

1989

Gold Standard, Inc v. American Barrick Resources Corporation, Barrick Resources (USA), INC.; Texaco INC., Getty Oil Company; and Getty Mining Compan Corporation : Petition for Rehearing

Utah Court of Appeals

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BRIEF

890205

IN THE SUPREME COURT OF THE STATE OF UTAH

GOLD STANDARD, INC.,)	
)	
Plaintiff,)	
vs.)	Case No. 890205
)	
AMERICAN BARRICK RESOURCES)	
CORPORATION; BARRICK)	
RESOURCES (USA), INC.;)	
TEXACO INC.; GETTY OIL)	
COMPANY; and GETTY MINING)	Priority No. 11
COMPANY,)	
)	
Defendants.)	

APPELLEES' PETITION FOR REHEARING

APPEAL FROM AN INTERLOCUTORY ORDER OF THE
THIRD DISTRICT COURT OF TOOELE COUNTY,
STATE OF UTAH, THE HONORABLE FRANK G. NOEL

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FILED

OCT 22 1990

Clerk, Supreme Court, Utah

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vs.)	Case No. 890205
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PETITION

Pursuant to Rule 35 of the Utah Rules of Appellate Procedure, appellees Texaco Inc. ("Texaco"), Getty Oil Company and Getty Mining Company (collectively "Getty") hereby petition this Court for a rehearing of this case on the grounds and for the reasons set forth below. By their signatures hereto, counsel for appellees hereby certify that this petition is made in good faith and not for delay.

INTRODUCTION

This Court reversed the trial court's ruling that the Kundert memoranda are protected by the work product doctrine. Had this Court given proper deference to the factual findings inherent in the ruling below, the opposite result would have been reached. As the law applied by the trial court is consistent with the law as defined by this Court, the basis for this reversal appears to be equivalent to a de novo review of factual issues, without the benefit of a full record relative to such facts. This Court should reconsider its Opinion in light of the trial court's factual findings. In the alternative, this Court should remand the matter to the trial court for further factual findings in light of this Court's ruling on the law.

SUMMARY OF ARGUMENT

In holding that the documents at issue were not created in anticipation of litigation and were therefore not privileged, this Court ignored critical uncontested evidence on which the trial court properly relied. By ignoring this evidence, this Court misapplied the law and created a rule that, in application, will make it virtually impossible to protect any document created before litigation is commenced.

Similarly, this Court improperly applied the doctrine of waiver to a situation where, based upon factual findings that differ from the facts set forth in this Court's opinion, the trial court held that the elements of waiver had not been demonstrated. In holding that Getty waived work product protection by allowing its employees to review the documents at issue, this Court ignored the well-accepted principle that the work product doctrine is not designed to protect confidentiality, but rather to preserve the adversary system. Indeed, the very cases upon which this Court relied recognize that disclosure of a work product document to a nonadversarial third party does not waive work product protection.

Furthermore, in contravention of the universally accepted principle that one cannot waive a right he does not know he has, this Court ruled that Getty waived the right to assert the work product doctrine. Waiver requires an "intentional relinquishment of a known right." Again, this Court erred in ignoring material uncontroverted facts, which confirm that, at the time in question, neither Getty nor its counsel had knowledge of the work product nature of the documents at issue, and hence waiver could not have occurred.

Finally, this Court's Opinion places an unreasonable burden on counsel where a claim of work product cannot be ascertained from the face of a document. In such a case, counsel now will be unavoidably faced with the dilemma of choosing among three unappealing alternatives. Under the Opinion, counsel must either refuse altogether to produce documents until completing all interviews and whatever additional investigation is necessary to ascertain potential claims of work product (potentially creating enormous delay in a complex case); withholding or objecting to production of selected documents without any basis other than a hope that evidence of work product may be discovered in the future

(thus violating ethical responsibilities and Rule 11 obligations); or, in a timely fashion produce all documents requested that are not reasonably identifiable as protected (thus waiving any claim of privilege that is not apparent or readily known). The policy behind the work-product doctrine is not assisted by placing such a burden on counsel.

ARGUMENT

I. This Court Failed to Apply the Proper Standard of Review.

Under the applicable standard of review, this Court must pay deference to the factual findings of the trial court and may reverse them only if they constitute clear error.¹ In reversing the trial court's ruling, this Court improperly ignored a number of the facts that were before the district court, disregarded the trial court's findings, and made its own independent factual inquiry and determination.

In Mower v. McCarthy, 245 P.2d 224 (Utah 1952), this Court granted an interlocutory appeal of a work product issue and set forth the standard of review for such an appeal:

In reviewing a case of this kind where issues of fact are involved and there are no findings of fact, we do not review the facts but assume that the trier of the facts found them in accord with its decision, and we affirm the decision if from the evidence it would be reasonable to find facts to support it. . . . This is the same procedure which is followed where a jury returns a general verdict without disclosing its findings on the facts, and in

¹ Not only does this Court fail to give the required deference to the trial court, it includes statements in its Opinion that are erroneous and contrary to the factual record. For example, this Court incorrectly states that: "Although Getty's in-house counsel was aware that Getty was preparing a response to Gold Standard's initial letter, the attorney did not request the response, nor did he assist in its preparation." Slip op. at 6. To the contrary, Jeff Collins, Getty's in-house attorney, was asked to participate and in fact took the lead in drafting Getty's October 1984 response to Gold Standard. [R. at 2701].

administrative agency cases where findings of fact are not required, but we cannot review the facts.

Id. at 226 (emphasis added). This Court and the Court of Appeals repeatedly have stated that rulings on pre-trial discovery, admissibility of evidence and case management are within the sound discretion of the trial court and should be reversed only for an abuse of that discretion.

In Jackson v. Kennecott Copper Corp., 495 P.2d 1254 (Utah 1972), this Court reaffirmed that a trial court must be given wide latitude in deciding issues of privilege. The defendant in Jackson claimed that smoke stack emission records, which it routinely prepared and sent to counsel, were protected work product. In reviewing the matter, this Court stated:

[S]ince the determination [of whether good cause exists for compelling production of the documents] depends to a large extent upon the facts of each case, a wide latitude of discretion is necessarily vested in the trial judge.

Id. at 1255 (concluding that "the trial court did not abuse its discretion" in finding good cause).

Contrary to its established precedent, this Court failed to give proper deference to the factual findings of the district court and, in fact, implicitly conducted its own factual review, focusing on only a portion of the record and omitting critical evidence. A review of the entire record reveals that the trial court did not abuse its discretion in ruling that the two memoranda were prepared in anticipation of litigation and that Getty did not waive the work product protection. The trial court's determination that the memoranda are entitled to work product protection should be affirmed. At a minimum, the case

should be remanded to the district court for further consideration in light of this Court's ruling.

II. This Court's Application of the "Anticipation of Litigation" Test Ignores the Factual Record Supporting the Ruling Below and Improperly Vitiates Work Product Protection for Nearly All Documents Created Prior to the Actual Filing of a Lawsuit.

It is well established that litigation need not actually have commenced before a party may invoke the work product doctrine to protect certain documents. See 8 C. Wright & A. Miller, Federal Practice and Procedure: Civil, § 2024 (1970). "The work product privilege is not so narrow. . . that it applies only to documents prepared after a party receives notice that litigation will occur." Parry v. Highlight Industries, Inc., 125 F.R.D. 449, 451 (W.D. Mich. 1989) (citing Binks Mfg. Co. v. National Presto Indus., Inc., 709 F.2d 1109, 1120 (7th Cir. 1983)); accord McMahon v. Eastern Steamship Lines, Inc., 129 F.R.D. 197, 199 (S.D. Fla. 1989).

This Court's application of the "anticipation of litigation" test to the facts of this case emasculates the purpose behind the rule and may well place the law in Utah out of step with the law in the rest of the country. By ignoring the attachment to Gold Standard's letter advising Texaco of its claims (the attachment asserted "the basis of a possible legal action" against Getty), the practical effect of this Court's ruling is to require that an adversary expressly and unequivocally threaten to sue before a party can anticipate litigation. Such a standard is at odds with the purpose of the work product doctrine as enunciated by this Court.²

² This Court stated that the anticipation of litigation test "should focus on the 'primary motivating purpose behind the creation of the document.'" Slip op. at 8.

In ruling that the memoranda were not prepared in anticipation of litigation, this Court focused almost entirely on Gold Standard's June 28th letter to Getty and disregarded not only the attachment to the letter, but the bulk of the factual evidence considered by the trial court. Even though Gold Standard's letter may have been the catalyst, it was only a small part of an ongoing chain of events that caused Getty to anticipate litigation. In a complex case such as this, determination of whether a party anticipated litigation is not properly resolved simply by reviewing the language of a single letter. Rather, "determination of whether the documents were prepared in anticipation of litigation is clearly a factual determination," based on consideration of all the facts and circumstances. Simon v. G.D. Searle & Co., 816 F.2d 397, 401 (8th Cir.), cert. denied, 484 U.S. 971 (1987).

There is ample support in the record for the trial court's finding that Getty did anticipate litigation. In fact, it is difficult to conceive of a situation in which a party would have a more substantial basis for anticipating litigation prior to the filing of an actual lawsuit than Getty had in this case. Two Getty employees, Mintz and Collins, provided uncontradicted testimony that Getty believed, as of the summer of 1984, that Gold Standard was threatening litigation. This testimony is objectively supported by two letters from Gold Standard that accuse Getty of numerous breaches and violations of legal duties, principally relating to whether Getty delivered a feasibility study to Gold Standard.³

³ This issue helps to illustrate the factual errors that undermine this Court's Opinion. At least three times in the Opinion, the Court incorrectly identifies the date on which the feasibility study was completed. At one point the Court states that Getty transferred its offices to Salt Lake City on October 1, 1980 "one month before completion of the feasibility study." Slip op. at 2. In the same paragraph, the Court further incorrectly states
(continued...)

Among commercial relationships, it is rare that a party would be more "threatening" and accusatory than was Gold Standard in its letters sent to Texaco and forwarded to Getty. Scott Smith's June 28, 1984 letter claimed that Getty's actions might create in Texaco a "legal disclosure responsibility;" an obligation that would arise only if Gold Standard were threatening to sue Getty. The letter from Robert McConnell, which Smith enclosed with his June 28th letter, is even more threatening. Indeed, it is difficult to envision a more menacing letter from a potential litigation adversary than the September 20, 1983 letter from McConnell, Gold Standard's legal counsel, to Scott Smith (Gold Standard's president). Yet this Court makes only passing reference to McConnell's letter in its "Factual Background" and inexplicably makes no mention of it at all in its work product analysis. In his letter, McConnell used ten single-spaced pages to describe in detail numerous alleged breaches and purported wrongs committed by Getty. He asserts that these wrongs have caused serious damages to Gold Standard and concludes that, as a result of Getty's actions, Gold Standard has "the basis for a possible legal action against Getty for damages Gold Standard has obviously suffered and will continue to suffer" [McConnell Letter at 9-10 (R. at 2685-2694)]. Under the circumstances, it certainly was reasonable for Getty to believe that Gold Standard would sue.

³(...continued)

that Getty presented the Bechtel study to Gold Standard "the following spring." Finally, the Court again incorrectly states that "Getty submitted the Bechtel study as the feasibility study sometime in the spring of 1981." Slip op. at 3. The Record establishes that the final Bechtel study was completed and provided to Gold Standard in June of 1981. [R. at 2617]. The difference in dates is critical because Kundert admits in his memorandum that he does not know what was presented to Gold Standard after May of 1981. Such errors serve to highlight the need to leave factual determinations for the trial court, leaving this Court to review only for an abuse of discretion.

Moreover, the authority on which this Court relied in holding that the memoranda were not created in anticipation of litigation is inapposite to the facts of this case. This Court states that the memoranda "fall squarely within the holding of Janicker v. George Washington Univ., 94 F.R.D. 648, 650 (D.D.C. 1982)." Slip op. at 9. Yet, there is simply no comparison between the evidence supporting work product in this case and the lack of such evidence in Janicker. Furthermore, even though this Court quotes from Janicker, it fails to follow Janicker's holding, which permitted the defendant to redact conclusions and recommendations from the memoranda.

Janicker involved a fire in a building on George Washington University's campus. The university immediately conducted an investigation without communications from potential adversaries. Furthermore, the very person who directed the investigation testified that he asked for the study to determine "what steps, if any, we could take to prevent or moderate such from happening again." Id. at 649. Despite the lack of any evidence from the university that the study was undertaken in anticipation of litigation, the court still permitted the university to "redact any conclusions or recommendations from such investigative reports, and thus producing only those portions of the reports setting forth factual information in the course of the investigation." Id. at 651 (emphasis added).

This Court further incorrectly compares the facts involved in this case with those in Binks Mfg. Co. v. National Presto Indus. Inc., 709 F.2d 1109, 1118 (7th Cir. 1983). In Binks, Presto Industries sought to protect an investigation by its mechanical expert, from discovery. In a dispute related to performance of equipment supplied to Presto, Binks wrote a letter that stated it had "good cooperation from [Presto's] personnel," but that it

would have to remove its equipment from Presto's plant if Presto did not complete its payments for the equipment. Id. at 119. The only evidence Presto provided of its own anticipation of litigation was the letter it wrote back to Binks, stating that if Binks did not cure certain defects in the equipment by a certain date, Presto would send its own experts to the plant location to cure the problems. Based on these two exchanges, the court concluded that, according to Presto's own statements in its letter to Binks, the purpose of the trip to the plant by Presto's experts "was to attempt to cure the mechanical problems with the System, and not to prepare for litigation." Id. at 1119.

This Court also relies on United States v. Gulf Oil Corp., 760 F.2d 292 (Temp. Emer. Ct. App. 1985), a case in which the defendant attempted to protect as work product documents that "were created at Arthur Young's [the outside auditors] request, in order to allow Arthur Young to prepare financial reports which would satisfy the requirements of federal securities laws." Id. at 297. Obviously, such documents cannot constitute work product.

In stark contrast to the complete lack of evidence of "anticipated" litigation in any of the cases cited by this Court, Getty provided uncontradicted affidavits from former Getty employees of Getty's intent and motives. Getty supported these affidavits by additional objective evidence that Gold Standard and its legal counsel had made serious allegations against Getty. When viewed in light of the strained historical relationship between the parties, Gold Standard's two letters are tantamount to "threatening" litigation against Getty.

Getty's former employees testified that Getty anticipated litigation as of July, 1984. It is ironic for Getty to be faced with an opinion to the contrary as part of the same proceeding that historically and objectively demonstrates the accuracy of that anticipation.⁴ The trial court did not abuse its discretion in concluding, based on the facts before it, that Getty prepared the memoranda in anticipation of litigation. A contrary result is only achievable by overriding the trial court's fact-finding province.

III. This Court's Determination that Getty Waived its Work Product Protection by Circulating the Memoranda to its Own Employees is in Error.

This Court's conclusion that Getty waived the work product protection for the Kundert memorandum by making the memorandum available to Richard Klatt, a former Getty employee, ignores the well recognized distinction between the work product doctrine and the attorney-client privilege. Although the attorney-client privilege may be waived upon disclosure of privileged information to any third party, work product protection may be waived only upon disclosure to an adversary. This Court correctly recognized that the "distinction between the two doctrines [attorney-client privilege and work product] disappears when the issue is disclosure to the adverse party." Slip op. at 10. This Court failed to recognize, however, that when the issue is disclosure to company employees or nonadversarial third parties, the distinction between the work product doctrine and the attorney-client privilege is critical.

⁴ Indeed, Gold Standard itself admits that it anticipated litigation with Getty by August of 1984, only one month after Kundert prepared his memorandum and prior to the date that Getty responded to Smith's letter. See Gold Standard's Answer to Interrogatory No. 23 of Getty's and Texaco's Second Set of Interrogatories to Gold Standard, Inc.

The very cases upon which this Court relied in its Opinion support Getty's position that disclosure of the Kundert memorandum to Getty's own employees cannot be deemed a waiver of work product protection. In Shields v. Sturm, Ruger & Co., 864 F.2d 379 (5th Cir. 1989), the court observed:

The work product privilege is very different from the attorney-client privilege. The attorney-client privilege exists to protect confidential communications and . . . is waived by disclosure of confidential communications to third parties. The work product privilege, however, does not exist to protect a confidential relationship but to promote the adversary system Therefore, the mere voluntary disclosure to a third person is insufficient in itself to waive the work product privilege.

Id. at 382. See also United States v. Gulf Oil Corp., 760 F.2d 292 (Temp. Emer. Ct. App. 1985). In Gulf Oil, another case upon which this Court relied, the court, after reaching the same conclusion as Shields regarding disclosure of work product to third parties, stated:

It is inapposite that an adversarial relationship ultimately developed between [the two parties that exchanged the document]. This was not the case at the time the disclosure was made.

Gulf Oil, 760 F.2d at 296.

Klatt was a Getty employee at the time he reviewed the memoranda and made a copy for his files. There is no evidence that Getty circulated the memoranda to anyone other than Getty employees. The fact that Klatt turned the memoranda over to Gold Standard after his departure from Getty and without Getty's knowledge is irrelevant. Since disclosure even to third parties does not necessarily waive the work product privilege, a

fortiori, Getty's disclosure to Klatt, a Getty employee, could not constitute a waiver of any work product protection.⁵

IV. This Court's Opinion on Waiver by Getty's Counsel Ignores an Essential Element of Waiver, Disregards Material Undisputed Facts, and Imposes an Unreasonable Standard on Counsel.

After considering the evidence supporting Gold Standard's allegations of waiver, the trial court explicitly found that "defendants have not acted in a dilatory manner either in coming to a knowledge of the importance of the documents in question or subsequently seeking their return." [Memorandum Decision dated November 23, 1988 at 2 (R. at 3261)]. In overruling the trial court and finding that Getty waived its work product protection by waiting until September of 1988 to bring a motion for protective order, this Court ignored an essential element of the doctrine of waiver, disregarded material undisputed facts offered by Getty and accepted by the trial court, and imposed an unreasonable standard on litigation counsel.

A. A Party Cannot Waive a Right While Acting Under a Misapprehension of Fact.

Courts have repeatedly held that a party can only waive a known right. See, e.g., Barnes v. Wood, 750 P.2d 1226, 1230 (Utah Ct. App. 1988) (must have knowledge of right in order to waive it). It follows, and the case law is clear, that a party cannot waive a

⁵ This Court concluded, without evidentiary support, that the memorandum was part of a "nonconfidential reading file." Slip op. at 3. The evidence reflected only that, within Getty, the file was not confidential; nowhere was there a suggestion that the file was available to third parties outside Getty. In fact, the record reveals that Klatt signed a confidentiality agreement with Getty in connection with his employment. [Affidavit of Louis Rove at ¶ 7]. Thus, there is no basis for the conclusion that the reading file was "nonconfidential" as to adversaries simply because Klatt read it.

right of which he is not aware. See Mid-Century Ins. Co. v. Brown, 654 P.2d 716, 720 (Wash. Ct. App. 1982) ("one cannot waive that which he does not know or where he has acted under a misapprehension of facts"); accord Harris Bros. Constr. Co. v. Crider, 497 S.W.2d 731, 733 (Ky. 1973); International Ins. Co. v. Jataine, 495 S.W.2d 309, 316 (Tex. Civ. App. 1973). Indeed, "[t]he essence of any waiver. . . is knowledge." Citizens Valley Bank v. Mueller, 662 P.2d 792, 794 (Ore. 1983). See also Adams v. Paine, Webber, Jackson & Curtis, Inc., 686 P.2d 797, 801 (Colo. Ct. App. 1984), aff'd, 718 P.2d 508 (Colo. 1986), ("For an individual to have waived his rights the individual must have had full knowledge of the facts concerning such waiver."); Gorrell v. City of Casper, 371 P.2d 835, 839 (Wyo. 1962)("'[A] party cannot be held to have waived a right based upon material facts, the existence of which he did not know.'" (quoting Howrey v. Star Ins. Co. of America, 28 P.2d 477, 479 (Wyo. 1934))).

Getty knew it had produced the the documents. It was not aware, however, of any legitimate basis upon which it could object to their production. Furthermore, there is not a single shred of evidence in the record that Getty knew the Kundert memoranda were protected by the work product doctrine prior to the summer of 1988. Absent such knowledge, Getty could not have waived the privilege.

Moreover, Getty presented evidence to the trial court, and the trial court so found, that Getty was operating under a misapprehension of fact. [Clark Affidavit at ¶ 7 (R. at 2723)]. This Court improperly ignored the evidence that all of the acts of waiver identified in its Opinion occurred while Getty's counsel was acting under a

misapprehension of fact.⁶ This Court suggests that Getty's counsel waived any protection by not objecting to the use of the memoranda in depositions.⁷ These depositions, however, also occurred prior to the time that Getty first became aware of even the possibility that the documents might constitute work product. Once Getty was alerted to that possibility, it immediately objected to use of the memoranda and they were not used again.

B. This Court Disregards Material Undisputed Facts That Were Presented to the Trial Court and That Support the Trial Court's Ruling on Waiver.

This Court also found waiver in the fact that Getty waited for three months to file its motion for protective order after first becoming aware of the possibility that the memoranda might constitute work product. This Court could only reach such a conclusion by totally disregarding the uncontroverted evidence presented to the trial court that explained Getty's delay [see Clark Aff. at ¶ 9 (R. at 2722)], including a letter from Getty's counsel to Gold Standard's counsel, dated July 6, 1988, in which Getty's counsel explained:

In order to complete our factual investigation, we must contact Mr. J.M. Mintz concerning the documents, the purpose of their preparation, and the relationship of the documents to anticipated litigation and legal advice. Unfortunately, after our conversation this morning, I was informed that Mr.

⁶ It is uncontroverted that Kundert's Affidavit erroneously attributes a nonprivileged, business purpose to the memoranda. [See Brief of Appellant, filed August 28, 1989 at 11]. It is also uncontroverted that Kundert "reaffirmed the contents of his affidavit under questioning by Getty's counsel" in his December 2, 1988 deposition. [Brief of Appellant, dated August 28, 1989 at 12]. Indeed, as a result of Kundert's affidavit and testimony, Gold Standard's own legal counsel was also under the same misapprehension that the document was not privileged. [See Affidavit of George Pratt at ¶ 15 (R. at 897-98)].

⁷ One of the depositions referred to in the Court's Opinion was the Tumazos deposition. That deposition occurred in an unrelated case to which Getty was not even a party. Getty was neither notified of this deposition nor present when it took place.

Mintz is out of the country and cannot be contacted until his return. His testimony is critical to this issue.

[Letter attached to Clark Affidavit at p. 2 (R. 2718)]. This evidence, which was unchallenged by Gold Standard and accepted by the trial court, was not even considered in this Court's Opinion.

This Court's discussion of waiver assumes that the existence of the privilege was evident from the face of the documents. Similarly, the cases cited by this Court involve situations where counsel knew that a document was privileged, but produced it inadvertently. Neither is the case here.

The undisputed facts in the record demonstrate that Gold Standard's counsel obtained an affidavit from Kundert, the author of the memorandum, that erroneously attributes a non-privileged, business purpose to the creation of the document. [Affidavit of George W. Pratt at ¶¶ 12-15 (R. at 897-98)]. Getty's counsel had no reason to doubt the accuracy of the affidavit. Moreover, in his deposition on December 2, 1987, Kundert reaffirmed his mistaken belief that his affidavit, which had been drafted by Gold Standard's counsel, was accurate and truthful. [Kundert Depo. at 42 (R. at 2648)]. In light of Kundert's explanation, Getty's counsel had no meritorious basis to withhold production of the memoranda or to object to their use in depositions. The Court's Opinion assumes that Getty could have lodged an objection in good faith to use of the document prior to June of 1988. This assumption is in direct contradiction of the facts.

C. This Court's Opinion Imposes an Unreasonable
Obligation on Litigation Counsel.

It is undisputed that Getty did not become aware of the potential claim of work product until June of 1988. [Clark Affidavit at ¶ 8 (R. at 2722)]. This Court's Opinion, however, suggests that Getty should have objected to the production and use of the memoranda prior to that time. Such a suggestion flies in the face of the ethical obligations imposed upon counsel.

This Court acknowledges that "the plain language of rule 26(b)(3) does not require that an attorney be involved in the preparation of the material." Slip op. at 6. Accordingly, as was the case here, the work product nature of a document may not be evident on the face of the document. Strict application of the waiver doctrine under such circumstances creates an impossible situation for counsel.

Gold Standard filed its lawsuit after Getty had merged with Texaco and the remaining Getty organization no longer employed those individuals who had been involved with the Mercur project. Accordingly, in preparing for the production of documents, Getty's counsel compiled lists of all attorneys involved in the Mercur project, met with Getty's former attorneys and former principal management employees and screened any documents that appeared to constitute attorney-client communications or work product. Pursuant to this Court's Opinion, even this level of preliminary investigation, however, is not sufficient to avoid a claim of waiver when, as in this case, important facts subsequently come to the knowledge of counsel.⁸

⁸ With thousands of documents involved in the case and numerous former employees to interview, Getty had no alternative but to produce documents and commence with
(continued...)

The alternative would have been to withhold the memoranda pending additional investigation. Such an approach is at odds with applicable rules. The Utah Rules of Civil Procedure and the Utah Rules of Professional Conduct impose obligations on counsel to assert objections to discovery only when a good faith argument exists to support the objection. Rule 26(g) of the Utah Rules of Civil Procedure provides that when an attorney signs a response to a request for production of documents, he certifies that any objection is "warranted by existing law or a good faith argument" and "not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." An attorney who violates this provision is subject to sanctions. See also Utah R. Civ. P. 11 (when filing a paper, an attorney certifies that it is "well grounded in fact and is warranted by existing law or a good faith argument for the extension, notification, or reversal of existing law").

Ethical rules impose similar requirements that cover all behavior of counsel, including objections in depositions. Rule 3.1 of the Utah Rules of Professional Conduct

⁸(...continued)

depositions before it was able to interview all former employees to discover potential work product claims. The document that, together with interviews with former employees, provided the nexus between a request for legal advice in connection with threats from Gold Standard and the preparation of the Kundert Memoranda was Deposition Exhibit 129, a letter from Reals to Wendt, dated June 29, 1984, requesting legal advice regarding Gold Standard's allegations. This document, however, was not utilized or referred to in the proceedings below until it was marked in a deposition on June 14, 1988. The following day, in Ed Wendt's deposition, Getty asserted its objection to further use of the Kundert and Mintz memoranda. In the face of Gold Standard's affidavit from Kundert, Getty's counsel had no basis for lodging an objection to the production and use of the memoranda until counsel became aware of the relationship between Smith's letter, Reals' request, Kundert's investigation and Mintz's response to Wendt.

provides that "[a] lawyer shall not . . . assert or controvert an issue . . . unless there is a basis for doing so that is not frivolous." Rule 3.4 further provides that:

A lawyer shall not:

(a) Unlawfully obstruct another party's access to evidence or unlawfully . . . conceal a document or other material having potential evidentiary value. . . .

(d) In pretrial procedure . . . fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party. . . .

These rules precluded Getty's counsel from objecting to the production and use of the documents until they had confirmed the fact that the documents were, in fact, created in anticipation of litigation.

This Court's ruling places an unreasonable and unworkable obligation on counsel. The discovery rules are designed to expedite the already slow pace common to civil litigation. This Court's ruling places trial counsel in the dilemma of potentially waiving important privileges or stalling the discovery process. Under the standard set forth by this Court, trial counsel could not safely proceed with production of documents or with depositions until after the completion of extensive investigation. Counsel would have to meet and thoroughly review documents with all potential witnesses before allowing any formal discovery to commence. In this particular complex case, such an investigation prior to producing documents or conducting depositions would have delayed discovery by many months and substantially increased the costs of the litigation.

CONCLUSION

This Court's factual determination that the Kundert and Mintz memoranda were not created in anticipation of litigation improperly and unduly infringes upon the function

and discretion of the trial court. This Court's factual determinations were based on Gold Standard's recitation of the facts, rather than on the complete record before the trial court. In reaching its holding, this Court simply did not apply the proper standard of review.

In addition, this Court misconstrued the law in holding that Getty waived the work product privilege by allowing some of its employees to see the documents. Finally, it ignored undisputed facts, disregarded a critical element of waiver and imposed an unreasonable burden on litigation counsel in ruling that Getty's counsel waived the work product protection. For these reasons, the Court should grant Getty's petition for rehearing.

Submitted this 19th day of October, 1990.

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of October, 1990, I caused four (4) copies of the foregoing APPELLEES' PETITION FOR REHEARING to be mailed, postage prepaid, to the following:

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