

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: May 22, 2013

TO: Karen P. Fernbach, Regional Director
Region 2

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: NYP Holdings, Inc. d/b/a The New York Post
Case 02-CA-091062

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530-6067-6001-3750
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The Region requested advice concerning whether documents responsive to an information request may be withheld due to their confidential nature, or because they are privileged attorney-client communications or attorney work product. We concluded that at least some of the requested materials must be disclosed. Therefore, absent settlement, the Region should issue a Section 8(a)(5) complaint.

FACTS

In August 2011, the management of NYP Holdings, Inc. (“NYP”) received an anonymous letter claiming that a delivery driver in a bargaining unit represented by the Newspaper Mail and Deliverers’ Union of New York and Vicinity (“the Union”) was regularly coming to work late and having other employees “cover” him by doing his work. NYP hired outside counsel and conducted an investigation in which members of its security team interviewed a number of employees, including the assistant general foreman (“AGF”). Based on this investigation, NYP determined that there had been several instances of misconduct of which AGF was (or should have been) aware, in his capacity as ranking supervisor on the night shift. NYP terminated AGF from his supervisory position but offered to reinstate him as a regular driver. He refused.

The Union filed for arbitration, claiming that NYP violated the parties' collective-bargaining agreement by discharging AGF without just cause.¹ In connection with this proceeding, the Union requested that NYP provide copies of various documents, including:

Request 1: All documents pertaining to the reason(s) for the Employer's decision to discharge [AGF], including, but not limited to, witness statements (including any statements made by [AGF]), audio and/or video tapes²; and

Request 2: Copies of any and all documents, including correspondence, witness statements, meeting summaries, internal notes, inter-office memoranda, e-mails and other electronic communications pertaining to: (1) any meetings or discussions, including grievance steps, at which [AGF] was present; and (2) the meeting at which it was decided to discharge [AGF].³

NYP refused to disclose various materials responsive to the Union's requests on grounds that they contain privileged and confidential information. In response to Request 1, NYP produced a privilege log indicating that 14 witnesses (in addition to AGF) were interviewed during the investigation. For each witness, investigators compiled an interview memorandum; in addition, two witnesses gave statements, which were also summarized into separate documents. NYP declined entreaties to produce a similar log concerning Request 2, stating: "There were discussions both in person and by telephone between legal counsel and Company management regarding the discipline given to AGF and other employees. Any documents related to such discussions would clearly be privileged attorney client communications."

ACTION

As to Request 1, we conclude that materials requested by the Union are not protected by either the attorney-client privilege or the work-product doctrine.

¹ The collective-bargaining agreement between NYP and the Union provides that foremen and assistant foremen are "members" of the Union despite their status as supervisors. For purposes of this memorandum, we assume that the Union can grieve AGF's termination; the parties expect to arbitrate this issue.

² NYP asserts that there are no video and/or audio tapes responsive the Union's request.

³ The Union's original Request 2 was for "All documents pertaining to any meetings preceding the discharge or at which NYP discharged [AGF]." After a request for clarification by NYP, the Union provided this longer statement.

Furthermore, although NYP established a legitimate and substantial interest in protecting the identities of witnesses who participated in the investigation, we conclude that NYP violated Section 8(a)(5) by failing to seek an accommodation between its confidentiality interest and the Union's need for the information. As to Request 2, we find that NYP has failed to show that materials requested by the Union are privileged or otherwise protected from disclosure.

Legal Principles

Parties to collective bargaining agreements are obligated to provide, upon request, information relevant to negotiating and administering such agreements.⁴ Information relating to bargaining unit employees and their terms and conditions of employment is presumptively relevant,⁵ including information needed to process grievances.⁶

A party's need for information may be outweighed by an interest in maintaining confidentiality.⁷ However, the party asserting confidentiality bears the burden of showing that its interest is both legitimate and substantial.⁸ And, even if it carries its burden, that party retains a duty to seek a good-faith accommodation of its concerns and the opposing party's need for the information.⁹

The Board has found that otherwise relevant information may be exempt from disclosure by the corporate attorney-client privilege.¹⁰ This privilege protects confidential communications between employees and attorneys for the corporation

⁴ *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967) (citing *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956)); *Penn. Power Co.*, 301 NLRB 1104, 1104-05 (1991).

⁵ *Penn. Power*, 301 NLRB at 1105 (citing *Curtiss-Wright Corp.*, 145 NLRB 152 (1963), *enforced*, 347 F.2d 61 (3d Cir. 1965)).

⁶ *Acme Indus.*, 385 U.S. at 436; *Ralphs Grocery Co.*, 352 NLRB 128, 134 (2008).

⁷ *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 318 (1979); *Penn. Power*, 301 NLRB at 1105.

⁸ *Detroit Edison*, 440 U.S. at 315; *Exxon Co. USA*, 321 NLRB 896, 898 (1996), *enforced mem.* 116 F.3d 1476 (5th Cir. 1997); *Penn. Power*, 301 NLRB at 1105.

⁹ *Borgess Med. Ctr. & Mich. Nurses Ass'n*, 342 NLRB 1105, 1106 (2004) (citing *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 21 (D.C. Cir. 1998)); *see also Exxon*, 321 NLRB at 898; *Penn. Power*, 301 NLRB at 1105-06.

¹⁰ *Patrick Cudahy, Inc.*, 288 NLRB 968, 970-71 (1988).

(acting in their capacity as attorneys), so long as they concern matters within the scope of the employees' duties and the employees are sufficiently aware that the information is being furnished in order for the corporation to obtain legal advice.¹¹ The attorney-client privilege applies only to communications, however, and does not exempt the underlying facts from disclosure.¹²

The Board also recognizes that relevant information may be protected by the work-product doctrine,¹³ which reaches more broadly than the attorney-client privilege.¹⁴ The work-product doctrine covers material "prepared in anticipation of litigation or for trial by or for another party or its representative."¹⁵ The party asserting the doctrine bears the burden of showing that a document "can fairly be said to have been prepared or obtained *because of* the prospect of litigation . . . and would not have been created in substantially similar form but for the prospect of that litigation."¹⁶ This standard requires showing that the party acted in the

¹¹ See *Upjohn Co. v. United States*, 449 U.S. 383, 394-95 (1981) (declining to clearly define parameters of attorney-client privilege, but identifying factors to consider in determining whether privilege applies, *i.e.*, (1) whether communications were made by employees to corporate counsel acting as such; (2) at the direction of corporate superiors; (3) concerning matters within scope of employees' corporate duties; (4) in order to obtain legal advice for the corporation; (5) whether employees knew this was the purpose of their communications; and (6) whether adequate measures were taken to preserve confidentiality); see also 1 Paul R. Rice, *Attorney-Client Privilege in the United States* § 4:14, at 280 (2011 ed.).

¹² See *Upjohn*, 449 U.S. at 395-96.

¹³ See *Hickman v. Taylor*, 329 U.S. 495 (1947); *Cent. Tel. Co. of Tex.*, 343 NLRB 987, 988 (2004); Fed. R. Civ. P. 26(b)(3).

¹⁴ To the extent that they overlap, the work-product doctrine "is distinct from and broader than the attorney-client privilege." *United States v. Nobles*, 422 U.S. 225, 238 n.11 (1975) (citing *Hickman*, 329 U.S. at 508).

¹⁵ Fed. R. Civ. P. 26(b)(3)(A); see also *Hickman*, 329 U.S. at 511; *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982).

¹⁶ *Cent. Tel.*, 343 NLRB at 988 (internal quotation marks and citations omitted); see also *Stephens Media, LLC, d/b/a Hawaii Tribune-Herald*, 359 NLRB No. 39, at 3 (2012) (finding that document was not attorney work product because it was "at least equally plausible . . . that . . . the preparation of the document [was] simply part of a routine investigation conducted in the ordinary course of business.").

subjective belief that litigation was a real possibility, and that this belief was objectively reasonable.¹⁷

The protections afforded work product are not absolute, and the showing necessary to override them varies depending on the contents of the material. To obtain “ordinary” or “fact” work product—that which contains relevant, non-privileged facts, including those resulting from an investigation¹⁸—the party seeking disclosure must show that it has a substantial need for the materials and cannot, without undue hardship, obtain their substantial equivalent by other means.¹⁹ By contrast, “opinion” or “core” work product includes information revealing the “mental impressions, conclusions, opinions, or legal theories of an attorney or other representative.”²⁰ Although courts are divided over the degree of protection accorded to opinion work product,²¹ all agree that its disclosure requires more than substantial need and undue hardship.²²

Discussion

As an initial matter, we agree with the Region that the Union has established the relevance of information responsive to Requests 1 and 2. NYP conducted an investigation into alleged misconduct among newspaper delivery drivers, the results of which led to AGF’s discharge. In connection with its demand to arbitrate AGF’s termination, the Union requested information about “the reason(s) for [NYP]’s

¹⁷ *Cent. Tel.*, 343 NLRB at 988-89 (quoting *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998)).

¹⁸ *Hickman*, 329 U.S. at 511; *In re Grand Jury Subpoena Dated July 6, 2005*, 510 F.3d 180, 183 (2d Cir. 2007).

¹⁹ Fed. R. Civ. P. 26(b)(3)(A)(ii); *see also Cent. Tel.*, 343 NLRB at 988; *Dir., Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997).

²⁰ Fed. R. Civ. P. 26(b)(3)(B); *see also In re Grand Jury Subpoena Dated July 6, 2005*, 510 F.3d at 183.

²¹ *See generally In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 663-64 (3d Cir. 2003).

²² *See, e.g., United States v. Adlman*, 134 F.3d 1194, 1204 (2d Cir. 1998) (“[A]t a minimum, such material is to be protected unless a highly persuasive showing is made.”) (citation omitted); *Dir., Office of Thrift Supervision*, 124 F.3d at 1307 (“Opinion work product . . . is virtually undiscoverable.”) (citations omitted). *See generally* 6 James W. Moore et al., *Moore’s Fed. Practice* § 26.70[5][e] (3d ed. 1997-2013); 8 Charles A. Wright et al., *Fed. Practice & P. Civ.* § 2026 (3d ed. 2010).

decision to discharge” AGF and documents pertaining to meetings or discussions leading to that decision. This information is directly relevant to the Union’s performance of its duties as collective-bargaining representative.

I. Request 1

A. NYP has a legitimate and substantial confidentiality interest in materials responsive to Request 1, but is obligated to seek an accommodation of this interest with the Union’s need for the information

In opposing the Union’s request, NYP asserts that materials responsive to Request 1 must remain confidential in order to protect those who participated in the investigation from reprisals and bodily harm. When a party offers a legitimate and substantial confidentiality interest against disclosure, the Board applies the *Detroit Edison* framework to weigh the asserted interest against the opposing party’s need for the information.

The Board has found that identifying information can raise a legitimate and substantial confidentiality interest if its disclosure “could reasonably be expected to lead to harassment or retaliation.”²³ To show that such expectation is reasonable, the party asserting confidentiality must offer evidence indicating “a likelihood or real risk” of harassing or retaliatory conduct; a mere possibility does not suffice.²⁴ NYP has provided an affidavit from a former assistant U.S. attorney in the Eastern District of New York who is currently retained by NYP as outside counsel. He states that: (1) the Union is connected to organized crime; (2) Union members have made threatening statements against NYP employees, including those who reported improper activities; (3) one employee was already subjected to physical harm; and (4) a Union representative expressed his intention to identify the “rats” who cooperated in NYP’s investigation and expose them to other members. These assertions indicate a likelihood or real risk that employees who participated in this investigation could face harassment or retaliation if their identities are disclosed. Accordingly, we agree with the Region that NYP has established a legitimate and substantial interest in protecting the identities of employees interviewed in the investigation.

Even though the *Detroit Edison* analysis weighs in favor of confidentiality, however, NYP remains obligated to seek a good-faith accommodation between its

²³ *Detroit Newspaper Agency*, 317 NLRB 1071, 1073 (1995).

²⁴ *Metro. Edison Co.*, 330 NLRB 107, 108 (1999). *See, e.g., Penn. Power*, 301 NLRB at 1107 (where employer received tips about certain employees being under the influence of drugs, risk of harassment to informers outweighed union’s need for identifying information).

concerns and the Union's, for example, the disclosure of redacted or summarized interview memoranda. We conclude that NYP's refusal to bargain with the Union over this accommodation violated Section 8(a)(5).

B. Witness statements are not categorically exempt from disclosure

NYP's privilege log indicates that 2 of the 14 interviewed employees gave statements to investigators. Under applicable Board law,²⁵ witness statements are categorically protected from disclosure if the witnesses received assurances of confidentiality and adopted the statements as their own.²⁶ NYP concedes that not all interviewed employees were given assurances of confidentiality, and there is no evidence that the two employees who gave statements received such assurances. Nor is there any evidence that these two employees adopted the statements as their own. For these reasons, we find that the two statements listed in NYP's privilege log are not exempt from disclosure.²⁷

In any case, the *Detroit Edison* analysis applies to the separate summaries of the statements even if the witnesses were given assurances of confidentiality and

²⁵ See *Anheuser-Busch, Inc.*, 237 NLRB 982, 984-85 (1978) (adopting bright-line rule exempting witness statements from disclosure), *overruled by Am. Baptist Homes of the W. d/b/a Piedmont Gardens*, 359 NLRB No. 46 (2012). We agree with the Region that, as the Board's ruling in *Piedmont Gardens* is prospective only, 359 NLRB No. 46 at 4-5, *Anheuser-Busch* still governs this particular issue.

²⁶ See *New Jersey Bell Tel. Co.*, 300 NLRB 42, 43 (1990) (finding that witness statements under *Anheuser-Busch* require showing that witness adopted statement and was given assurance that statement would remain confidential), *enforced*, 936 F.2d 144 (3d Cir. 1991); *El Paso Elec. Co.*, 355 NLRB 428, 428 n.3, 458 (2010) (relying on *New Jersey Bell* to require adoption of statement and assurance of confidentiality); see also *Piedmont Gardens*, 359 NLRB No. 46, at 6 (2012) (reciting two-pronged test for *Anheuser-Busch* witness statements).

²⁷ We also reject NYP's claim that, under the Board's decision in *Northern Indiana Public Service Co. ("NIPSCO")*, 347 NLRB 210 (2006), interview memos compiled by NYP's investigators are categorically exempt from disclosure. Contrary to this case, the investigator in *NIPSCO* assured each employee that their conversation would remain confidential. *Id.* at 210. Moreover, the Board found that the information compiled by the investigator was "qualitatively different" from the type of information needed by the union to process its grievance. 347 NLRB at 213. Here, by contrast, the contents of the memos go to the heart of the Union's grievance: whether NYP had just cause to terminate AGF.

adopted their statements.²⁸ Balancing NYP's confidentiality interest against the Union's competing need for information, we conclude that NYP is required to supply the Union with the summaries of both witness statements, redacted to omit information that could serve to identify the witnesses.²⁹

C. NYP has not established that documents responsive to Request 1 are privileged attorney-client communications

As the party opposing disclosure, NYP bears the burden of showing that materials responsive to the Union's Request 1 meet the essential elements of the attorney-client privilege.³⁰ The information submitted by NYP falls short of meeting that burden. Notably, there is no evidence as to whether employee witnesses knew they were being interviewed in order for NYP to obtain legal advice, whether they did so at the direction of corporate superiors, whether they understood the confidential nature of these communications, and whether NYP took adequate steps to maintain confidentiality thereafter.³¹ In fact, as noted by the Region, NYP concedes that only some witnesses received assurances of confidentiality. Therefore, we find that NYP has not established that documents responsive to Request 1 are privileged attorney-client communications exempt from disclosure.

Furthermore, even if NYP were to demonstrate that the materials in question are privileged, the attorney-client privilege does not protect disclosure of the underlying facts—in this case, the information on which NYP relied to discharge AGF.³² Ordinarily, the Union would be free to obtain this information by

²⁸ See *Penn. Power*, 301 NLRB at 1107.

²⁹ See *id.* (finding employer obligated to provide summaries of *Anheuser-Busch* witness statements as accommodation under *Detroit Edison* analysis); *Mobil Oil Corp.*, 303 NLRB 780, 781 (1991) (same).

³⁰ *United States v. Mejia*, 655 F.3d 126, 132 (2d Cir. 2011); *In re Lindsey*, 148 F.3d 1100, 1106 (D.C. Cir. 1998).

³¹ Cf. *Upjohn*, 449 U.S. at 387 (employees received letter from company chairman asking them to fill out questionnaire as part of investigation into possible illegal conduct, and instructing them to “treat the investigation as ‘highly confidential’ and not to discuss it with anyone other than Upjohn employees who might be helpful in providing the requested information.”).

³² See *id.* at 395-96; see generally 24 Charles A. Wright et al., *Fed. Practice & P. Evid.* § 5484 (1st ed. 1986-2013) (“[T]he privilege only applies to communications, not to their informational content. . . . Any employee who has the relevant information may be required to divulge it during trial or deposition, and the

conducting its own investigation, including by interviewing the employees who were interviewed by NYP. However, since the identities of the witnesses cannot be revealed, owing to NYP's legitimate concerns about harassment and retaliation, the Union is unable to obtain this information through independent means.

D. The work-product doctrine does not exempt materials responsive to Request 1 from disclosure because the Union has shown a substantial need for these documents and inability to obtain their equivalent without undue hardship

As the party opposing disclosure, NYP bears the initial burden to show that documents responsive to the Union's Request 1 were prepared in reasonable anticipation of litigation. NYP provided an affidavit from a senior vice president and deputy general counsel for News America Incorporated, its parent company ("VP/Dep. GC"), who states that in August 2012, he was informed that NYP had received an anonymous letter alleging misconduct among employees. The VP/Dep. GC determined that, if these allegations were proven true, NYP would likely discipline or discharge the employees involved, and that litigation would probably ensue. He directed NYP's security team to conduct a full investigation, during the course of which he also retained the law firm of Mintz & Gold to provide assistance. He and the Mintz & Gold attorneys received regular reports, copies of memos and summaries, and discussed strategy and progress with investigators. The Union does not offer any evidence in rebuttal. Based on that evidence, we agree with the Region that documents responsive to Request 1 are attorney work product.³³

However, we conclude that the Union has made the showing of substantial need and undue hardship required to obtain disclosure of fact work product. To the extent that the requested documents contain information about facts or allegations on which NYP relied to fire AGF, they are necessary to the Union not only to prepare for arbitration, but also to make an informed decision whether to pursue arbitration at all.³⁴ Furthermore, given NYP's interest in not disclosing the identities of witness, the Union cannot obtain substantially equivalent information

corporation may be required to reveal the knowledge in response to an interrogatory so long as what is asked for is the information and not the revelation of a communication to counsel.") (footnotes omitted).

³³ See *Hawaii Tribune-Herald*, 359 NLRB No. 39, at 3 (citing cases where courts found documents to be protected work product based on affidavits from attorneys stating materials were prepared in anticipation of litigation).

³⁴ See *Penn. Power*, 301 NLRB at 1105 (noting that "the goal of the process of exchanging information is to encourage resolution of disputes, *short of arbitration* . . . [,] so that the arbitration system is not 'woefully overburdened.'") (quoting *Acme Indus.*, 385 U.S. at 438) (other citations omitted) (emphasis added).

without undue hardship.³⁵ For these reasons, we find that NYP must produce all documents responsive to Request 1, except for information related to the mental impressions, conclusions, opinions, or legal theories of its attorneys.

NYP may argue that interview memos are, intrinsically, opinion work product because they reveal attorneys' mental processes when evaluating the oral statements of witnesses.³⁶ If so, NYP should be required to submit the memos for *in-camera* review by the judge assigned to this case,³⁷ in order to determine whether their disclosure could indeed reveal the opinions or legal theories of NYP's attorneys.³⁸

II. Request 2

A. NYP has not established that materials responsive to Request 2 are exempt from disclosure

The Union requested copies of all documents and communications pertaining to meetings or discussions related to NYP's decision to discipline AGF. NYP contends that any such materials are protected from disclosure under either the attorney-client privilege or the work-product doctrine. NYP declined to produce a privilege log of documents responsive to Request 2.

³⁵ *Cf., e.g., Cent. Tel.*, 343 NLRB at 990 (finding that union did not show undue hardship since there was no evidence it could not interview witness itself).

³⁶ *See, e.g., Upjohn*, 449 U.S. at 401 (finding that attorneys' notes and memoranda compiled from witnesses' oral communications are work product that can reveal the attorneys' mental processes in evaluating these communications).

³⁷ *See Kaiser Aluminum & Chem. Corp.*, 339 NLRB 829, 829 (2003) (authorizing judge to review subpoenaed documents *in camera* to determine whether work-product doctrine applies); *Brink's Inc.*, 281 NLRB 468, 470 (1986) (holding that hearing officer should have inspected documents *in camera* to determine if attorney-client privilege prevented disclosure).

³⁸ *See, e.g., In re Grand Jury Subpoena Dated July 6, 2005*, 510 F.3d at 183-84 (explaining that party seeking protection for opinion work product must show "a real, rather than speculative, concern" that documents will reveal opinions or thought processes, and holding that, where a party simply relies on conclusory assertions to carry its "heavy burden," that party "bears the consequences of not submitting [materials] for *in camera* review.") (citations omitted); *In re John Doe Corp.*, 675 F.2d 482, 493 (2d Cir. 1982) (disclosing interview notes did not violate "any substantial interest protected by the work-product immunity" where notes simply "recite[d] in a paraphrased, abbreviated form," statements by interviewee).

As the party opposing disclosure, it is NYP's burden to show that materials responsive to Request 2 are indeed exempt.³⁹ Specifically, NYP must furnish a privilege log describing each document and the applicable privilege—a blanket assertion of privilege does not suffice.⁴⁰ Therefore, as an initial matter, NYP has not carried its burden to show that materials responsive to Request 2 are protected by the attorney-client privilege or the work-product doctrine.

B. The attorney-client privilege exempts only those materials responsive to Request 2 that are communications with attorneys who are acting in their legal capacity

If NYP furnishes a privilege log or other, similar document that fulfills its initial burden, the following principles would apply. With regard to communications with outside counsel, there is no question that these involved attorneys acting in their legal capacity, as they were retained to assist in the investigation.

With regard to any communications involving the VP/Dep. GC, however, “courts have held that communications to and from in-house counsel can be sheltered ‘only upon a clear showing that [in-house counsel] gave [advice] in a professional legal capacity.’”⁴¹ Given the VP/Dep. GC's title, it is likely that his responsibilities extend “outside the lawyer's sphere.”⁴² Therefore, in order for communications between him and NYP management or employees to be privileged, NYP must offer clear evidence that each communication involved a request for, or

³⁹ See *In re Grand Jury Subpoena Dated July 6, 2005*, 510 F.3d at 183 (“The party invoking the privilege bears the *heavy burden* of establishing its applicability.”) (emphasis added) (citation omitted).

⁴⁰ See Fed. R. Civ. P. 26(b)(5)(A) (“When a party withholds information otherwise discoverable by claiming that it is privileged or subject to protection as trial-preparation material, the party must . . . describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.”).

⁴¹ Rice, *supra*, § 7:30 at 1206 (footnote omitted) (quoting *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984)). See generally *id.* at § 7:30 (explaining why communications with in-house counsel are not always presumed to be for the purpose of obtaining legal advice).

⁴² *In re Sealed Case*, 737 F.2d at 99.

provision of, legal advice by the VP/Dep. GC acting in his professional legal capacity.⁴³

CONCLUSION

Accordingly, the Region should issue complaint, absent settlement, alleging that NYP violated Section 8(a)(5) by refusing to provide relevant, non-privileged information without seeking a good-faith accommodation with the Union regarding confidentiality concerns.

/s/
B.J.K.

⁴³ If NYP demonstrates that documents not covered by the attorney-client privilege constitute attorney work product created in anticipation of litigation, the Union will be entitled to disclosure if it is able to show substantial need for the documents and inability to procure their substantial equivalent by other means, as discussed above.