no person has a privilege to refuse to testify as a witness, to refuse to disclose any matter, to refuse to produce any document, or prevent another from doing so. Id. The attorney-client privilege, a narrow exception to discovery, rests on a public policy of encouraging full and frank communications between attorney and client. International Tel. & Tel. Corp. v. United Tel. Co. of Fla., 60 F.R.D. 177, 185 (M.D. Fla. 1973) (allowing party to withhold evidence in discovery but introduce it later at trial contravenes policy supporting privilege). This policy is only furthered if the following conditions are satisfied:

> (1) The communications must originate in a confidence that they will not be disclosed.
>
> (2) This element of confidentiality must be essential to the full and satisfactory

[8] Fla. Stat. § 364.18(1) (1991) (right to "inspect all accounts, books, records, and papers"); id. § 364.18(2) (power to require the filing of reports by not only the monopoly but its parent and subsidiaries as well); id. § 364.185 (right to physically inspect any company facility and conduct on-site "investigations, inspections, examinations, and tests"); id. § 350.117 (authority to perform management and operation audits); id. § 350.123 (power to administer oaths, take depositions, issue protective orders and subpoenas, and compel the production of documents and attendance of witnesses); id. § 350.124 (authority to seek immunity for witnesses to compel testimony); id. § 350.127 (power to impose penalties of up to $5,000 a day for willful violations of agency rules); id. § 364.183 (power to issue protective orders for proprietary business information, e.g. trade secrets, internal audits).

> maintenance of the relation between the parties.
>
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

Id. at 186 (quoting Wigmore, Evidence § 2285 at 527; emphasis in original).

16. One of the purported benefits obtained from extending the privilege to lower-level employees is to encourage private corporations to police themselves. See Sexton, A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege, 57 N.Y.U. L. Rev. 443, 475 (1982) (characterizing the Upjohn Court's decision as an acceptance of the benefits to society obtained from corporate voluntary compliance with governmental regulation). Supposedly, the pressures of a competitive marketplace create great incentives for companies to actively enforce self-policing measures. The Legislature, recognizing that utility monopolies have no competitors, turned the policing role over to the Commission. The greater benefit derived from allowing the Commission access to the facts known by employees/witnesses of public monopolies, therefore, outweighs any putative benefit obtained by a utility's being encouraged to police its own activities under a broad application of the privilege.

17. In a pre-Upjohn decision, the Federal Communications Commission [FCC] addressed the balancing of a utility's claim of attorney-client privilege with its policing function. Lecturing Columbia Broadcasting System, the FCC stated that its duty to protect the public from "staged" news events demanded it have access to a utility's investigatory files to determine whether a utility has conducted a complete investigation. In re: Notification to Columbia Broadcasting System, Inc. Concerning Investigations by CBS of Incidents of "Staging" by its Employees of Television News Programs, 45 F.C.C.2d 119 (Nov. 1973) [hereinafter CBS]. In a post-Upjohn decision, the United States District Court of Appeal for the District of Columbia reasoned that the Securities and Exchange Commission's [SEC] mission to protect the public interest and the interest of shareholders required a balancing test between the agency's need to obtain the truth against a corporation's interest in retaining the confidentiality of privileged communications. S.E.C. v. Gulf & Western Indus., Inc., 518 F. Supp. 675, 686 (D.D.C. 1981) (holding that corporation failed to show that the SEC improperly solicited privileged information from the corporation's counsel). The district court stated that "[in] this case, the Commission, as protector of the public interest, could possibly show good cause to justify disclosure of any privileged information obtained from Dolkart [corporate counsel]." Id.

18. Corporate "clients" should be identified as corporate decision-makers, not all employees within the company. This

would enable the Commission, and the consumer's statutory representative, to fulfill the watchdog role assigned them by the Legislature, while allowing a utility to retain its privilege to hear and act upon its counsel's advice. The benefits obtained by private, competitive companies from a broad application of the privilege disappears in the regulation of monopolies. Indeed, the obverse is true. The benefits obtained from regulatory oversight are lost if the regulator is denied access to the truth.

19. The Florida Legislature, in dealing with a similar privilege, trade secrets, predetermined this balancing for public utilities. Under the Evidence Code, trade secrets are privileged unless non-disclosure would conceal a fraud or work an injustice. Fla. Stat. § 90.506; Becker Metals Corp. v. West Fla. Scrap Metals, 407 So. 2d 380 (Fla. 1st DCA 1981) (compelled disclosure of trade secret requires a court to issue an appropriate protective order). Section 364.183, Florida Statutes (1991), however, grants the Commission access to trade secrets, while mandating their confidentiality. Regulated utilities trade a diminution of their privilege to keep certain corporate matters confidential for the financial benefits gained from holding a public monopoly.

20. The Legislature made this clear as to trade secrets and, by implication, this same balancing choice extends to other privileges. In the confines of utility regulatory law, the interests of justice can only be served by a narrow application

of the attorney-client privilege. The control-group test best meets that Legislative balance between protecting Florida's citizens from poor quality of service at set rates, misrepresentations, and fraud, and a utility's right to sell that monopoly service free from competition.

21. The U.S. Supreme Court also based its Upjohn decision on the need of corporate decision-makers to have access to the employees, often middle-or lower-level managers, who had relevant information. Upjohn, 449 U.S. at 391. This rests on the assumption that employees would be willing to disclose evidence of wrongdoing to their corporate superiors. Employees, as individuals, can neither claim nor waive the attorney-client privilege for statements made to corporate counsel. Tail of the Pup, Inc. v. Webb, 528 So. 2d 506 (Fla. 2d DCA 1988) (management controls the privilege). Any notion that an employee in these circumstances should feel freer to communicate with corporate counsel is not credible. Cf. Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 357 (1985) (chilling effect no greater when corporate officers run the risk of successor officers waiving privilege); See generally, Sexton, A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege, 57 N.Y.U. L. Rev. 443, 465-67 (1982) (raising the argument that employees may be unwilling to communicate with corporate attorneys from fear of waiver resulting in liability and possible disciplinary action).

22. BellSouth may yet determine that it's in its best interest to release these statements to the Commission. If so, the employees will individually run the risk of liability for statements they made to corporate counsel. The attorney-client privilege does not promote full, frank disclosure by employees under these circumstances. Furthermore, a public monopoly has a duty to keep the Commission informed of any wrongdoing that adversely affects its customers.

BellSouth's Work Product Does Not Immunize These Statements

23. BellSouth also claims that these employees/witnesses' statements, as well as their identities,[9] are protected by its work product privilege. The Supreme Court of Florida has adopted the work product immunity developed by the U.S. Supreme Court in Hickman v. Taylor, 329 U.S. 495 (1947). Dodson v. Persell, 390 So. 2d 704, 706-7 & n.3 (Fla. 1980). The work product doctrine provides a limited protection for an attorney's mental impressions, investigative materials, legal theories, and personal notes from discovery when prepared in anticipation of litigation by an attorney or an employed investigator at the direction of a party. Id. The objecting party must first show the existence of the privilege. Hartford Accident & Idem. Co. v. McGann, 402 So. 2d 1361 (Fla. 4th DCA 1981). Only if clearly

[9] See In re: Petition on Behalf of Citizens of the State of Florida to Initiate Investigation into the Integrity of Southern Bell Telephone and Telegraph Company's Repair Service Activities and Reports, Docket no. 910163-TL, Order no. PSC-0339-FOF-TL (May 13, 1992), appeal docketed, No. 80,004 (Fla. Sept. 14, 1992).

demonstrated does the moving party have to demonstrate need to overcome the immunity. Id.

24. The supreme court recognized that the immunity could be overcome by a showing of need and inability to obtain substantially similar evidence through independent means. Dodson, 390 So. 2d at 706-7. The policy supporting the limitation rests upon the court's need to know all of the relevant facts in order to arrive at a just decision. Id. Quoting Hickman v. Taylor, the supreme court noted the exceptions to the privilege:

> 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 non-privileged 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. And production might be justified where the witnesses are no longer available or can be reached only with difficulty. 329 U.S. at 511, 67 S.Ct. at 394.

Dodson, 390 So. 2d at 708 (surveillance films not intended to be used as evidence are subject to discovery if unique and otherwise unavailable); accord Transcontinental Gas Pipe Line Corp., 18 F.E.R.C. ¶ 63,043 (Feb. 9, 1992) (finding that materials that were related to the issue, which were prepared at the direction of counsel, were discoverable by the adverse party because the materials could not be duplicated without undue hardship).

25. Public Counsel was foreclosed from deposing employees with knowledge of relevant facts as BellSouth claimed the identities of the employees interviewed was privileged information. Public Counsel did depose a large number of employees, who had been named in the personnel department manager's notes of disciplinary actions taken against network operations managers. Most of those employees denied knowledge of any wrongdoing.

26. In Xerox Corp. v. International Business Machines Corp., 64 F.R.D. 367 (S.D.N.Y. 1974), the district court resolved a similar dispute involving the alleged misappropriation of Xerox trade secrets by IBM in developing an IBM copier. IBM's in-house counsel interviewed 37 of its employees and made notes of each interview. Xerox, 64 F.R.D. at 375. These notes were part of the company's internal investigation begun in anticipation of the suit by Xerox. Id. IBM released the names of the 37 employees to Xerox. Id. Xerox deposed 23 of the 37 named employees, but was unable to elicit the information it sought because the employees were unable to recall which Xerox documents they saw or used, if any. Id. It appeared that IBM also raised objections in the depositions as to what the employees said to IBM counsel. Id. Xerox then sought a court order to compel the production of IBM's counsel's notes of the interviews of the 37 employees. Id.

27. The district court stated that Xerox had shown sufficient need to compel the production of the statements of the 23 employees deposed. Id. at 382. The district court stated that

in order to determine if IBM had misappropriated Xerox's trade secrets it was necessary to know which IBM employees, if any, had access to Xerox's trade secrets, the extent of their knowledge and understanding of the secrets, and the use made of the secrets. Id. The information was obviously to be found only within the IBM organization. Id. Xerox had attempted to obtain this information through traditional discovery without success. Id. IBM refused to produce its counsel's notes under a work product claim. Id. The district court viewed IBM's actions "as an attempt to hide behind this privilege in order to prevent Xerox from getting the facts to which it would otherwise be entitled." Id. In requiring IBM to produce the notes, the district court reasoned that

> the basic thrust of Hickman and its progeny is that documents containing the work product of attorneys which contain the attorneys' thoughts, impressions, views, strategy, conclusions, and other similar information produced by the attorney in anticipation of litigation are to be protected when feasible, but not at the expense of hiding the non-privileged facts from adversaries or the court. Both sides of a suit need to know the facts in order to properly present their case to a court; and the court needs to know the facts in order to make a sound and intelligent decision. Thus, the right of privacy of an attorney's notes must be balanced against the critical need for the facts. Where the non-privileged facts are intertwined with information which conceivably is privileged, the critical factor becomes the availability of the non-privileged facts from other sources; and where no other sources exist, then a balance must be struck in favor of distilling, if possible, the non-privileged facts from the attorney's documents. If such a distillation becomes impossible, however, then the entire contents of the documents must

> be produced. This is especially true where one party has control over the information sought. A party should not be allowed to conceal critical, non-privileged, discoverable information, which is uniquely within the knowledge of the party and which is not obtainable from any other source, simply by imparting the information to its attorney and then attempting to hide behind the work product doctrine after the party fails to remember the information.

Id. at 381-82 (emphasis added). The district court excised the attorney's mental impressions and opinions from the notes and ordered them produced. Id.

28. Any work product privilege that may have attached to the emplloyees' statements must be set aside in light of Citizens' substantial need for the information to prepare its case and the their inability to obtain the information from any other source. See Citizens' Tenth Motion to Compel.

Respectfully submitted,

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