

CONFIDENTIAL

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General Attorney

Southern Bell Telephone  
and Telegraph Company  
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November 3, 1993

Mr. Steve C. Tribble  
Director, Division of Records and Reporting  
Florida Public Service Commission  
101 East Gaines Street  
Tallahassee, Florida 32301

Re: Docket No. 910163-TL; 900960-TL ~~610163-TL~~

Dear Mr. Tribble:

Enclosed please find an original and fifteen copies of Southern Bell Telephone and Telegraph Company's Request for Confidential Classification, which we ask that you file in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely yours  
*J. Phillip Carver*  
J. Phillip Carver (AW)

Enclosures

cc: All Parties of Record  
A. M. Lombardo  
Harris R. Anthony  
R. Douglas Lackey

DD

A BELLSOUTH Company

DOCUMENT NUMBER-DATE  
11876 NOV-3 8  
FPSC-RECORDS/REPORTING

**CERTIFICATE OF SERVICE**

**Docket No. 920260-TL**

**Docket No. 910163-TL**

**Docket No. 910727-TL**

**Docket No. 900960-TL**

I HEREBY CERTIFY that a copy of the foregoing has been  
furnished by United States Mail this *3rd.* day of *Nov.*, 1993  
to:

Robin Norton  
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Florida Public Service  
Commission  
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J. Phillip Carver (Att)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition on behalf of Citizens of the State of Florida to initiate investigation into integrity of Southern Bell Telephone and Telegraph Company's repair service activities and reports.	)	Docket No. 910163-TL
<hr/>		
In re: Show cause proceeding against Southern Bell Telephone and Telegraph Company for misbilling customers.	)	Docket No. 900960-TL
<hr/>		
	)	Filed: November 3, 1993

**SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S  
REQUEST FOR CONFIDENTIAL CLASSIFICATION**

COMES NOW BellSouth Telecommunications, Inc., d/b/a Southern Bell Telephone and Telegraph Company ("Southern Bell" or "Company"), pursuant to Rule 25-22.006, Florida Administrative Code, and files its Motion for Confidential Classification and Permanent Protective Order and states as grounds in support thereof the following:

1. The Office of Public Counsel ("Public Counsel") issued a Notice of Deposition in the above-referenced docket in order to take the depositions of Southern Bell employees, David Mower and Cynthia White, on December 17, 1992 in Jacksonville, Florida. The depositions of these Southern Bell employees, which were taken pursuant to this notice, have been transcribed and were received by Southern Bell on October 12, 1993. During these depositions numerous questions were asked and answered that

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entailed the disclosure of information regarding Southern Bell employees that may relate to the matters at issue in this docket. Some of this employee-related information is entitled to confidential classification.

2. Southern Bell filed on October 13, 1993, its Notice of Intent to Seek Confidential Classification of the information contained in these depositions. Accordingly, Southern Bell's Request for Confidential Classification is due under Rule 25-22.006(3)(a), Florida Administrative Code, on or before November 3, 1993.

3. Southern Bell has filed as Attachment "A" a listing of the specific pages and lines of each deposition that contain proprietary confidential information, which has been correlated so that the page and line are "identified with the specific justification proffered in support of the classification of such material". Rule 25-22.006(4)(c). Southern Bell has also filed a highlighted version of the depositions in a sealed container, which is marked as Attachment "B." Finally, Southern Bell has filed two redacted copies of the depositions as Attachment "C."

4. Southern Bell seeks confidential treatment of the employee information described below. This information is clearly confidential and proprietary under Florida Statutes, Section 364.183(f), which provides that "proprietary confidential

business information" includes "employee personnel information unrelated to compensation, duties, qualifications, or responsibilities."

5. Specifically, this employee-related information arose in two different contexts: One, in the deposition of Ms. White, Public Counsel requested that she state her home address. This information was provided in response to Public Counsel's request. This information appears in Ms. White's deposition at the first page that is identified as confidential on Attachment "A" to this motion. This information should be treated as confidential because it is employee information that is obviously unrelated to "compensation, duties, qualifications or responsibilities".

6. Two, in both of the above-referenced depositions, numerous questions were asked and answered that either required the disclosure of the names of certain Southern Bell employees who received some form of discipline or included facts that would allow the identification of disciplined employees. Southern Bell seeks confidential treatment only of the specific identities of the employees disciplined. This information is clearly confidential and proprietary under Florida Statutes, § 364.183(f).

7. The four areas of employee personnel information that are not, per se, confidential pursuant to § 364.183(f), Florida

Statutes, are compensation, duties, qualifications, and responsibilities of an employee. A common sense reading of this list, as well as a review of the definitions of these items as contained in Webster's Seventh New Collegiate Dictionary demonstrate that the names of employees who were disciplined do not fit any of these exceptions and are, therefore, entitled to confidential classification under § 364.183(f), Florida Statutes.

8. A review of these terms, in the context of § 364.183(f), Florida Statutes, reveals their meaning.

"Compensation" is the amount of money or other value that an employee is paid to perform his or her job duties. "Duties" are the particular acts an employee is expected to perform as a part of his or her job. "Qualifications" are the skills, knowledge, and abilities needed to perform a particular job. Finally, "responsibilities" are those things that an employee is obliged to do as part of his or her job. These meanings are confirmed by the dictionary definition of these words. Webster's definitions of these terms are as follow:

- A. Compensation - payment, wages.
- B. Duty - the action required by one's position or occupation.
- C. Qualification - something that qualifies; a condition that must be complied with.
- D. Responsibility - the quality or state of being responsible.

9. The discipline of a particular employee has nothing to do with the employee's qualifications or compensation. Likewise, such discipline is not related in a strict sense to the employee's responsibilities or with the particular employee's duties.

10. Inasmuch as this docket has already resulted in widespread publicity as to Southern Bell, it is probable that the public disclosure of the identities of these employees would also be widely published. The public disclosure of the names of employees who were disciplined would have the potential effect of subjecting them to public opprobrium and scorn. This disclosure is unnecessary where, as here, the public will have access to all pertinent information, except for the names of the employees disciplined.

11. Further, as to employee discipline, there is an equally compelling reason that this information should be treated as confidential. Section 364.183, Florida Statutes, provides that in addition to the specifically identified types of documents that are confidential, such as those enumerated in subsection (f), any document that, if disclosed, "would cause harm to the ratepayers or the person's or company's business operations ... is also entitled to protection." The potential for harm to



Southern Bell's business operations that would result from disclosure of the subject information is great.

12. The public disclosure of the names of disciplined employees would have a significantly deleterious effect on morale that, in turn, would serve as a practical impediment to the functioning of the Company. Those who have cooperated with the efforts of the company to police itself have done so on the well-founded assumption that the information would be handled discreetly, appropriately, and that it would result in discipline that was warranted. If Southern Bell is now forced to reveal publicly the names of the employees disciplined, then the employees who have cooperated will no doubt feel that their good faith efforts to address any problems that may have occurred have been betrayed. It is easy to see how this sense of betrayal could result in morale problems that would be both widespread and severe.

13. Moreover, public disclosure could well result not only in general morale problems, but also in a general employee wariness and concern that would make future attempts to remedy problems far more difficult. Southern Bell can only effectively investigate an internal problem with the cooperation of its employees. If the lesson to be learned by employees in this particular instance is that any cooperation may result in

exposure of disciplined employees to the additional ordeal of public ridicule, then the prospect of obtaining adequate employee cooperation to address effectively any future problems diminishes significantly.

14. Further, the managers of Southern Bell who are charged with the duty of administering employee discipline will unquestionably be hesitant to do so if they know that any employee disciplined for even the most minor infraction may later have that discipline disclosed and widely published.

15. Finally, to reveal this information publicly would serve no purpose whatsoever. Arguably, if disclosure of the identities of these employees served some public purpose, or if this disclosure were necessary for this Commission to deal thoroughly with the issues of this docket, then a balancing test might be necessary. That is, the Commission would need to balance the benefits to be derived from public disclosure against the detriment to the Company and the employees. In this case, however, public disclosure will result in no benefit whatsoever.

16. This Commission can fully consider all issues pertinent to this docket, based on the information that Southern Bell has provided, which includes the names of employees disciplined. It is only the public disclosure of these employees' names that Southern Bell seeks to prevent. Southern Bell has stated that it does not object to public disclosure of the extent of the employee discipline, the type of discipline, and the number of persons disciplined. There simply is nothing to be gained by the

additional, public disclosure of the identities of the particular persons disciplined. Florida Statutes § 364.183(f) clearly provides that the names of these employees should be kept confidential. To hold otherwise will do nothing more than damage, perhaps irreparably, the reputations of individual Southern Bell employees and expose them personally to public ridicule.

17. This Commission should rule that the names of these employees shall not be publicly disclosed because this disclosure would require an inappropriately broad construction of the four exceptions to the grant of confidentiality for personnel information that is set forth in § 364.183(f).

18. Certain of the information for which Southern Bell is requesting confidential treatment should not be publicly disclosed for another, equally compelling, reason. During the deposition at issue, Public Counsel questioned the witness based upon the contents of the deposition exhibits that was identified as Composite No. 1.

19. This composite exhibit is comprised, in whole or in part, of hand-written notes that are covered and protected by the work product doctrine and the attorney-client privileges. This document was inadvertently produced to Public Counsel by Southern Bell in response to a request for production that was propounded prior to the time of the deposition in question.

20. Upon discovering the inadvertent disclosure, counsel for Southern Bell verbally requested that Public Counsel return

the documents to Southern Bell. Thereafter, counsel for Southern Bell sent to Public Counsel a letter requesting the immediate return of this document. A similar letter request was made of and a letter sent to the Commission Staff's attorney. These letters, copies of which are attached hereto as Attachment "D", set forth the clear, persuasive case law that provides that the inadvertent disclosure of documents is not a waiver of the privilege. Public Counsel and Staff Attorney, nevertheless, refused to return these documents. Public Counsel then utilized these documents in the instant deposition by asking questions that either quoted directly from the documents, or alternatively, paraphrased them in such a way that the transcript of the deposition reveals clearly the contents of the documents.

21. Southern Bell herein requests confidential treatment of Composite Exhibit No. 1 of the deposition and of the designated portions of the deposition transcript that reflect the contents of those exhibits.

22. This Commission has broad discretion under § 364.183(3), Florida Statutes, to exempt from the public disclosure requirements of Florida Statutes § 119.07(1) proprietary confidential business information. The phrase "proprietary confidential business information" is, in turn, defined broadly by the statute to allow this Commission to protect from disclosure any information that is (1) intended to be private and treated accordingly by the company when (2)

disclosure of the information would cause harm to the company's business operations.

23. It is obvious that the gratuitous public disclosure of confidential attorney-client communications has a significant prospect for harm to the company. The privilege itself was created because, in the words of one court, "in the interest of the administration of justice, ... persons seeking legal aid and counsel should be free to communicate with a confidential advisor about the subject matter of their problem without fear of consequences or the apprehension of disclosure." Modern Woodmen of American v. Watkins, 132 F.2d 352, 354 (5th Cir. 1942).

24. Likewise, the work product doctrine is of crucial importance in this situation. This "doctrine was developed in order to discourage counsel from one side from taking advantage of trial preparation undertaken by opposing counsel, and thus both to protect the morale of the profession and to encourage both sides to a dispute to conduct thorough, independent investigations in preparation for trial." U.S. v. 22.80 Acres of Land, 107 F.R.D. 20, 24 (U.S.D.C. Cal. 1985). The work product doctrine, and the compelling reasons for its existence, apply equally to situations such as ours in which the documents in question are created in anticipation of litigation. See generally, U.S. v. Real Estate Board of Metropolitan St. Louis, 59 F.R.D. 637 (U.S.D.C, Mo.1973).

25. In this instance, Southern Bell has likely already been harmed by the combination of the inadvertent disclosure of the

privileged material and the subsequent refusal of Public Counsel to acknowledge the case law holding that no privilege was waived and to return the documents. This injury should not be compounded by the additional and unnecessary public disclosure of information that the company reasonably expected to be kept confidential.

WHEREFORE, Southern Bell requests that this Commission grant its Motion for Confidential Treatment and Permanent Protective Order.

Respectfully submitted,

ATTORNEYS FOR SOUTHERN BELL  
TELEPHONE AND TELEGRAPH COMPANY

*Harris R. Anthony (ps)*

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FPSC DOCKETS 910163-TL & 900960-TL  
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY  
REQUEST FOR CONFIDENTIAL CLASSIFICATION

TRANSCRIPTS OF DECEMBER 17, 1992 DEPOSITIONS OF  
WHITE AND MOWER

JUSTIFICATION FOR CONFIDENTIALITY REQUEST

1. This information is employee personnel information unrelated to compensation, duties, qualifications and responsibilities. As such, this information is confidential business information pursuant to Section 364.183, Florida Statutes, and is exempt from the requirement of public disclosure of Section 119.07, Florida Statutes.

2. The information contained in this listing is Attorney/Client work product and is, therefore, proprietary and privileged information.

The following information identified by page and line numbers is considered confidential and proprietary:

<u>DEPONENT</u>	<u>PAGE NO.</u>	<u>LINE NOS.</u>	<u>REASON PROPRIETARY</u>
WHITE	4	13-15	1
	7	16,17	1
	8	1-25	1
	9	1-14	1
	10	1-25	1
	30	11	1
	31	24	1
	32	5	1
	35	5,21	1
	37	4	1
MOWER	19	22,25	1
	20	1,2,3,8,9,10,11,13,20,21, 22,23,24,25	1
	28	18,25	1
	29	1,4,22	1
	38	22	1
	39	11,15,16,19,20	1
	40	22,23	1
	41	4,5,10,13,15,16,17,18,19,24	1
	42	20	1
	43	1,4	1
	44	24	1
	45	1,3,4,7,8,11,12	1
	53	3	1

FPSC DOCKETS 910163-TL & 900960-TL  
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY  
REQUEST FOR CONFIDENTIAL CLASSIFICATION

TRANSCRIPTS OF DECEMBER 17, 1992 DEPOSITIONS OF  
WHITE AND MOWER

MOWER EXHIBITS

	<u>PAGE NOS.</u>	<u>LINE(S)</u>	<u>COLUMN(S)</u>	<u>REASON</u>
COMPOSITE 1	1-14	All Lines		1 & 2
	15	All Lines		2
	16-40	All Lines		1
EX 2	Item No. 4 Page 1 of 1	15 20-23	Disciplined...	1 1
EX 3	1	3,4	EMPLOYEE	1
	2	3,4	EMPLOYEE	1
	3	3-6	EMPLOYEE	1
		7,8	EMPLOYEE, COMMENTS	1
		9-12	EMPLOYEE	1
	4	3-5	EMPLOYEE	1
		6	EMPLOYEE, COMMENTS	1
		7-11	EMPLOYEE	1
	5	3-13	EMPLOYEE	1
	6	3-8	EMPLOYEE	1
	7	3-7	EMPLOYEE	1
	8	4,5	EMPLOYEE	1
	9	4	EMPLOYEE, COMMENTS	1
		8	EMPLOYEE	1
		9,10	COMMENTS	1
	10	3,4	EMPLOYEE	1
	11	3-8	EMPLOYEE	1
	12	3-5	EMPLOYEE	1
	13	3,4	EMPLOYEE	1
	14	3-5	EMPLOYEE	1
	15	3-5	EMPLOYEE	1
	16	3	EMPLOYEE	1
	17	4-8	EMPLOYEE	1
	18	4	EMPLOYEE	1
	19	3	EMPLOYEE	1
	20	3-14	EMPLOYEE	1
	21	3-6	EMPLOYEE	1
		8	EMPLOYEE, COMMENTS	1
		9	COMMENTS	1



Harris R. Anthony  
General Attorney-Florida

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May 28, 1992

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Tallahassee, Florida 32399-1400

RE: Docket No. 910163-TL

Dear Charlie:

On March 21, 1992, Public Counsel issued its Twenty-Second Set of Requests for Production of Documents in the above captioned matter. Southern Bell filed its Responses and Objections to same on April 29, 1992, wherein it objected to the request to the extent it sought documents covered by the attorney/client privilege or attorney work product privilege or both. The documents so protected were described as notes compiled by the Personnel Department and derived from the privileged internal legal investigation.

On May 21, 1992, at a panel deposition conducted by the Florida Public Commission Staff, it was brought to Southern Bell's attention that certain privileged information had inadvertently and accidentally been disclosed in the responses filed on April 29, 1992. This material consisted of 14 pages, numbers 56 through 70, which contained Personnel Department notes as described above. As counsel for Southern Bell, I informed you of the mistake and requested the return of the privileged material. You refused to return the privileged material.

In accord with United States v. Pepper's Steel & Alloys, Inc., 742 F.Supp. 641 (S.D. Fla. 1990), the privilege remains with respect to this set of notes and they should immediately be returned to Southern Bell. In Pepper's Steel, the court adopted the test of Parkway Gallery v. Kittinger, 116 F.R.D. 46, 50

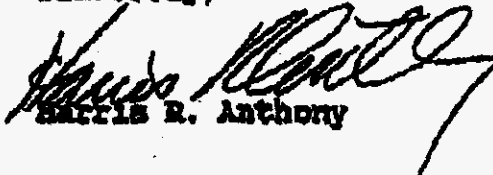
Mr. Charles J. Beck  
May 27, 1992  
Page 2

(M.D.N.C. 1987) in which five factors were used in determining whether an inadvertent production waives privilege:

(1) The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay and measures taken to rectify the disclosures; and (5) whether the overriding interests of justice would be served by relieving a party of its error.

These factors clearly demonstrate that Southern Bell's inadvertent production of this set of notes did not waive the privilege. Southern has taken every reasonable precaution to protect its privilege in a case where voluminous discovery is taking place. This letter is an immediate attempt to rectify the disclosure. In accord with Pepper's Steel and Georgetown Manor, Inc. v. Ethan Allan, Inc., 753 F.Supp. 936 (S.D.Fla. 1991), the inadvertent disclosure of the privileged documents is not a waiver of the privilege. I therefore request that you immediately return to me all copies of the above described material in your possession or control.

Sincerely,

  
Harris R. Anthony

cc: Tracy Hatch

Harris A. Anthony  
General Attorney-Florida

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July 20, 1992

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Deputy Public Counsel  
Office of Public Counsel  
c/o The Florida Legislature  
Room 812  
111 West Madison Street  
Tallahassee, Florida 32399-1400

RE: Docket No. 910163-TL

Dear Charlie:

On March 21, 1992, Public Counsel issued its Twenty-Second Set of Requests for Production of Documents in the above captioned matter. Southern Bell filed its Responses and Objections to same on April 29, 1992, when it objected to the request to the extent it sought documents covered by the attorney-client privilege or attorney work product privilege or both. The documents so protected included notes compiled by the Personnel Department, as well as a typed index of employee names, both of which were derived from the privileged internal legal investigation.

On June 17, 1992, at a deposition conducted by the Office of Public Counsel, it was brought to Southern Bell's attention that the above described privileged information had inadvertently and accidentally been disclosed in the responses filed on April 29, 1992. As counsel for Southern Bell, I informed you of the mistake and requested the return of the privileged material. You did not return the privileged material.

Communications between attorneys and their clients are

shielded from discovery under Rule 1.280(b)(i), Florida Rules of Civil Procedure. This rule is codified at §90-502, Florida Statutes. Attorney-client privilege applies to corporations. Upjohn v. United States, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). The elements of the attorney-client privilege require that (1) the communication must be made in confidence, (2) by one who is a client, (3) seeking legal advice from an attorney, and (4) the communication is requested to be kept confidential and such privilege has not been waived. International Telephone & Telegraph Corp. v. United Telephone Co. of Florida, 60 F.R.D. 177, 184-85 (N.D.Fla. 1973). The internal investigation conducted by Southern Bell's Legal Department with regard to the Company's compliance with the Florida Public Service Commission's rules and regulations clearly falls within the attorney-client privilege.

Attorney work product is shielded from discovery under Rule 1.280(b)(i), Florida Rules of Civil Procedure. In Surf Drugs, Inc. v. Vernetts, 236 So.2d 108, 113 (Fla. 1970), the Supreme Court of Florida held attorney-work product to include investigative materials prepared in anticipation of litigation by an attorney or an employee investigator at the direction of a party. See also Hickman v. Taylor, 323 U.S. 495 (1947). A document is prepared in anticipation of litigation if it is not one that would otherwise be required to be prepared. It does not matter whether the product is the creation of the party, agent, or attorney. See also In Re: ITR Securities Litigation, 89 F.R.D. 595 (N.D. Texas, 1981) (information gathered in a manner as to be privileged does not become discoverable solely because management makes other business use of the information). Under these cases, it is more than apparent that the notes compiled by the Personnel Department and derived from the privileged internal legal investigation are covered by the attorney-client privilege or attorney work product privilege or both as asserted in the Responses and Objections to Public Counsel's Twenty-Second Request for Production of Documents filed on April 29, 1992.


In United States v. Peppersteel & Alloys, Inc., 742 F.Supp. 641 (S.D. Fla. 1990), the court held that the litigant did not waive an attorney-client privilege that attached to the documents by accidentally disclosing them to another party during discovery where the litigant took every reasonable effort to protect the privilege. The court adopted the test of Parkway Gallery v. Kittinger, 116 F.R.D. 46 (N.D.N.C. 1987) (in which five factors were used in determining whether an inadvertent production waives the privilege:

(1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay in measures taken to rectify the disclosure; and (5) whether the overriding interest of justice would be served by relieving a party of its error.

See also Georgetown Manor, Inc. v. Ethan Allen, Inc., 753 F.Supp. 936 (S.D.Fla. 1991) (which also held that production of privileged material by an attorney did not waive the client's attorney-client privilege.

The factors described in Parkway Gallery clearly demonstrate that Southern Bell's inadvertent production of the documents in question did not waive the privilege. Southern Bell has taken every reasonable precaution to protect its privilege in a case where voluminous discovery has taken place. This letter is a follow up to the verbal request that the documents in question be returned. In accord with Peppersteal and Georgetown Manor, the inadvertent disclosure of the privileged documents is not a waiver of the privilege. I therefore request that you immediately return to me all copies of the above-described material in your possession or control.

Sincerely,

  
Harris R. Anthony

cc: Tracy Hatch

Harris R. Anthony  
General Attorney-Florida

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July 20, 1992

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RE: Docket No. 910163-TL

Dear Angela:

On May 1, 1992, the Florida Public Service Commission Staff ("Staff") issued its sixteenth Set of Requests for Production of Documents in the above captioned matter. Southern Bell filed its Responses and Objections to same on June 5, 1992, wherein it objected to the Request to the extent it sought documents covered by the attorney-client privilege or attorney work product privilege or both. The documents so protected included notes compiled by the Personnel Department, as well as a typed index of employee names, both of which were derived from the privileged internal legal investigation.

On June 17, 1992, at a deposition conducted by the Office of Public Counsel, it was brought to Southern Bell's attention that the above described privileged information had inadvertently and accidentally been disclosed in the Responses filed on June 5, 1992. As counsel for Southern Bell, I informed you of the mistake and requested the return of the privileged material. You did not return the privileged material.

Communications between attorneys and their clients are shielded from discovery under Rule 1.280(b)(i), Florida Rules of Civil Procedure. This rule is codified at § 90-502, Florida Statutes. Attorney-client privilege applies to corporations.

Upjohn v. United States, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). The elements of the attorney-client privilege require that (1) the communication must be made in confidence, (2) by one who is a client, (3) seeking legal advice from an attorney, and (4) the communication is requested to be kept confidential and such privilege has not been waived.

International Telephone & Telegraph Corp. v. United Telephone Co. of Florida, 60 F.R.D. 177, 184-85 (N.D.Fla. 1973). The internal investigation conducted by Southern Bell's Legal Department with regard to the Company's compliance with the Florida Public Service Commission's rules and regulations clearly falls within the attorney-client privilege.

Attorney work product is shielded from discovery under Rule 1.280(b)(i), Florida Rules of Civil Procedure. In Surf Drugs, Inc. v. Vermetts, 236 So.2d 108, 113 (Fla. 1970), the Supreme Court of Florida held attorney-work product to include investigative materials prepared in anticipation of litigation by an attorney or an employee investigator at the direction of a party. See also Hickman v. Taylor, 323 U.S. 495 (1947). A document is prepared in anticipation of litigation if it is not one that would otherwise be required to be prepared. It does not matter whether the product is the creation of the party, agent, or attorney. See also In Re: LTB Securities Litigation, 89 F.R.D. 595 (N.D. Texas, 1981) (information gathered in a manner as to be privileged does not become discoverable solely because management makes other business use of the information). Under these cases, it is more than apparent that the notes compiled by the Personnel Department and derived from the privileged internal legal investigation are covered by the attorney-client privilege or attorney work product privilege or both as asserted in the Responses and Objections to Public Counsel's Twenty-Second Request for Production of Documents filed on April 29, 1992.

In United States v. Peppersteel & Alloys, Inc., 742 F.Supp. 641 (S.D. Fla. 1990), the court held that the litigant did not waive an attorney-client privilege that attached to the documents by accidentally disclosing them to another party during discovery where the litigant took every reasonable effort to protect the privilege. The court adopted the test of Parkway Gallery v. Kittinger, 116 F.R.D. 46 (N.D.N.C. 1987) (in which five factors were used in determining whether an inadvertent production waives the privilege:

- (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in

view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay in measures taken to rectify the disclosure; and (5) whether the overriding interest of justice would be served by relieving a party of its error.

See also Georgetown Manor, Inc. v. Ethan Allen, Inc., 753 F.Supp. 936 (S.D.Fla. 1991) (which also held that production of privileged material by an attorney did not waive the client's attorney-client privilege).

The factors described in Parkway Gallery clearly demonstrate that Southern Bell's inadvertent production of the documents in question did not waive the privilege. Southern Bell has taken every reasonable precaution to protect its privilege in a case where voluminous discovery has taken place. This letter is a follow up to the verbal request that the documents in question be returned. In accord with Peppersteel and Georgetown Manor, the inadvertent disclosure of the privileged documents is not a waiver of the privilege. I therefore request that you immediately return to me all copies of the above-described material in your possession or control.

Sincerely,

  
Harris R. Anthony