Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 89-610

In re Application of

RAVEESH K. KUMRA File No. 10019-CL-P-340-A-88

For construction authority to
establish a new cellular system to
operate on Frequency Block A in the
Domestic Public Cellular Radio
Telecommunications Service to serve
Market 340, California 5 -
San Luis Obispo Rural Service Area

MEMORANDUM OPINION AND ORDER

Adopted: September 11, 1990 Released: September 21, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. On July 11, 1990, Raveesh K. Kumra, pursuant to 47 CFR 1.301(a)(2), filed an appeal from *Memorandum Opinion and Order*, FCC 90M-1900, released July 3, 1990, in which Administrative Law Judge Richard L. Sippel (ALJ) required the production of certain documents over Kumra's claims of attorney-client and work-product doctrine privileges. An opposition was filed on July 18, 1990 by Frank H. Mirgon (Mirgon). For the reasons set forth below, we grant the appeal in part.

BACKGROUND

2. In his *Memorandum Opinion and Order*, the ALJ identified (in Appendix A) 94 documents which Kumra had submitted for *in - camera* inspection. After discussing the relevant legal standards, at paras. 2-7, the ALJ ruled on each document, furnishing a brief reason for his action, at pages 5-10. Kumra's appeal to the Board now involves 46 documents which he was ordered to disclose. These documents have been provided under seal to the Board for its review, and are described in Appendix A to the ALJ's *Memorandum Opinion and Order*.

3. At the outset, we note that some of these documents are not properly ripe for review. As the ALJ found in his *Memorandum Opinion and Order*, at para. 8: "There were nine instances when documents that were cited and identified in the list were not provided for review. (Tabs. 35, 44, 52, 56, 58, 65, 80, 81, 82)." Our review of the materials submitted to the Board confirms the accuracy of the ALJ's finding, and has revealed three other documents which are incomplete, or not provided for review (Tabs. 28, 32, and 50). The ALJ stated with regard to this matter:

> [t]hat experience gives concern as to whether the universe of documents has been ascertained. Therefore, Kumra will be required to explain in a declaration why certain documents were omitted and those missing documents will need to be submitted.

Id. The ALJ's also stated that:

> there is no description provided for Mr. [Bruce G.] Patterson. It appears to be evident that he is an employee of Kumra and WCSI [Western Cellular Services, Inc.]. But that fact must be established by the proponent of the privilege. *See Matter of Walsh*, [623 F.2d 489 (7th Cir. 1980)]. Kumra must also show in a declaration the nature of his relationship with Mr. Patterson, including a description of the latter's employment and duties and the period of time over which such duties were performed for Kumra and/or WCSI and at whose directions.

Id. Eight of the the documents before the Board are related to Patterson (Tabs. 24, 52, 54, 55, 73, 75, 76, and 77). Because Kumra has not fully complied with the ALJ's requirements as to all of the documents enumerated above, the Board will not reach the merits of his privilege claims as to those documents.

DISCUSSION

4. Before turning to the particular documents reviewed, however, a brief discussion of the attorney-client and work-product doctrine privileges will assist in understanding our resolution of the appeal. The attorney-client privilege protects communications by a client to his attorney made in confidence for the purpose of obtaining legal advice, and "is intended to encourage complete disclosure of facts between client and attorney on the rationale that the latter can act effectively only if fully advised of all pertinent facts by the party he represents." *Opal Chadwell*, 103 FCC 2d 840, 841 (Rev. Bd. 1986) (citing *U. S. v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950)). Similarly, an attorney's communications to a client may also be protected by the privilege, to the extent that they are based on or contain confidential information provided by the client, or legal advice or opinions of the attorney. *Schenet v. Anderson*, 678 F. Supp. 1280 (E.D. Mich. 1988). The "privilege is to be confined strictly within the narrowest possible limits consistent with the logic of its principle," *Anderson v. Torrington Co.*, 120 F.R.D. 82,85 (N.D. Ind. 1987), and the burden of establishing the existence of the privilege is on the person asserting it. *Schenet*, 678 F. Supp. at 1282. Voluntary disclosure of an otherwise privileged communication to a third person who lacks a commonality of interest with either the client or his attorney breaches the confidentiality of the attorney-client relationship and therefore waives the privilege. *See In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982).

5. The work-product privilege doctrine, in turn, is broader than, and distinct from the attorney-client privilege, and assures an attorney (or other representative of a party) that his private files and thoughts, opinions, and theories reflected therein will remain free from intrusions by opposing counsel, absent special circumstances. It was first set forth by the United States Supreme Court in *Hickman v. Taylor*, 329 U.S. 495, 511-12, (1947), and is a

qualified privilege of immunity from discovery during litigation. *In re Grand Jury Proceedings*, 73 F.R.D. 647, 753 (M.D. Fla.1977). The work-product privilege doctrine expressly provides that " *a party may obtain discovery of documents* and tangible things . . . *prepared in anticipation of litigation* or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant . . . or agent) *only upon a showing that the party seeking discovery has substantial need of the materials* in the preparation of the party's case *and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.* " Fed. R. Civ. P.26(b)(3)(codifying *Hickman v. Taylor*, 329 U.S. 495 (1947)) (emphases added). *See generally WWOR - TV, Inc.*, 4 FCC Rcd 2551 (Rev. Bd. 1989). The privilege also covers the work-product of a party as well as that party's attorneys. Fed. R. Civ. P.26(b)(3); *see also Moore v. Tri - City Hosp. Authority*, 118 F.R.D. 646, 649 (N.D. Ga. 1988).

6. Our analysis which follows utilizes the same five categories as did Kumra's appeal, and Mirgon's opposition. In the first category, which now pertains only to document 7 (a second document, 47, was included in two categories but has been addressed in category five), Kumra was ordered to disclose that document because the lawyer-client privilege had been waived by "Kumra sending a copy to [a third party] Tubman." On appeal (at 3) Kumra argues that: "Kumra and Tubman had a community of interests at the time, namely, obtaining the necessary regulatory approvals to construct the Elmira cellular system." However, we agree with Mirgon that Kumra has not established a community or commonality of interest. The attorney in question represented Kumra, and no one has contended that there was a joint representation of Kumra and Tubman. In *Georgia Public Telecommunications Commission*, FCC 90-247, released July 18, 1990, the Commission found that an applicant had waived its attorney-client privilege concerning a letter sent to a third party which had formed the applicant. Finding that the applicant had not established that the third party was a joint client, agent, or alter ego, or that the sending of the letter to the third party was essential to the provision of legal services to the applicant, the Commission rejected a claim of commonality of interest between the applicant and the third party. Kumra has similarly failed to establish such a relationship here, and the ALJ's ruling therefore is affirmed.

7. The second category of documents (Tabs. 22, 43, and 90) also incidentally relates to Tubman. These are alleged to be "communications between a law firm that represented [Kumra] at the time the correspondence was written, and a law firm that had formerly represented him, where the subject was the implications of the former representation . . . " Appeal pp. 4-5. Mirgon responds that Kumra's analysis fails to take into account that Kumra's "former attorney had also been Tubman's former attorney." Opposition 5. We fail to perceive the legal significance of that fact. In this instance, it does not appear that Kumra waived his attorney-client privilege because Document 43 reveals that Kumra's present counsel had informed former counsel not to represent Tubman in an identical matter because such representation would jeopardize Kumra's confidential communications. Documents 22 and 90 are letters to Kumra's counsel from former counsel describing his file concerning representation of Kumra. Their disclosure would reveal in what areas Kumra sought legal advice from former counsel. Accordingly, these documents exchanging confidential information between his various counsels are protected by the attorney-client privilege. *See Calloway v. Marvel Entertainment Group*, 110 F.R.D. 45, 50 (S.D.N.Y. 1986) (upholding privilege claim as to letter from client to one attorney recounting confidential conversation with other attorneys).

8. The third category under consideration concerns three sets of chronologies and an index prepared by Kumra at request of counsel in anticipation of litigation (Tabs. 18, 88, 93, and 94). The ALJ ordered disclosure on the ground the documents failed to include legal advice. Kumra argues, however, that they are privileged since they were prepared in order to obtain legal advice in expectation of litigation, and would not have been created without protection of the privilege. We agree that the documents are protected. *See Jaroslawicz v. Engelhard Corp.*, 115 F.R.D. 515, 518 (D.N.J. 1987) (information prepared by client pursuant to attorney's instructions in connection with rendering legal advice protected by attorney-client privilege); *Moore v. Tri-City Hosp. Authority*, 118 F.R.D. at 650 (diary entries made in anticipation of litigation before counsel retained protected by work-product privilege, and after retention of counsel by both attorney-client and work-product privileges). No "substantial need" has been shown for these chronologies.

9. The fourth group of documents under review (Tabs. 53, 66, 69, 70, 74, 78, 85) relates to draft correspondence and other draft documents exchanged between Kumra and his attorneys prior to conveying such documents to third parties. Kumra contends that the documents are privileged because they relate to drafts sent to counsel for review and comment, or from counsel to client, and that the correspondence has been produced in this proceeding in its final form in response to document production requests. Our review confirms Kumra's contention that these are draft documents exchanged between him and his counsel, and we find they are protected by the reasoning set forth in *Gross Telecasting, Inc.*, 39 RR 2d 1640 (1977). There the Commission observed, with respect to a draft press release:

> A press release is obviously meant for publication; however, a draft constitutes an intermediate stage in the publication process and, by its very nature, is not intended to be made public. In this regard, the document was conveyed to the attorney for him to review and to then return it to Gross. The involvement of Gross' attorney with this draft document appears to have been based solely upon the professional attorney-client relationship. Further, we consider the draft to be a communication between those parties and one in which the attorney actively participated. For these reasons, we hold that the draft press release is privileged material.

39 RR 2d at 1645.

10. The last category of documents (Tabs. 8, 12, 27, 46, 47, 48, 59, 60, 61, 64 and 89) consists of cover memoranda or transmittal sheets, and appended underlying documents (that have purportedly already been produced pursuant to other discover requests) exchanged between attorney and client. Kumra argues that since the other parties to the case already have access to the underlying documents, they "have no right to know which of those

documents a client and his lawyer have sent to one another, citing *e.g., Sporck v. Peil,* 759 F.2d 312, 315-317 (3rd Cir.), *cert. denied,* 474 U.S. 903 (1985) (party need not reveal which of many documents produced in discovery his lawyer showed him to prepare him for deposition); *Jaroslawicz v. Engelhard Corp.,* 115 F.R.D. at 517-18. Appeal p. 3. No one has disputed the fact that the underlying documents have already been produced. Thus, to the extent that the transmittal sheets and underlying documents are protected by the work product privilege, there can be no showing that the other parties are "unable without undue hardship to obtain the substantial equivalent of the materials by other means." *See para. 5 supra.* And, disclosure of only those underlying documents that were exchanged between client and counsel would serve no purpose but to reveal the specific matters upon which Kumra sought legal advice. Thus, those documents are protected by the basic attorney-client privilege.

11. Finally, we note that at this point, no one has invoked the doctrine of "exception" discussed in *Welch Communications, Inc.,* 4 FCC Rcd 3979, 3982 note 12, (Rev. Bd. 1989), which is applicable "when a privilege relationship is used to further a crime, fraud or other fundamental misconduct." *Sealed Case,* 676 F.2d at 807, and *Clark v. U.S.,* 298 U.S. 1 (1933). Thus, the ALJ is free to reassess the applicability of the privilege should an appropriate showing be made that the client consulted an attorney for advice that served him in the commission of a fraud upon the Federal Communications Commission. *See Welch, supra.*

12. ACCORDINGLY, IT IS ORDERED, That the appeal filed July 11, 1990 by Raveesh K. Kumra IS GRANTED to the extent indicated and IS DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board