

1989

# Gold Standard, Inc. v. American Barrick Resources Corporation; Barrick Resources (USA), Inc.; Texaco, Inc.; Getty Oil Company; And Getty Mining Company : Brief of Respondent

Utah Supreme Court

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BRIEF

**890393**

IN THE SUPREME COURT OF THE STATE OF UTAH

GOLD STANDARD, INC.,	)	
	)	
Appellant,	)	BRIEF OF RESPONDENTS AMERICAN
	)	BARRICK RESOURCES CORPORATION,
vs.	)	BARRICK RESOURCES (USA) INC.,
	)	TEXACO INC., GETTY OIL COMPANY
AMERICAN BARRICK RESOURCES	)	AND GETTY MINING COMPANY
CORPORATION, BARRICK	)	
RESOURCES (USA) INC.,	)	Priority No. 10
TEXACO INC. GETTY OIL	)	
COMPANY and GETTY MINING	)	
COMPANY,	)	Case No. 890393
	)	
Respondents.	)	

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

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Company

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### JURISDICTION AND NATURE OF PROCEEDINGS

This is an interlocutory appeal from a discovery order entered by the Honorable Frank G. Noel, Third Judicial District Court of Tooele County. The district court ruled that a letter dated June 11, 1985 was privileged and need not be produced. This Court granted petitioner Gold Standard, Inc. (hereafter "Gold Standard") permission to appeal the district court's order pursuant to Rule 5, Rules of the Utah Supreme Court.

The respondents on appeal are as follows: American Barrick Resources Corporation, Barrick Resources (USA) Inc., Texaco, Inc., Getty Oil Company and Getty Mining Company (hereafter "Barrick/Getty"). For the purposes of this appeal, the term "Barrick" shall refer to the two Barrick entities and the term "Getty" shall refer to the two Getty entities.

### ISSUE PRESENTED FOR REVIEW

The issue that Gold Standard presents in its opening brief is premised on factual mischaracterizations that are not supported by the record. Simply stated, the proper issue on appeal is:

Did the district court abuse its discretion when it determined that the June 11, 1985 letter, which is in the nature of a retainer agreement and contains confidential communications, is protected by the attorney-client and work product privileges?

### DETERMINATIVE STATUTES AND RULES

**Utah Code Ann. § 78-24-8 Privileged Communications.**

There are particular relations in which it is the policy of the law to encourage confidence and to preserve it

inviolable. Therefore, a person cannot be examined as a witness in the following cases:

\* \* \*

(2) An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given therein, in the course of professional employment; nor can an attorney's secretary, stenographer, or clerk be examined, without the consent of his employer, concerning any fact, the knowledge of which has been acquired in such capacity.

**Rule 26(b)(3), Utah Rules of Civil Procedure:**

**Trial preparation: Materials.** Subject to the provisions of Subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under Subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

**STATEMENT OF THE FACTS AND CASE**

In December, 1986, Gold Standard filed a lawsuit against various entities including, but not limited to the parties to this appeal. Since that time, a massive amount of discovery has taken place including the production of over one hundred thousand pages of documents by Barrick/Getty. There are 170



volumes of deposition testimony and the district court has resolved numerous discovery motions during the past three years.

On May 10, 1989, Gold Standard filed its motion to compel production of the particular document that is the subject of this appeal, a June 11, 1985 letter addressed to Parsons, Behle & Latimer and signed in counterparts by Texaco, Inc., Getty Oil Company, Getty Mining Company, Getty Gold Mine Company, Barrick Petroleum (USA) Inc. and Barrick Resources Corporation (hereafter "June 11 letter"). In the memorandum in support of its motion, Gold Standard argued that the document contains terms regarding the sale of Getty's interest in the Mercur Mine to Barrick and, therefore, is not protected by either the attorney-client or the work product privileges. Record at 4283.

In its memorandum in opposition to plaintiff's motion to compel, Barrick argued that the document was protected by the attorney-client privilege and work product immunity and that Gold Standard had failed to demonstrate both that it had substantial need of the materials in the preparation of its case and that it was unable, without undue hardship, to obtain the substantial equivalent of the materials by other means. Both criteria are required by the exception to work product protection contained in Rule 26(b)(3), Utah Rules of Civil Procedure. Barrick submitted the June 11 letter to the district court for in camera review. Barrick also submitted an Affidavit of Patrick J. Garver, Barrick's counsel, in support of its position that the document was prepared in anticipation of litigation, contained

confidential communications concerning legal advice, and that the parties who signed the document formulated steps to ensure that the document remained confidential. Record at 4322 (copy included in Appendix as Item "1"). Getty and Texaco also filed a pleading in opposition to Gold Standard's motion to compel. Record at 4346.

After an in camera review of the document and consideration of both the legal memoranda filed by the parties and the oral arguments of counsel, Judge Frank G. Noel entered a minute entry on July 28, 1989 stating that, "[t]he Court is of the opinion that the agreement of June 11, 1985 is privileged and therefore denies [plaintiff's] motion to compel." Record at 4754 (copy included in Appendix as Item "2"). The order denying plaintiff's motion to compel and making the sealed copy of the document a part of the record on appeal was entered on August 14, 1989. Record at 4937 (copy included in Appendix as Item "3").

#### SUMMARY OF ARGUMENT

The district court has broad power to determine whether a document is privileged. Its finding will be overturned only if it is clearly erroneous. After an in camera review of the document, the district court correctly ruled that the June 11 letter is privileged. Although the document is in the nature of a retainer agreement, its terms go beyond that type of agreement. The June 11 letter contains confidential communications that are protected from discovery by the attorney-client privilege. In addition, the document was prepared in anticipation of litigation

and contains legal observations and conclusions. Therefore, it is work product, as well.

#### STANDARD OF REVIEW

In the more than three years that this case has been proceeding toward trial, the district court has presided over and managed discovery while hearing and ruling on several substantive motions. In the process, the court has acquired a working knowledge of the complex facts and procedural background of this case. A lower court's finding should be overturned only if clearly erroneous. E.g., United States v. Wilson, 798 F.2d 509 (1st Cir. 1986).

#### ARGUMENT

##### I. INTRODUCTION

The inquiry that is required to resolve the issue on appeal imposes constraints on both parties. Barrick/Getty is unable to discuss the June 11 letter in detail without disclosing its contents and possibly waiving the privileges afforded to the document. Understandably, Gold Standard must speculate as to the document's contents because Gold Standard has never seen it. As is common in this type of matter, and as occurred at the district court level, Barrick has submitted the June 11 letter to this Court for in camera inspection in connection with the present appeal. See Parker v. Kitzhaber, No. 88-1089-JU (D. Or. June 8, 1989) (LEXIS, Genfed library, Dist. File) (district court ordered party to submit retainer agreements under seal for in camera review) (copy included in Appendix as Item "4").

In an attempt to balance effective advocacy and the risk of waiver, Barrick/Getty will discuss the nature of the document without discussing its specific contents. The June 11 letter cannot readily be classified or categorized. It contains elements of a retainer agreement, but its terms go beyond those of a standard retainer agreement. As the court will discern from its in camera inspection, the document contains communications that are privileged, as well as, observations and conclusions that are work product. The June 11 letter also contains one paragraph that might possibly be characterized as "transactional," but that paragraph is not directed at effectuating the June 1985 sale of the Mercur Mine, as Gold Standard speculates, but rather, is conditional and focuses on future events. More importantly, the paragraph is inextricably bound up with the attorney-client relationship.

Gold Standard speculates that the agreement may contain indemnity terms. It does not. Gold Standard argues that the document is at the heart of the questions of title, property rights, breach of fiduciary and contractual obligations, and conspiracy. It is not.

II. THE DOCUMENT IS PROTECTED FROM DISCOVERY BY  
THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK  
PRODUCT DOCTRINE.

A. The Attorney-Client Privilege Promotes Broad Public Interests.

It is well settled that the attorney-client privilege provides protection from disclosure of confidential communications that are made between client and lawyer in the course of

providing legal advice of any kind to the client. See, e.g., J. Wigmore, 8 Wigmore on Evidence § 2292, p. 554 (McNaughton rev. ed. 1961). The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

B. The Work Product Doctrine Is Well Recognized Under Utah Law And Protects Materials Prepared In Anticipation Of Litigation.

The work product doctrine protects material prepared in anticipation of litigation from compelled disclosure. The doctrine was first recognized in Hickman v. Taylor, 329 U.S. 495 (1947), and has been codified and broadened in Utah by Rule 26(b)(3), Utah Rules of Civil Procedure. The rule states in pertinent part:

[A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent or the materials by other means.

(Emphasis added.)

Documents are protected by the work product doctrine if they have been prepared by or for a party or by or for that

party's representative in anticipation of litigation. See Rule 26(b)(3), Utah Rules of Civil Procedure; City Consumer Services, Inc. v. Horne, 100 F.R.D. 740, 747 (D. Utah 1983). The rationale for the doctrine is that it is unfair to allow parties to avail themselves of an opposing lawyer's work product.

The United States Court of Appeals for the Fifth Circuit has held that, "litigation need not necessarily be imminent . . . as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation." United States v. Davis, 636 F.2d 1028, 1040 (5th Cir. 1981), cert. denied, 454 U.S. 862 (1981); Osterneck v. E.T. Barwick Industries, Inc., 82 F.R.D. 81, 87 (N.D. Ga. 1979) citing 8 C. Wright & A. Miller, Federal Practice and Procedure § 2024, at p. 198 (1970). From a review of the document itself it is apparent that the June 11 letter was prepared in anticipation of this very litigation.

C. The Document Fulfills The Requirements For Protection Pursuant To Both The Attorney-Client Privilege And The Work Product Doctrine.

1. The document contains confidential communications that are protected by the attorney-client privilege.

As stated above, the terms of the document go beyond those of a retainer agreement. The June 11 letter sets forth the substance of confidential discussions between clients and counsel relating to legal advice. Record at 4322. As the Court will see from its in camera inspection, the document contains confidential

communications that are protected by the attorney-client privilege.

2. The document was prepared in anticipation of litigation and is protected by the work product doctrine.

The record demonstrates that the June 11 letter was prepared in anticipation of litigation with the involvement of counsel for Barrick/Getty. Record at 4322. Additionally, Gold Standard makes no claim that Barrick/Getty did not anticipate litigation at the time the document was created. As the Court will see from its in camera review, the letter contains observations and conclusions, was prepared in anticipation of this very litigation and, is therefore, protected from discovery.

D. When Confidential Communications Are Contained In A Retainer Agreement They Are Protected From Discovery.

Barrick does not quarrel with Gold Standard's position that the external trappings of the attorney-client relationship, such as the existence of the relationship, the fees paid and the basic terms of the attorney's employment, are not protected from discovery. That argument does not apply to the June 11 letter, however, because the terms of the letter go beyond the basic facts of the attorney-client relationship. Indeed, the document contains privileged confidential communications.

Confidential communications within retainer agreements are protected by the courts pursuant to the attorney-client privilege. See Parker v. Kitzhaber, No. 88-1089-JU (D. Or. June 8, 1989) (LEXIS, Genfed library, Dist. file); Cf. United States v.

Liebman, 742 F.2d 807 (3rd Cir. 1984) (a substantial confidential communication was privileged when the communication was disclosed during the act of retaining a lawyer); In re Securities Litigation, 89 F.R.D. 595, 603 (N.D. Tex. 1981) (rejecting a claim of attorney-client privilege because request did not seek confidential matters); J. Gergacz, Attorney-Corporate Client Privilege, at 3-35 (1987) (disclosure of factual circumstances of attorney-client relationship may be privileged if they reveal or threaten to reveal the substance of attorney-client confidences).

In the recent case of Parker v. Kitzhaber, the plaintiff sought a copy of all retainer agreements between a law firm and its client. The United States District Court for the District of Oregon ruled that the attorney-client privilege did not apply to the names, addresses, telephone numbers and dates of contacts with client representatives, pointing out that the attorney-client privilege does not cover issues related to the creation or existence of the attorney-client relationship (which are not at issue here). However, the court noted that the documents may contain confidential communications that are covered by the attorney-client privilege. Id. at 2 (copy included in Appendix as Item "4").

During Robert McConnell's deposition, Gold Standard itself argued this position and refused to disclose the terms of its own engagement of counsel on the grounds of the attorney-client privilege. See Deposition of Robert McConnell,



p. 336 (a copy of the relevant page is included in Appendix as Item "5").

The document contains confidential communications that are privileged and concern legal advice. Record at 4320. As the above discussion points out, privileged confidential communications are protected regardless of whether they are contained in a retainer agreement. The confidential communications in the June 11 letter are protected from discovery by the attorney-client privilege.

E. The Document Is Not An Arms-Length Commercial Agreement, Rather, It Is A Joint Communication To Counsel For The Parties Relating To Potential Litigation.

In its brief, Gold Standard argues that the respondents could not have a legally protectable expectation of confidentiality in executing an agreement that was part of an arms-length commercial transaction. Opening brief at 10. The June 11 letter is not directed at effectuating the June 1985 sale of the company that owned the Mercur Mine. Rather, the document is conditional and focuses on contingencies in the event of litigation which was threatened by Gold Standard.

Additionally, the signators to the document were made aware that the document was to be treated as privileged and kept confidential. Record at 4322. An in camera review of the document will disclose provisions that were formulated to help preserve the document's confidentiality. Indeed, Gold Standard cites no evidence of waiver in the voluminous record below. In

fact, there is none. The privileges attached to the document have been protected.

F. The Document Was Addressed To Counsel And Was Created With Counsel's Assistance, Not Merely "Funneled" To Counsel, Making Jackson v. Kennecott Inapplicable To This Case.

In the opening paragraph of its brief, Gold Standard argues that the Utah Supreme Court previously decided the issue raised by this appeal in Jackson v. Kennecott Copper Corp., 495 P.2d 1254 (Utah 1972). Gold Standard cites Jackson for the proposition that when presented with the question of whether particular documents were privileged, this Court "rejected a claim of privilege and protection because the [documents were] merely 'funneled' to counsel." Opening brief at p. 9. In this case, the document was not "funneled" to a lawyer who had no hand in the creation of the document, as occurred in Jackson. Rather, the June 11 letter is a communication addressed to counsel and counsel for the signators was involved in its preparation. Record at 4322.

Unlike Jackson, in which the documents sought were highly factual and contained mostly raw data, this case involves a letter to counsel that contains confidential communications between counsel and client. The document contains virtually no factual information. Moreover, in Jackson, the defendant did not anticipate specific litigation, whereas, in this case, the parties to the document were aware of both Gold Standard's identity and the specific claims that Gold Standard might bring. That awareness became a reality in December, 1986 when Gold Standard

filed this lawsuit against the parties to the document. Record at 36.

In Jackson, Kennecott's counsel was not involved in the actual drafting of the documents, but merely had requested that a series of potentially damaging documents, containing factual data, be forwarded to him. In contrast, counsel for the signators of the June 11 letter was involved in the drafting of the document, which contains the substance of discussions relating to legal advice. Record at 4322. Jackson does not apply to the instant facts and therefore, does not resolve any of the issues raised by this appeal.

III. THE JUNE 11 LETTER WAS NOT DIRECTED AT THE JUNE 1985 SALE OF THE GETTY GOLD MINE COMPANY BUT AT CONTINGENCIES THAT MIGHT RESULT FROM FUTURE LITIGATION.

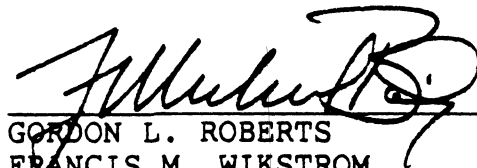
Throughout its brief, Gold Standard's recurring theme is that Barrick has somehow admitted that the document is "part and parcel" of the sale of the Mercur Mine. As a matter of fact, Barrick has never made such an admission. Out of an abundance of caution, Gordon Roberts, counsel for Barrick, stated at a deposition that the June 11 letter "may come within the purview of that [question]" when a witness was asked whether the Stock Purchase Agreement reflected the entire agreement between Barrick and Texaco with respect to the acquisition of the Mercur Mine. See Deposition of Stephen Dattels, p. 301 (a copy of the relevant page is included in Appendix as Item "6"). Mr. Roberts then agreed to, and did furnish the foundational basis for Gold Standard to bring the motion to compel before the district court.

As stated earlier, the document is primarily a retainer agreement. The June 11 letter was not directed at effectuating the June 1985 sale of the company that owned the Mercur Mine. Rather, the terms of the letter are conditional and focus on aspects of an attorney-client relationship in the event that Gold Standard initiated litigation.

#### CONCLUSION

As this Court will see by virtue of its in camera inspection, the ruling of the Third District Court that the June 11, 1985 letter was protected under the attorney-client and work product privileges was well founded. For the reasons set forth above, respondents Barrick/Getty respectfully request that this Court affirm the district court's Order denying Gold Standard's Motion to Compel.

SUBMITTED this 3<sup>rd</sup> day of January, 1990.



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CERTIFICATE OF HAND-DELIVERY

I hereby certify that I caused to be hand-delivered, four (4) true and correct copies of the foregoing BRIEF OF RESPONDENTS AMERICAN BARRICK RESOURCES CORPORATION AND BARRICK RESOURCES (USA) INC., TEXACO INC., GETTY OIL COMPANY AND GETTY MINING COMPANY to the following on this 3<sup>rd</sup> day of January, 1990:

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A handwritten signature in dark ink, appearing to read "Christopher L. Burton", is written over a horizontal line.

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