

1989

Gold Standard v. American Barrick Resources Corporation; Barrick Resources Inc.; Texaco, Inc.; Getty Oil Company; and Getty Mining Company : Reply Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT
BRIEF

DOCKET NO: 890205

IN THE SUPREME COURT OF THE STATE OF UTAH

GOLD STANDARD, INC.,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	REPLY BRIEF OF APPELLANT
	:	GOLD STANDARD, INC.
	:	
AMERICAN BARRICK RESOURCES	:	
CORPORATION; BARRICK RESOURCES	:	
(USA), INC.; TEXACO, INC.;	:	
GETTY OIL COMPANY; and GETTY	:	Case No. 890205
MINING COMPANY,	:	
	:	Priority No. 10
Defendants.	:	

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

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Company and Getty Mining
Company

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Utah Supreme Court

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	:	REPLY BRIEF OF APPELLANT
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REPLY BRIEF OF PLAINTIFF/APPELLANT

Plaintiff submits this brief in reply to the Brief of Respondents Texaco Inc., Getty Oil Company and Getty Mining Company ("Getty's Brief"). The statement of the facts and the statement of the issues on appeal are unchanged from plaintiff's opening brief ("Plaintiff's Brief").

STANDARD OF REVIEW

Getty errs when it asserts that an abuse of discretion standard of review is applicable to this discovery dispute. "The issue whether [materials] are protected by the . . . work product doctrine is a question of law." Langdon v. Champion, 752 P.2d 999, 1001 (Alaska 1988). Accordingly, no deference should be afforded to the lower court's decision, particularly since this court has before it, as the record on appeal, the identical paper submissions that were presented to the trial court.

However, even under an abuse of discretion standard, the lower court's failure to "properly identify and apply the law to the facts" constitutes an abuse of discretion. Southern Idaho Production Credit Ass'n v. Astorquia, 746 P.2d 985, 987 (Idaho 1987). Therefore, under either standard, the ruling of the lower court should be reversed.

ARGUMENT

I. THE COURT ERRED, AS A MATTER OF LAW, IN HOLDING THAT THE MEMORANDA ARE PROTECTED WORK PRODUCT.

It is indisputable that Getty, as the asserting party, has the burden of demonstrating the applicability of the work product doctrine. See Barclaysamerican Corp. v. Kane, 746 F.2d 653, 656 (10th Cir. 1984). However, Getty has failed to establish that the management investigation undertaken by Mintz and Kundert, which was devoid of any attorney involvement, is worthy of such protection.

A. The Memoranda Lack the Requisite Attorney Involvement to Constitute Work Product.

Although criticized by Getty, the rule that attorney involvement is necessary to generate protectable work product, as stated in the seminal case of Thomas Organ Co. v. Jadranska Slobodna Plovidba, 54 F.R.D. 367 (N.D. Ill. 1972), is nonetheless recognized as the majority view. The Alaska Supreme Court recently noted:

The majority of courts dealing with the problem have taken the position that litigation is not "anticipated" until the expectation of litigation is such that an attorney has become involved in the dispute and has prepared the documents himself or has requested their preparation.

Langdon v. Champion, supra, 752 P.2d 999, 1005 (Alaska 1988) (numerous citations omitted). See also cases cited in Plaintiff's Brief at 23-25. The few cases relied upon by Getty, to the effect that protectable work product may be created without any attorney involvement, see Getty's Brief at 22-24, are distinctly the minority view.

In support of its position, Getty places principal reliance on the language of Rule 26(b)(3) of the Utah Rules of Civil Procedure, as that Rule was amended in 1970. That Rule now provides that a document may be eligible for work product protection if it is prepared "by or for another party or by or for that other party's representative" Utah R. Civ. Pro. 26(b)(3). Thus, Getty contends, any representative of a party may generate work product.

Plaintiff submits that this portion of the Rule is unfortunately worded, and that the Court should not adopt the construction opted for by Getty. The Rule must be read consistent with its historical policy, to create a zone of privacy for the lawyer preparing a case for trial. The "representatives" referred to in the Rule should be construed to include those people that act as extensions of the attorney.

Particularly in complex litigation, no one attorney can do all the trial preparation. Therefore the Rule was

expanded, to extend work product protection to representatives that may act as extensions of the attorney engaged in the trial preparation process. This interpretation of the Rule (although admittedly somewhat at odds with its language) was squarely endorsed by the U.S. Supreme Court in U.S. v. Nobles, 422 U.S. 225 (1975). The Court there stated:

[A]ttorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.

Id. at 238-39 (emphasis added). The court noted further:

The sole issue in Hickman related to materials prepared by an attorney, and courts thereafter disagreed over whether the doctrine applied as well to materials prepared on his behalf. . . . Necessarily, it must. This view is reflected in the Federal Rules of Civil Procedure, see Fed Rule Civ Proc 26(b)(3)"

Id. at 239, n. 13 (emphasis added).

It is undisputed that no attorney ever had any involvement in the underlying investigation, or the preparation

of the Kundert and Mintz Memoranda. Therefore they cannot, plaintiff submits, constitute work product.^{1/}

B. Even Those Cases That Recognize the Possibility of Protectable Work Product Without Attorney Involvement Would Not Extend Such Protection to the Kundert/Mintz Investigation.

Plaintiff recognizes that, as Getty points out, there are a small handful of cases in which the courts have extended work product protection to documents prepared without any attorney involvement. A reading of the cases cited by Getty reveals, however, that in each case, the non-attorney authors of work product were performing the type of functions that are

^{1/} Plaintiff submits that, since the purpose of the doctrine is to protect materials that were created "to aid in possible future litigation," Janicker v. George Washington University, 94 F.R.D. 648, 650 (D.D.C. 1982), a document cannot qualify for work product protection unless its author is, at the very least, part of a team that is purposefully engaged in the preparation of trial materials. Unless the materials are prepared with an "eye toward litigation," Hickman v. Taylor, 379 U.S. 495, 511 (1947), they cannot be work product. Getty has cited no cases where work product protection has been extended to a document whose author had no idea of any potential litigation. Plaintiff submits that, as the court held in Scott Paper Co. v. Ceilcote Co., 103 F.R.D. 591 (D. Me. 1984), work product protection will not be extended where "the author was reporting his and others' perceptions of the opposing parties' position rather than purposefully producing materials that would aid in impending litigation." Id. at 597.

ordinarily performed by an attorney. Getty cites no case in which work product protection is extended to a non-attorney author who is simply reporting an investigation of historical facts, without any awareness that his investigation has anything to do with potential litigation.

One of the principal cases relied upon by Getty for this proposition, Duplan Corp. v. Deering Milliken Inc., 540 F.2d 1215 (4th Cir. 1976), aptly illustrates this point. In Duplan, protection was afforded to materials prepared by a conseil en brevets, a French patent representative for which there is no American legal equivalent. The documents in question were drafted by the patent agent in his capacity as the party's representative, and concerned a prior litigation and settlement agreement in which he was intimately involved. Id. at 1218-1219. Thus, the non-attorney who was afforded protection was essentially acting as a lawyer.

Similarly, in Moore v. Tri-City Hospital Authority, 118 F.R.D. 646 (N.D. Ga. 1988), the other principal authority relied on by Getty, diary entries prepared by a party prior to retaining counsel were protected because they manifested legal thoughts and ideas normally expressed by an attorney. The diary contained "[thoughts] about persons who could serve as witnesses, attorneys who could assist [the party], and legal

arguments that could be made on [the party's] behalf." Id. at 650. Thus they were protected because, again, plaintiff submits, the party was doing the type of thing ordinarily done by an attorney.

None of the cases cited by Getty provides authority to extend work product protection to the Kundert and Mintz Memoranda. Kundert and Mintz were not acting as Getty's legal representatives, as in Duplan; nor were they expressing thoughts about legal strategy, as in Moore. In short, neither was doing the type of thing that ordinarily would be done by an attorney. Instead Kundert, who himself had no idea that his investigation had anything to do with any potential litigation, merely performed an historical investigation of a purely technical matter--whether or not a feasibility study had been prepared in connection with the Mercur Project. This is not the type of non-attorney investigation that, even under the authorities relied upon by Getty, could possibly qualify for work product protection.

C. Non-Legal Corporate Management Investigations Are Not Protectable.

In Plaintiff's Brief, several cases are cited to support the proposition that internal management investigations, even where litigation clearly is anticipated,

cannot result in the creation of work product. See Plaintiff's Brief at 28-31. Getty attempts to dismiss these cases on the basis that in none of them had there been a prior demand letter sent to the party claiming work product protection. Getty argues that this case is totally different than those relied upon by plaintiff, because here Getty had received a demand letter from plaintiff before the Kundert and Mintz investigation.

By making this argument, Getty is attempting to create a new legal threshold, under which any internal investigation of historical facts made after a demand letter has been received, shall remain secret. Getty cites not one case, however, in support of this thesis. No authority is offered for the proposition that receipt of a demand letter is an important factor (or any factor at all) for determining whether a document created later is protected work product.^{2/} Getty has simply concocted this alleged distinguishing factor out of thin air.

^{2/} At least one court has explicitly rejected the notion that the receipt of a demand letter provides automatic work product protection. In Binks Manufacturing Co. v. National Presto Industries, Inc., 709 F.2d 1109 (7th Cir. 1983), a demand letter prepared by corporate counsel did not provide the basis for work product protection because although the letter demanded payment in full of an amount owed, it did not explicitly threaten litigation. See id. at 1119-1120.

Plaintiff concedes, however, that in certain circumstances, the sending of a demand letter may at least be a factor bearing on this issue. It still provides no basis, however, to distinguish the several authorities cited by plaintiff, at pages 28 to 31 of Plaintiff's Brief. In each of those cases, the courts expressly determined that although, as the courts found, litigation clearly was anticipated at the time of their creation, the results of in-house management investigations into the underlying facts were not work product. Getty's effort to distinguish these cases, on the basis of a factor that no court has even considered in this analysis--the receipt of a demand letter--is completely unpersuasive.

D. The Work Product Doctrine Does Not Provide a Right of Secrecy Simply Because a Threat or Allegation has Been Made.

Throughout its brief, Getty is careful not to analyze the issue on this appeal in terms of any of the traditional, recognized policy objectives of the work product doctrine--that is, preservation of the integrity of the adversary system, protection of its trial preparation process, or the protection of the thought processes of attorneys. Instead, Getty is in reality endorsing a completely new policy objective for the

doctrine. Its most candid statement of its true position is set forth at page 29 of its brief:

[W]hen a potential adversary, like Gold Standard in this case, makes particularized and direct allegations of legal liability, an opposing party should be able to begin preparations to defend itself against the specific allegations asserted by its opponent, without fear of compelled disclosure of its preparation to the accusing party.

Nowhere, however, does Getty attempt to explain why this should be the case. Getty has attempted, subtly, to shift the inquiry away from the protection of the adversary system, to convince the court to establish a new right--to keep the true facts secret as soon as litigation is a prospect. The work product doctrine is not designed, however, to hide the facts. This court should not endorse Getty's attempt to distort the doctrine in this manner.

II. THE COURT ERRED, AS A MATTER OF LAW, IN FAILING TO APPLY THE SUBSTANTIAL HARDSHIP EXCEPTION TO THE WORK PRODUCT DOCTRINE.

A. A Party's Non-Legal Employees Do Not Qualify for Opinion Work Product Protection.

Getty asserts that the Memoranda contain "opinion" work product, and therefore are not discoverable even if the showing of substantial need and undue hardship has been made. Even if the Memoranda are deemed to contain opinions rather

than facts,^{3/} the opinions of non-legal employees do not receive the heightened protection afforded an attorney's opinions, and are thus discoverable upon a showing of "substantial need" of the Memoranda and "undue hardship" in obtaining their equivalent elsewhere.

1. Kundert and Mintz cannot produce opinion work product.

By definition, opinion work product can only be created by "an attorney or other representative of a party." Utah R. Civ. Pro. 26(b)(3). It does not apply to a party or to a party's employees, and thus employee opinions are not afforded heightened protection. In North Georgia Lumber & Hardware v. Home Insurance Co., 82 F.R.D. 678 (N.D. Ga. 1979), the court held that "mental impressions and personal evaluations" of a party's employees were discoverable upon a showing "similar to that required to overcome" the protection afforded ordinary work product. Id. at 680. See also State

^{3/} A reading of the Memoranda reveals plainly that they contain recitations of historical facts, not opinions. Even Kundert's statement that "I explained to Hautala that, in my view, the Bechtel work could not be used as a final Feasibility Study" (the one statement in the Memoranda most closely resembling an "opinion"), is not reported as a presently held opinion, but is instead merely a factual account of a statement he made to Hautala in 1981.

Farm Fire and Casualty Co. v. Perrigan, 102 F.R.D. 235, 237 (W.D. Va. 1984).

Getty cites four cases to demonstrate that opinion work product may be generated by a "party and its nonattorney representatives," Getty's Brief at 35, and argues that the Kundert and Mintz Memoranda should therefore receive this heightened protection. However, none of Getty's cases extend heightened protection to the opinions of a party's employees. Those cases only afforded heightened protection to investigators hired by attorneys, see Laxalt v. McClaltchy, 116 F.R.D. 438 (D. Nev. 1987); Rodriguez v. McDonnell Douglas Corp., 87 Cal. App. 3d 626, 151 Cal. Rptr. 399 (1978), and to a representative performing legal duties. See Duplan, supra. In fact, in United States v. Chatham City Corp., 72 F.R.D. 640 (S.D. Ga. 1976), FBI investigative reports were not even afforded heightened protection but were subject to disclosure upon a finding of substantial hardship. See id. at 643. Thus Kundert and Mintz, as non-legal employees, are not even capable of creating opinion work product.

2. Only purely legal opinions can constitute opinion work product.

A further limitation on opinion work product is that it includes only opinions about litigation; it does not embrace

non-legal opinions as to the underlying facts. In Sporck v. Peil, 759 F.2d 312 (3rd Cir. 1985), cert. denied 474 U.S. 903, the court protected "an attorney's legal strategy, his intended lines of proof, his evaluation of the strengths and weaknesses of his case, and the inferences he draws from interviews of witnesses." Id. at 316. Likewise, courts have protected opinion letters outlining a party's potential legal claims, see Parry v. Highlight Industries, Inc., 125 F.R.D. 449, 452 (W.D. Mich. 1989), as well as a party's conception of the law and its evaluation of the strengths and weaknesses of its case. See McKibben v. Mohawk Oil Co., 667 P.2d 1223, 1231 (Alaska 1983). In short, the decided cases granting heightened protection to "opinion work product" have all addressed opinions somehow relating to the litigation process.

Opinion work product must also pertain to pending litigation. Rule 26(b)(3), as it concerns opinion work product, avoids the "anticipation of litigation" language used earlier in the Rule, and instead only embraces opinions generated "concerning the litigation." Utah R. Civ. Pro. 26(b)(3) (emphasis added). This difference in language indicates that only opinions prepared for an actually existing, as opposed to merely "anticipated" litigation, are protected. To this end, the court in Brown v. Maricopa Superior Court, 670 P.2d 725 (Ariz. 1983), held that heightened protection "only

applies to the case being litigated and not to such material prepared for some prior case." Id. at 735-36 n. 8 (emphasis added).

Thus, opinion work product can only be produced by an attorney, or one working intimately with an attorney, and must consist of legal thoughts and strategies concerning ongoing litigation. Getty has not, and cannot, cite any authority granting heightened opinion work product protection to corporate employees conducting internal factual investigations, whose reports do not even mention any actual litigation. Therefore, the Memoranda are discoverable upon a showing of substantial need and undue hardship.

B. The Plaintiff Has Demonstrated Both Substantial Need And Undue Hardship.

The lower court did not rule on whether the substantial hardship exception applied in this matter, even though, contrary to Getty's assertions, plaintiff did present this matter to the lower court. In addition to consistently reiterating the importance of these documents, plaintiff dedicated three pages in its brief below to demonstrate that it could not obtain the facts demonstrated by the Memoranda elsewhere. R. at 3207-3205. In fact, in that brief an argument heading explicitly stated that "Gold Standard Is Entitled to These Documents Under the Fraud or Hardship

Exceptions." R. at 3193. Thus, because plaintiff adequately raised and argued this issue below, the lower court's failure to apply this exception is an error of law.^{4/}

1. The Memoranda are important both for their contents and because they were shown to Texaco.

The Memoranda are important for a variety of reasons. First, they contain a view from Getty's upper management that the Bechtel study could not be used as a final feasibility study. See Addendum I to Plaintiff's Brief. This view directly contradicts Getty's position in this case, and specifically contradicts deposition testimony later given by Kundert and Mintz on the feasibility study issue. See Plaintiff's Brief at 37-41.

The Memoranda are important not only for the probative worth of their contents. In addition, they are important because they were the only information available to Texaco when it told Gold Standard that its claim regarding the feasibility study was a "lame excuse." See Plaintiff's Brief at 41-43. They are thus vital to enable plaintiff to prove its claim that Texaco deliberately violated Gold Standard's right of first

^{4/} Even if this court should determine that this issue was not adequately raised below, it still has authority to consider the issue on appeal, if "injustice might otherwise result." Singleton v. Wulff, 428 U.S. 106, 121 (1976).

refusal, and to demonstrate Texaco's callous disregard, in the face of the contents of the Memoranda, of Gold Standard's rights.

Throughout its Brief, Getty attempts to minimize the overall significance of the Memoranda, apparently based on the view that, if they aren't really very important anyway, plaintiff could not have any "substantial need" for them. First Getty asserts that Kundert's investigation only encompassed documents prepared through October, 1980. See Getty's Brief at 9-10. However, the Memoranda themselves reveal, to the contrary, that Kundert in fact examined documents created well after this date. Getty further asserts that "Kundert did not review the documents given to Gold Standard in July 1981 which Getty maintains constituted the feasibility study" Getty Brief at 10. The Kundert Memorandum itself, however, specifically refers to "the Bechtel work" (provided by Getty as part of the alleged "feasibility study"), stating that it "could not be used as a final Feasiblity Study [since] Bechtel had not reviewed the geology and ore reserves because updated data were not available; thus the document was incomplete." Addendum I to Plaintiff's Brief.

Getty also attempts to minimize the significance of the Kundert inquiry by contending that the letter from Texaco to Scott Smith following the inquiry, wherein Getty denied that

it had failed to provide an adequate feasibility study, was based on "more complete information provided by those with direct knowledge of the circumstances." Getty's Brief at 9-10. However, this assertion is totally unfounded; Texaco has never provided any evidence that any information, other than the Memoranda, was relied upon when Getty, on Texaco's behalf, told Gold Standard that its claim regarding the lack of a proper feasibility study was "contrary to a long series of facts and admissions." See Addendum X to Plaintiff's Brief.

In all events, the ultimate significance of the Memoranda is something to be determined by the trier of fact. Plaintiff believes they are extremely significant; at trial, Getty will be entitled to present any evidence that may detract from their overall significance. The fact that defendants may have some strategy to "explain away" this damaging evidence is no basis, in all events, to shield them from the discovery process.

2. Plaintiff cannot obtain this important evidence anywhere else.

The Memoranda contain a variety of facts relating Kundert's and Mintz's perceptions of the Mercur Project from 1979 through 1981. Although plaintiff, admittedly, might be able to obtain some of the background information elsewhere,

Kundert's and Mintz's personal recollections, and particularly their statements concerning the inadequacy of the Bechtel report, cannot be obtained anywhere else. See Plaintiff's Brief at 36-40.

In addition to the contradictory testimony given by Kundert and Mintz, other Getty and Texaco personnel have likewise given testimony at odds with the facts evidenced by the Memoranda. Although the circumstances giving rise to the creation of the Memoranda, see Plaintiff's Brief at 8, 42 n. 16, help to demonstrate Texaco's intimate involvement with the Kundert investigation, Texaco has denied knowledge of the Kundert investigation. H. Edward Wendt, the President of Getty Mining who communicated with Mintz regarding Kundert's inquiry, did not recall having received the Mintz memorandum or even having been involved in the Kundert investigation. R. at 3102-3097. Similarly, Willis B. Reals, the Texaco Vice President who Getty claims initiated the inquiry, testified that he never saw the Memoranda and was never told about the results of the investigation by Wendt or anyone else. R. at 3107-3106.^{5/}

^{5/} A transmittal from Wendt to Reals, however, plainly reveals that the Memoranda were provided to Texaco's Reals. See Addendum XIII to Plaintiff's Brief; Plaintiff's Brief at 42 n. 16.

Despite all of this conflicting testimony, Getty maintains that plaintiff has not shown sufficient hardship. To the contrary, plaintiff has demonstrated blatant contradictions between the Memoranda and the testimony of important witnesses. This is not "mere conjecture" of a discrepancy in testimony, as argued by Getty; the discrepancy between the 1984 and 1988 statements of these Getty and Texaco personnel is palpable.

III. THE COURT ERRED, AS A MATTER OF LAW, IN FAILING TO FIND THAT GETTY WAIVED WORK PRODUCT PROTECTION.

Getty does not even attempt to seriously address plaintiff's arguments on the waiver issue. Rather than discuss waiver cases in the context of the discovery of documents (which provides no support for Getty's position), Getty cites only to general case law on waiver. It argues that since Getty's trial lawyers did not know there might be a potential claim of work product for the Memoranda,^{6/} it could not have waived its right to make this claim, even though it deliberately produced the documents.

^{6/} As noted in Plaintiff's Brief at 47, this assertion is in and of itself something of an oxymoron.

A. Getty's Failure to Maintain the Confidentiality of the Memoranda Waived any Work Product Protection.

Getty's argument completely ignores the entire policy justification for affording protection to documents in the first place--certain documents, whether protected by the attorney-client privilege, the work product doctrine, or on some other basis, may be eligible for protection if they are maintained as confidential. This is because they contain materials that, the law recognizes, a party may be entitled to keep secret. Once they have been disclosed to the adverse party, however, the underlying confidentiality is lost, and there is no longer any reason to continue to treat them confidentially. That is, once otherwise protectable documents have been disclosed, it is no longer possible to achieve the benefits of any privilege--i.e., confidentiality--and the privilege is lost. See W. R. Grace & Co. v. Pullman, Inc., 446 F. Supp. 771, 775 (W.D. Okla. 1976); United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 465 (E.D. Mich. 1954) ("when the policy underlying the rule can no longer be served, it would amount to no more than mechanical obedience to a formula to continue to recognize it." (emphasis added)). Once confidentiality is lost, the objective of preserving

secrecy must yield to the overriding concern of the litigation process--ascertainment of the truth.

Here there is no dispute that Getty "voluntarily produced [the Memoranda] after [they] had knowledge that [the plaintiff] had them." R. at 3096. After that production, Getty thereafter failed to object to the use of the Memoranda in numerous depositions. Yet Getty now claims, without citing any authority, that there was no waiver because its lawyers didn't know they might have a potential work product claim, and thus a basis to keep the facts contained in the Memoranda a secret.

Getty's interpretation of waiver fails to recognize this cornerstone principle of confidentiality. Getty's view is especially untenable where, as here, the Memoranda were generated by Getty's own in-house inquiry. After the existence of the Memoranda became known to Getty in 1987, a minimal internal investigation should have alerted Getty to the Memoranda's supposed work product significance. Getty failed to make such an inquiry. Instead, Getty now advocates a view that rewards it for neglecting to investigate the origins of materials within its domain, and penalizes its opponent for having used those materials after they were knowingly and voluntarily disclosed.

B. The Inadvertent Disclosure Exception Is Inapplicable Where Getty Did Not Mistakenly Produce The Memoranda.

Some jurisdictions permit a party who "inadvertently" produces materials to have its mistake rectified.^{7/} See, e.g., Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 104 F.R.D. 103 (S.D.N.Y. 1985). Getty and the lower court relied upon this doctrine to excuse Getty's production of the Memoranda. However, because Getty produced the Memoranda knowingly and voluntarily, and not mistakenly, that exception has no application to the present case.

As its title suggests, this exception has only been applied to cases wherein a document is produced "inadvertently"--that is, by accident. Not one case has applied this exception when a party voluntarily produces a document and then attempts to retract it by later claiming that it was previously unaware of a basis to withhold the document.

As a matter of law, Getty clearly waived work product protection of the Memoranda by voluntarily producing them. Getty made no clerical mistake when it produced the Memoranda;

^{7/} Some jurisdictions apply instead a strict waiver standard, denying protection even when production is inadvertent. See, e.g., Thomas v. Pansy Ellen Products, Inc., 672 F. Supp. 237 (W.D.N.C. 1987).

its only mistake was in failing to investigate their origin. No recognized legal principle supports Getty's view that its claim of work product privilege has not been waived.


CONCLUSION

Getty personnel created the Memoranda as part of a factual, non-legal investigation, without the involvement of attorneys. Thus, the Memoranda cannot be work product, and even if they could, they are discoverable based on plaintiff's showing of substantial need and undue hardship. Further, Getty voluntarily produced the Memoranda, thereby waiving any claim of confidentiality for the documents.

Getty had the burden of demonstrating that the Memoranda were within the ambit of the narrow work product rule in order to exclude the Memoranda from discovery. They failed to do so. Thus, these important and unique documents must be made available for plaintiff's use throughout the course of the proceedings below.

RESPECTFULLY SUBMITTED this 30th day of November, 1989.

JONES, WALDO, HOLBROOK & MCDONOUGH

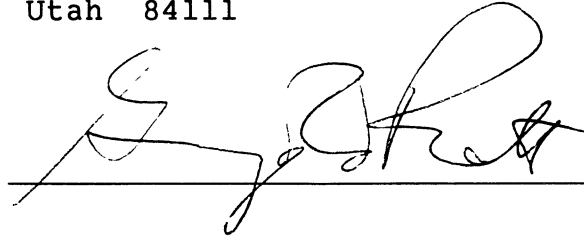
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of November, 1989, I caused four (4) copies of the foregoing Reply Brief of Appellant Gold Standard, Inc. to be hand delivered, to:

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