In the

United States Court of Appeals

For the Seventh Circuit

No. 88-2503 (UNDER SEAL)

IN RE: MICHAEL FELDBERG, A WITNESS BEFORE THE SPECIAL MAY 1987 GRAND JURY

APPEAL OF: WORLD SPORTS & ENTERTAINMENT, INC., and NORBY WALTERS,

Intervenors-Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
The Honorable **John F. Grady**, Judge Presiding.

BRIEF FOR THE UNITED STATES

ANTON R. VALUKAS
United States Attorney
Northern District of Illinois
219 South Dearborn Street
Chicago, Illinois 60604
(312) 353-5300

LAURIE N. FELDMAN
Assistant United States Attorney

JAMES R. FERGUSON
Assistant United States Attorney
Of Counsel

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 88-2503
(UNDER SEAL)

IN RE: MICHAEL FELDBERG
A WITNESS BEFORE THE
SPECIAL MAY 1987 GRAND JURY

WORLD SPORTS AND ENTERTAINMENT, INC.
and NORBY WALTERS,

Intervenors-Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

THE HONORABLE JOHN F. GRADY,
CHIEF JUDGE PRESIDING

BRIEF FOR THE UNITED STATES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Authorities

JURISDICTIONAL STATEMENT

The jurisdictional summary in intervenors'-appellants' brief is complete and correct.

STATEMENT OF THE CASE

The Special May 1987 Grand Jury is investigating allegations that Norby Walters and others associated with his company, World Sports & Entertainment, Inc., devised a scheme to recruit elite college athletes to sign secret representation agreements which, if known, would render the athletes ineligible to compete in college sports or to receive athletic scholarships. (R. 5, 22). On March 26, 1987, pursuant to this investigation, a subpoena issued on behalf of the Special December 1986 Grand Jury[1/] to World Sports & Entertainment, Inc. requiring production of various records. (R. 22 at 2 and at Appendix "A"). Attorney Michael Feldberg who represented World Sports & Entertainment in 1987, obtained from the company and produced certain players' contracts called for by the subpoena. (R. 22 at 3). Shortly thereafter, Feldberg also obtained and produced lists of players covered by those contracts, as required by the subpoena. (R. 22 at 4 and at Appendix "D").

The government informed Feldberg that not all contracts called for by the subpoena had been produced. Feldberg then obtained from the company and produced seven additional contracts and an expanded list of players. (R. 22 at 4-5 and at Appendix "D"). None of the originally produced contracts pertained to athletes who remained eligible for intercollegiate competition at the time of the document production, whereas six of the seven belatedly produced contracts did. (R. 22 at 5).

On June 7, 1988, Michael Feldberg testified before the Special May 1987 Grand Jury. (R. 22 Appendix "F").[2/] In response to certain questions regarding the production

---

1/ This investigation was thereafter transferred to the Special May 1987 Grand Jury on May 5, 1987. (R. 5 at 4n. 3).

2/ Citations herein to the grand jury transcript of June 7, 1988, attached to the Government's Motion to Compel the Testimony of Michael Feldberg as Appendix "F," are noted as "R. 22 Appendix 'F'." Citations to the grand jury transcript of June 28, 1988, attached to the government's reply brief in support of that motion, are noted as "R. 25 transcript."

of and failure to produce subpoenaed materials, Feldberg declined to testify on grounds of attorney-client privilege. (R. 22 Appendix "F" at 10, 12-13). On June 16, 1988, the government filed a motion to compel Feldberg's testimony. (R. 22). On June 22, 1988, Norby Walters and World Sports & Entertainment, Inc., appellants herein, filed a motion to intervene and in opposition to the government's motion to compel (R. 27) and a supporting memorandum. (R. 28). On June 28, 1988, by agreement of the parties, Michael Feldberg again testified in the grand jury to clarify the issues raised by the government's motion (R. 25 transcript at 3), and again asserted the attorney-client privilege as a bar to testifying about certain events surrounding the production of and failure to produce documents. (R. 25 transcript at 6, 8, 11, 15-16, 17, 18, 19, 25, 32). On July 20, 1988, the government filed a reply in support of its motion to compel. (R. 25). The government did not contest the appellants' request to intervene. (R. 25 at 1).

On July 26, 1988, the Honorable John F. Grady issued an order. (R. 35). Judge Grady allowed appellants to intervene (R. 35 at 2), and granted the government's motion to compel (R. 35 at 6). The intervenors filed a motion to stay the order (R. 36) which Judge Grady granted until August 16, 1988 (R. 38). The intervenors filed a notice of appeal on August 1, 1988. (R. 37).

The grand jury indicted this case on August 24, 1988.[3/]

3/ The government has moved to supplement the record with the indictment. The indictment does not render this appeal moot since the grand jury can continue to investigate the production of records as it may relate to a charge of obstruction of justice or conspiracy to defraud the government.

ISSUES PRESENTED FOR REVIEW

I. Are communications between a corporate client and its attorney in the context of the attorney's production of his client's documents pursuant to a grand jury subpoena made without confidentiality and hence, not privileged?

II. Has the government established prima facie evidence of fraud, and hence waiver of attorney-client privilege, as to communications between a corporate client and its attorney in which the client attempted to make the grand jury believe that document production was complete, when in fact relevant documents were being withheld?

STATEMENT OF FACTS

Norby Walters is the president of World Sports & Entertainment, Inc. The Special May 1987 Grand Jury is investigating allegations that Norby Walters and others associated with World Sports & Entertainment, Inc. devised a scheme to defraud various universities by secretly recruiting elite college athletes to sign representation agreements with World Sports & Entertainment, Inc. while these athletes were attending college on athletic scholarships and competing in intercollegiate athletics. Walters allegedly offered cash to more than sixty such athletes in exchange for their signing agreements to have World Sports & Entertainment, Inc. serve as their agent and represent them when they turned professional. These agreements, if known, would render the athletes ineligible to compete in college sports or to receive athletic scholarships. As part of the alleged scheme, the fact that the athlete had signed a representation agreement with and received money from a sports agent was concealed from the athlete's university in order to protect the athlete's eligibility and scholarship. (R. 5, 22).

On or about March 26, 1987, a subpoena issued on behalf of the Special December 1986 Grand Jury to World Sports & Entertainment, Inc. The subpoena required production of various records on April 6, 1987. (R. 22 Appendix "A," Appendix "F" at 5). This subpoena was served on Norby Walters by Special Agents of the Federal Bureau of Investigation on March 27, 1987. (R. 22 at 2).

Attorney Michael Feldberg is a partner at the New York City law firm of Shea and Gould. (R. 22 Appendix "F" at 3). In April, 1987, Feldberg's firm represented World Sports & Entertainment, Inc., and also represented Walters "in certain matters." (Id. at 4-5).[4/] Feldberg received the subpoena for the records of World Sports & Entertainment shortly after it was issued in March, 1987. (Id. at 5-6).

4/ Feldberg and his firm no longer represent World Sports & Entertainment or Walters. (R. 25 transcript at 38).

Feldberg called the Assistant United States Attorney whose name appears on the subpoena. (Id. at 6). Based on his conversations with his clients, Feldberg notified the Assistant that he represented World Sports & Entertainment in connection with this grand jury investigation and would handle the company's compliance with the subpoena. (Id. at 6-7, R. 25 transcript at 11).

The Assistant told Feldberg that for the time being, the government would allow production of records through Feldberg rather than require someone from World Sports & Entertainment, Inc. to appear personally before the grand jury to produce the documents. (R. 22 Appendix "F" at 7-8). The Assistant agreed to grant World Sports & Entertainment additional time to comply with most portions of the subpoena on the condition that the contracts called for by the subpoena be produced the next week. (Id. at 14, 18, R. 25 transcript at 12). Feldberg agreed to this arrangement and confirmed it in a letter to the Assistant dated April 1, 1987. (R. 22 Appendix "B," Appendix "F" at 13-14, R. 25 transcript at 13).

Feldberg did not personally conduct a search of the files of World Sports & Entertainment in order to gather the information necessary to comply with the subpoena. (R. 22 Appendix "F" at 10, 16). Feldberg did discuss the subpoena and the gathering of information with certain individuals from World Sports & Entertainment: Norby Walters, Lloyd Bloom and possibly Irene Walters. (Id. at 10-11, R. 25 transcript at 5, 13). Feldberg, in his grand jury testimony, declined on the ground of attorney-client privilege to testify as to the content of these conversations or to answer the question of whether he directed someone to conduct a search of the company's files for the purpose of gathering the information required by the subpoena. (R. 22 Appendix "F" at 10, R. 25 transcript at 6, 8, 15-16). Feldberg's general practice is to inform clients that all documents responsive to a subpoena must be produced, and that any questions about a

subpoena's coverage or about privilege of particular documents should be brought to his attention. (R. 25 transcript at 8-9).

Feldberg received contracts from World Sports & Entertainment pertaining to fifty-one athletes (Id. at 16, R. 25 transcript at 18), but in the grand jury declined on the basis of attorney-client privilege to testify as to who gathered these contracts. (R. 25 transcript at 18). Feldberg told Norby Walters, Lloyd Bloom, and possibly Irene Walters that he would be transmitting these contracts to the government. (Id. at 17). Feldberg declined on the basis of attorney-client privilege to testify as to whether he told his clients that he would represent to the government that the contracts produced were all those called for by the subpoena. (Id. at 17-18). At the time he produced these contracts to the government, however, Feldberg believed that he was producing all of the contracts that were called for by the subpoena. (R. 22 Appendix "F" at 16-17, R. 25 transcript at 20). This belief was based solely on conversations with the Walters and Bloom. (R. 25 transcript at 22-23). Feldberg did not know of any additional contracts that existed or were being withheld. (R. 22 Appendix "F" at 17-18, R. 25 transcript at 20). Feldberg expected the government to conclude that all contracts called for had been produced. (R. 25 transcript at 21).

Feldberg sent the Assistant United States Attorney the contracts pertaining to fifty-one athletes, along with a cover letter dated April 6, 1987. The letter stated: "In response to the grand jury subpoena served on World Sports & Entertainment, I enclose documents." (R. 22 Appendix "C," Appendix "F" at 15, R. 25 transcript at 16). After receiving these copies of contracts, the Assistant United States Attorney telephoned Feldberg and stated that the copies Feldberg sent were difficult to read. (R. 22 Appendix "F" at 9, R. 25 transcript at 23-24). The Assistant also requested that Feldberg provide the government with the list of athletes called for in paragraph one of the attachments to the subpoena. (R. 22 Appendix "F" at 9-10, R. 25 transcript at 24).

On April 8, 1987, Feldberg sent the Assistant United States Attorney a letter enclosing "lists of players under contract to World Sports & Entertainment." (R. 22 Appendix "D," Appendix "F" at 8-9, R. 25 transcript at 26). Feldberg claimed privilege when asked whom from World Sports & Entertainment he had directed to produce the list. (R. 25 transcript at 25). Feldberg received this list from someone from World Sports & Entertainment, but does not know who provided it. (R. 22 Appendix "F" at 10, R. 25 transcript at 25-26). Feldberg informed his clients that he would be turning the list over to the government. (R. 25 transcript at 27). At the time, Feldberg believed that the list he provided the government consisting of fifty-one players was complete as to the players who were under contract to World Sports & Entertainment. (R. 22 Appendix "F" at 12-13, R. 25 transcript at 26-27). Feldberg did not knowingly withhold the names of any individuals who were under contract to World Sports & Entertainment. (R. 22 Appendix "F" at 13). In his grand jury testimony, Feldberg at first declined to answer the question as to how he came to understand that the list he provided the government was complete, asserting that doing so would violate the attorney-client privilege. (Id. at 12-13). Feldberg later testified simply that his understanding that the list was complete came from conversations with his client. (R. 25 transcript at 27).

Feldberg received a telephone call from the Assistant United States Attorney, who informed Feldberg that the government had evidence that not all contracts called for by the subpoena had been produced. (R. 22 Appendix "F" at 16, R. 25 transcript at 28). Feldberg passed this information along to his clients. (R. 25 transcript at 29). Later that month, Feldberg flew to Chicago and produced the original contracts for each of the copies he had produced on April 6, 1987. (R. 22 Appendix "F" at 17, R. 25 transcript at 30). He also produced seven additional contracts, (R. 25 transcript at 30),

and a list of fifty-eight athletes under contract to World Sports & Entertainment. (R. 22 Appendix "D," R. 25 transcript at 31). At the time he originally produced copies of contracts on April 6th, he was not aware that these additional contracts existed. (R. 22 Appendix "F" at 17-18). Feldberg claimed privilege as to his discussions with his clients regarding the belatedly produced contracts and list. (R. 25 transcript at 32).

None of the contracts originally produced on April 6, 1987, pertained to college athletes who remained eligible for intercollegiate competition at the time of the document production. Six of the seven contracts which were produced only after the government informed Feldberg of deficiencies in the initial production, on the other hand, pertained to athletes who still remained eligible for intercollegiate competition in the sport in which they were represented by World Sports & Entertainment -- the very situation under investigation by the grand jury. (R. 22 at 5).

The government moved to compel Feldberg's testimony on the questions to which he asserted privilege. (R. 22). The government argued, first, that the conversations at issue were not confidential and hence not privileged, because they concerned information intended to be conveyed to the government. The government argued alternatively that any privilege was waived under the crime-fraud exception to the attorney-client privilege. Appellants moved to intervene and to oppose the government's motion. (R. 27, 28).

The Honorable John F. Grady granted the motion to intervene. On the merits, Judge Grady granted the government's motion to compel. (R. 35). Judge Grady found that the communications at issue were not confidential since the clients used their attorney as their agent to comply with the subpoena and could not cloak their attorney with greater confidentiality concerning the production, identity and completeness of documents produced than they themselves could have invoked had they personally

responded to the subpoena. (R. 35 at 3-4). Judge Grady distinguished between conversations between attorney and client such as those at issue here relating to the act of production, which are not privileged, and those relating to the general subject matter of the investigation - - such as the underlying transactions, or how the documents came to be prepared - - which are privileged. (Id. at 4-5). As to the government's other ground for compelling the testimony, Judge Grady did not find prima facie evidence of fraud based on the government's briefs, and because of the dispositive finding that the communications were not privileged, declined to hold a hearing as to whether fraud occurred. (R. 35 at 5).

ARGUMENT

I WHERE AN ATTORNEY PRODUCES SUBPOENAED DOCUMENTS ON BEHALF OF A CLIENT, CONVERSATIONS BETWEEN THE ATTORNEY AND CLIENT REGARDING THE ACT OF PRODUCTION ARE NOT CONFIDENTIAL AND, HENCE, NOT PRIVILEGED

The grand jury carries two weighty responsibilities: "the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecution." United States v. Calandra, 414 U.S. 338, 343 (1974). Because of the grand jury's "special role in ensuring fair and effective law enforcement[,]" id., the grand jury enjoys wide, virtually unchecked latitude in its inquiries. See id.

A refusal to testify before the grand jury is justified in rare circumstances. One such circumstance is the assertion of a valid privilege, as established by the Constitution, statute, or common law. See Calandra, 414 U.S. at 346; United States v. Nixon, 418 U.S. 683, 709 (1974). Rule 501 of the Federal Rules of Evidence, which governs grand jury proceedings, see Fed.R.Evid. 1101(c), 1101(d)(2), dictates that the existence and scope of privileges in federal proceedings be determined by federal common law. Under this federal law, those privileges which apply at the grand jury stage are "exceptions to the demand for every man's evidence [and] are not lightly created nor expansively construed, for they are in derogation of the search for truth." United States v. Nixon, 418 U.S. at 710 (footnote omitted).

The attorney-client privilege, accordingly, has been construed to protect "only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege." Fisher v. United States, 425 U.S. 391, 403 (1976). In Radiant Burners, Inc. v. American Gas Association, 320 F.2d 314, 319 (7th Cir.), cert. denied, 375 U.S. 929 (1963), the Seventh Circuit adopted the general principles of the attorney-client privilege as outlined by Wigmore:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communication relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived. 8 Wigmore § 2292.

(Footnote omitted). The party seeking to invoke the privilege has the burden of establishing all of its elements as to each question for which privilege is claimed. United States v. First State Bank, 691 F.2d 332, 335 (7th Cir. 1982); United States v. Lawless, 709 F.2d 485, 487 (7th Cir. 1983). "The scope of the privilege should be 'strictly confined within the narrowest possible limits.'" Id. at 487, quoting 8 Wigmore, Evidence § 2291 (McNaughton rev. 1961).

In this case, attorney Michael Feldberg acted as an agent for his clients in fulfilling their obligation to produce all documents required by the grand jury's subpoena. The intervenors have not established that Feldberg's communications with them regarding the act of production of documents were "made in confidence." Feldberg in fact told his clients that he would be turning the documents over to the government. (R.25 transcript at 17). Hence, these communications are not privileged. Confidentiality is not present for two reasons. First, as Judge Grady held, where an attorney produces documents on behalf of a client, the attorney-client privilege does not shield communications about which the client himself can be compelled to testify regarding the production, identity, and completeness of documents produced pursuant to subpoena. Second, information regarding the act of production is not confidential because it is presumptively intended to be transmitted to the government.

A. The Attorney-Client Privilege Does Not Shield This Information Which Client Can be Compelled to Disclose

Judge Grady correctly held that Norby Walters or other records custodians of World Sports Entertainment could be compelled to produce the company's records and testify about their production, identity and completeness, and therefore attorney

Feldberg, acting as the agent of production, cannot cloak this subject with confidentiality. Otherwise, "the right of the grand jury to know what it has received in response to the subpoena would be frustrated." (R. 35 at 4).

In Fisher v. United States, 425 U.S. 391 (1976), the United States Supreme Court held that an attorney cannot invoke the attorney-client privilege to protect information which the client can be required to reveal. This is so because when information is not held confidentially by the client, the attorney-client privilege is unnecessary in order to encourage the client to share it with the attorney. As to such information, then, the attorney-client privilege does not apply. According to Wigmore, a fundamental precondition to recognition of a privilege is that "'confidentiality must be essential to the full and satisfactory maintenance of the relations between the parties.'" Radiant Burners, Inc., 320 F.2d at 318 (emphasis in original). "[S]ince the privilege has the effect of withholding relevant information from the factfinder, it applies only when necessary to achieve its purpose." Fisher v. United States, 425 U.S. 391, 403 (1976).

Hence, in the context of document production at issue in Fisher, the Supreme Court endorsed the rule that "pre-existing documents which could have been obtained by court process from the client when he was in possession may also be obtained from the attorney by similar process following transfer by the client [to the attorney] in order to obtain more informed legal advice". Id. at 403-04 (citations omitted). Conversely, "'when the client himself would be privileged from production of the document . . . the attorney having possession of the document is not bound to produce.'" Id. at 404 (citation omitted) (emphasis in original). In order to determine whether an attorney could be compelled to produce tax records transmitted to him by his clients, then, the Court analyzed whether or not the clients had a fifth amendment privilege with respect to the documents. Id. at 405.

The same analysis applies to communications between attorney and client other than the transfer of pre-existing documents. See United States v. Weger, 709 F.2d 1151, 1155-56 (7th Cir. 1983) (since client has no fifth amendment protection of handwriting exemplars, attorney-client privilege does not prevent use as handwriting exemplar of letter written by client to attorney). If a client has no fifth amendment or other privilege against revealing information, no purpose is served by shielding the information from disclosure by the attorney. This is particularly so where, as here, the information pertains to an area in which the attorney acts as the client's agent and the grand jury would be entitled to question the client if acting on his own behalf.

The intervenors here have no fifth amendment privlege as to the questions at issue. The subpoena required production of corporate records. A corporation has no fifth amendment privilege, and its "custodian may not resist a subpoena for corporate records on fifth amendment grounds." Braswell v. United States, 108 S.Ct. 2284, 2292 (1988). Accompanying the custodian's duty to produce subpoenaed records is the duty to identify and authenticate the produced records and reveal whether or not production is complete. As Judge Learned Hand wrote,

> the greater includes the lesser, and . . . since production can be forced, it may be made effective by compelling the producer to declare that the documents are genuine. . . . Hence, . . . testimony auxiliary to the production is as unprivileged as are the documents themselves. By accepting the office of custodian the holder not only exposes himself to producing the documents, but to making their use possible without requiring other proof than his own.

United States v. Austin-Bagley Corp., 31 F.2d 229, 234 (2d Cir. 1929). See also cases cited at Curcio v. United States, 354 U.S. 118, 125 n.3 (1957); In re Grand Jury Proceedings (The John Doe Co., Inc.), 838 F.2d 624, 626 (1st Cir. 1988). Compelling such testimony is justified because

> "[t]he custodian's act of producing books or records in response to a subpoena duces tecum is itself a representation that the documents produced are those demanded by the subpoena. Requiring the custodian to identify or authenticate the documents for admission in evidence merely makes explicit what is implicit in the production itself."

Braswell, 108 S.Ct. at 2293, quoting Curcio v United States, 354 U.S. 118, 125 (1957).[5/] Accordingly, the Court of Appeals for the First Circuit recently held that a corporate agent must testify as to whether produced records represent all of the corporation's records and whether they are authentic. In re Grand Jury Proceedings (The John Doe Co., Inc.), 838 F.2d at 624, 626.[6/] Similarly, when an agent fails to produce subpoenaed documents, if questioned "he must give sworn testimony that he does not possess them" as "part of his duty to comply with a lawful demand for them." United States v. O'Henry's Film Works, Inc., 598 F.2d 313, 318 (2d Cir. 1979).

In this case, the attorney stood in his client's shoes in the grand jury. But, as Judge Grady noted, Attorney Feldberg, unlike his clients, "claims absolutely no personal knowledge as to whether there are, even now, more corporate documents that should be produced pursuant to the subpoena." (R. 35 at 4). Nor does Feldberg appear to have personal knowledge as to the identity of or method of assembling the documents. The government could have required a person with knowledge to produce the records and testify as to their identity and completeness, and in order to establish these points meaningfully, the government could have probed the areas Feldberg refused to address, such as whether the custodian or someone else had searched the company's files for the records, if so who, and how the custodian knew that all required records had been produced. Since the client must provide such information, under Fisher the attorney

---

5/ While providing this justification, the Court in Curcio did not directly rule on the propriety of questioning the custodian. In Braswell, however, the Court cited this language as reflecting a proper understanding of the testimonial aspects inherent and unprivileged in the act of production. 108 S.Ct. at 2293.

6/ An en banc panel of the Third Circuit held to the contrary in In re Grand Jury Matter, 768 F.2d 525, 526-28 (3d Cir. 1985). The Supreme Court in Braswell, however, cited this opinion as reflecting a misunderstanding of the operative principles of self-incrimination in the context of document production. See 108 S.Ct. at 2290-91.

who lacks firsthand knowledge can be asked to reveal those communications by which he has learned this information.[7/] Otherwise, nonsensically, by extending the convenience of allowing the attorney to appear on the client's behalf, the grand jury forfeits its right to know what documents it has and has not received.

7/ By distinguishing between communciations relating to the act of production and those relating to matters such as the legal implications of the documents and the underlying fraud, and limiting his order to the former, Judge Grady properly followed Fisher's distinction between those areas where the client, and hence the attorney, can be compelled to testify and those where a fifth amendment privilege applies.

B. The Attorney-client Privilege Does Not Shield This Information Which Was Transmitted, For Disclosure To The Government, To Attorney In His Role As Producer Of Documents

Many communications between a client and his lawyer are made without expectation of confidentiality, and, therefore, are not protected by the attorney-client privilege:

> "[T]he privilege protects only the client's confidences, not things which, at the time, are not intended to be held in the breast of the lawyer, even though the attorney-client relation provided the occasion for the lawyer's observation of them."

United States v. Weger, 709 F.2d 1151, 1154 (7th Cir. 1983) quoting Clanton v. United States, 488 F.2d 1069, 1071 (5th Cir.), cert. denied 419 U.S. 877 (1974). In particular, information given to an attorney for transmission to a third party is not confidential. Thus, as the Seventh Circuit observed in Weger, "courts have refused to apply the attorney-client privilege 'to information a client intends his attorney to impart to another.'" 709 F.2d at 1155, quoting United States v. Pipkins, 528 F.2d 559, 563 (5th Cir.) cert. denied, 426 U.S. 952 (1976). "When information is transmitted to an attorney with the intent that the information will be transmitted to a third party (in this case on a tax return) such information is not confidential." United States v. Lawless, 709 F.2d at 487, citing Colton v. United States, 306 F.2d 633 (2d Cir. 1962) cert. denied, 371 U.S. 951 (1963). See also United States v. Windfelder, 790 F.2d 576, 579-80 (7th Cir. 1986)(information client conveyed to his attorney so that attorney could explain certain discrepancies to the IRS was not confidential and, therefore, was not privileged).

It is not simply the specific information transmitted to a third party that falls outside the attorney-client privilege. Disclosure of specific information effectively waives the privilege " 'not only [as] to the transmitted data but also as to the details underlying that information.' ". Lawless, 709 F.2d at 488, quoting United States v. Cote,

456 F.2d 142, 145 (8th Cir. 1972). See United States v. Willis, 565 F.Supp. 1186, 1193 (S.D. Iowa 1983)(no privilege for source of and method of calculating figures disclosed in attorney-prepared tax return).[8/] This is so because the privilege protects subject matters, not particular expressions. See Cote, 456 F.2d at 145. Thus, the circumstances surrounding the disclosure of the information - such as the method employed to transmit that information - are not confidential and cannot be concealed behind an assertion of the attorney-client privilege.

In Lawless, this Court held that information transferred to an attorney in connection with the preparation of a federal estate tax return is not protected by the attorney-client privilege. 709 F.2d at 487. This Court rejected the privilege argument even though the information transmitted to the attorney was not disclosed on the return: "If the client transmitted the information so that it might be used on the tax return, such a transmission destroys any expectation of confidentiality which might have otherwise existed." Id. Similarly, in Windfelder, this Court found that information the client provided to his attorneys so that they could explain discrepancies in tax returns to the IRS was not confidential information covered by the attorney-client privilege.

In this case, the intervenors used attorney Feldberg as their agent for document production. The information he has declined to reveal, such as who searched for the documents, what instructions they received, and what they said with regard to

---

8/ Intervenors-Appellants rely on Willis for its holding that confidentiality should extend to any information the attorney does not in fact disclose to third parties. 565 F.Supp. at 1193. This rule is not the law of the Seventh Circuit, see Lawless, 709 F.2d at 488. It means that the attorney dictates by his acts what information is privileged, rather than having to meet the burden of establishing the elements of privilege. It contradicts the principle that the waiver of privilege is judged as to subject matters, not just particular communications. Moreover, it is inconsistent with another holding in the same case, that disclosure of tax returns shows lack of confidentiality and hence lack of privilege as to the undisclosed sources of and method of calculating the data reflected on the returns, 565 F.Supp. at 1193, information analogous to that sought by the government in this case.

the completeness of the production, pertains to the subject of production of documents, which is by definition not confidential. Intervenors have made no showing, as they must to invoke privilege, that discussions on this subject were meant to be "held in the breast" of Feldberg. Whatever was said, for instance, to give Feldberg the impression that the initial document production was complete -- whether innocently or intentionally erroneous[9/] -- was presumably intended to be transmitted to the government so that the grand jury would believe the company had complied with the subpoena.

The intervenors attempt in this appeal to distinguish the caselaw concerning communications intended to be transmitted to third parties by suggesting a limitation to the context of tax return preparation where the attorney acts essentially as an accountant. Neither the cases nor their underlying principles, however, are so narrow. No matter the factual context, the party seeking to invoke the privilege must establish that the communications were made with an expectation of confidentiality, see Lawless, 709 F.2d at 487, a showing that has not been made here. Moreover, the tautological rule that information which is intended to be transmitted is not communicated in confidence is applicable in any context, not just that of tax return preparation. Lawless itself so indicates: "When information is transmitted to any attorney with the intent that the information will be transmitted to a third party (in this case on a tax return), such information is not confidential." 709 F.2d at 487 (citation omitted)(emphasis added). By mentioning its particular factual context only parenthetically, this Court clearly sought to speak generally. The principle has been so applied. See, e.g., United States v. Bump, 605 F.2d 548, 551 (10th Cir. 1979)(prosecutor properly cross-examined defendant about his communication to attorney of purported facts constituting defense to drug charge,

---

9/ If the error was intentional, then the communication is not privileged, not only because the clients would have wanted the government to know and believe the false communication that production was complete, but also because the clients were attempting through their attorney to commit a fraud. See infra at 21-24.

which facts attorney disclosed to government in pretrial discovery and defendant did not show that disclosure was unauthorized) and cases cited therein; Henderson v. National R.R. Passenger Corp., 113 F.R.D. 502, 509 (N.D.Ill. 1986)(communications regarding discrimination made to agent of defendant company's law department by employees with knowledge that information would be transmitted to law department for investigation are not privileged from disclosure to plaintiff's lawyer); Dorothy K. Winston and Co. v. Town Heights Development, Inc., 376 F.Supp. 1214, 1220-21 (D.D.C. 1974)(information given to attorney acting as finder for real estate investors was intended to be publicly disseminated and as such is not privileged).

A corollary to the principle of confidentiality is the second prong of the Wigmore test for privilege, supra at 12, that communications are privileged only when made to an attorney acting in his role as legal adviser, rather than as accountant, colleague, producer of documents, or any of the number of roles attorneys might assume. Intervenors confuse the issue by broadening the communications at stake in this case to those involving "the representation by an attorney of a target of a grand jury investigation -- as clearly 'legal' a service as could be imagined." (Brief of Intervenors - Appellants at 7; see also broad "questions of law and strategy" listed id. at 8-9). But this wide scope of communications is not at issue, and as Judge Grady ruled, is largely privileged. The narrow area involved arises from Feldberg's role as agent of document production. For the attorney-client privilege to apply, "the attorney must be acting in his capacity as a professional legal adviser at the time the information was transferred." Lawless, 709 F.2d at 487. The communications here were made in the context of Feldberg's role as the company's agent in producing records, not a service in the exclusive province of professional attorneys but one that any corporate recordkeeper can perform. See United States v. Willis, 565 F.Supp. 1186, 1189 (S.D. Iowa 1983)(attorney preparing tax returns does not perform service different in kind than non-attorney tax preparer performs); cf. United States v. Brown, 688 F.2d 1112, 1116 (7th Cir. 1982)(when

attorney acts as client's agent in producing documents, attorney's act of authentication is attributable to client).

Since the intervenors have not established that the communications were made in confidence to Feldberg in his role as legal adviser, and since the facts suggest to the contrary, Judge Grady's finding of lack of privilege should be affirmed.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO FIND PRIMA FACIE EVIDENCE THAT IF THE ATTORNEY-CLIENT PRIVILEGE DOES APPLY, IT WAS WAIVED UNDER THE CRIME-FRAUD EXCEPTION

Judge Grady ruled, without explanation, that in the absence of a hearing, "no prima facie case of fraud or obstruction of justice has been made out on the facts presently before the court." (R. 35 at 5). This Circuit's precedents establish that in so ruling, Judge Grady was incorrect. Even if this Court finds that the communications at issue are otherwise covered by the attorney-client privilege, the ruling below should be affirmed based on the government's prima facie showing that the intervenors have involved their attorney in the commission of a crime and fraud.

The attorney-client privlege is waived when it is abused. Because the attorney-client privlege hinders the search for truth, confidence is maintained only where it serves its intended function:

> the client must not abuse the confidential relation by using it to further a fraudulent or criminal scheme, and as a condition to continued representation, the lawyer is required to advise the client to cease any unlawful activities that the lawyer perceives are occurring. Law and society consent to the attorney-client privilege on these preconditions. By insisting on their observance, we safeguard the privilege itself and protect the integrity of the professional relation.

United States v. Hodge and Zweig, 546 F.2d 1347, 1355 (9th Cir. 1977)(Kennedy, J.). The privilege is waived "when the client uses the attorney-client relationship to engage in ongoing fraud rather than to defend against past misconduct." In re Special September 1978 Grand Jury (II), 640 F.2d 49, 59 (7th Cir. 1980)(citation omitted). "The privilege

takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told." Clark v. United States, 289 U.S. 1, 15 (1933).

To defeat a claim of attorney-client privilege, the government need only present a prima facie case of crime or fraud, "'something to give color to the charge'" beyond a mere allegation. Clark v. United States, 289 U.S. at 15 (citation omitted); see In re Sealed Case, 754 F.2d 395, 399 (D.C. Cir. 1985); United States v. Horvath, 731 F.2d 557, 562 (8th Cir. 1984); In re Special September 1978 Grand Jury (II), 640 F.2d 49, 60-61 (7th Cir. 1980). The "government need not prove the existence of a crime or fraud beyond a reasonable doubt." In re Sealed Case, 754 F.2d at 399.

In In re Special September 1978 Grand Jury (II), this Court found that the lower court had abused its discretion in not finding prima facie evidence of fraud and hence waiver of the attorney-client privilege on facts similar to those in this case. In that case, as here, a government official requested information (disclosure of campaign contributions as required by an Illinois reporting law) from a business association. The recipient of the letter gave it to a law firm which prepared and filed a report. As here, this disclosure failed to reveal pertinent requested information. Specifically, the report disclosed one cash fund used for political contributions, but did not disclose a second secret fund. In response to grand jury subpoenas for files and documents concerning preparation of the report, the law firm asserted a privilege claim. 640 F.2d at 53-54. This Court, reversing the court below, held that "the only reasonable inference that can be drawn from the entire record is that the Association intentionally failed to report" the second fund, id. at 60, and where "[prima facie] evidence [of fraud] exists, as it does here, 'the seal of secrecy is broken.'" Id. at 61. (Citation omitted).[10/]

10/ The court noted that the law firm was not a participant in the fraud. See 640 F.2d at 52 n.1. An attorney's ignorance of his client's purpose does not save the privilege where the client uses the relationship in furtherance of a fraud. See United States v. Horvath, 731 F.2d 557, 562 (8th Cir. 1984).

This case involves the same type of fraud as in In re Special September 1978 Grand Jury (II). Feldberg, as the attorney for World Sports & Entertainment, agreed to produce the contracts which are called for by the subpoena. On April 6, 1987, Feldberg produced representation agreements and promissory notes for fifty-one college athletes. All of these athletes had completed their college eligibility in the sport in which they had agreed to be represented by World Sports & Entertainment. Based on conversations with his clients, Feldberg was led to think production was complete. At the time, Feldberg was unaware that there existed additional contracts World Sports & Entertainment had signed with athletes who were still participating in college athletics while receiving an athletic scholarship from their universities. The representation agreements and promissory notes for these athletes were not produced by Feldberg until after the government informed him of serious deficiencies in the initial production of records.

These facts are more than sufficient to establish a prima facie showing that Feldberg's clients used him as an instrument to fraudulently conceal from the government and the grand jury the fact that he had signed representation agreements and promissory notes with athletes who were still competing in intercollegiate athletics and still receiving athletic scholarships from their universities. This fact was of critical signficance to the investigation of allegations that Walters had devised a scheme to defraud various universities by concealing the fact that he had signed representation agreements with and paid money to undergraduates who were competing in intercollegiate athletics and receiving athletic scholarships. It is too uncanny to be coincidental that the very contracts which evidenced an ongoing crime were not originally produced, and then showed up only when the government indicated its

knowledge that they existed. The clients clearly intended to conceal their ongoing contracts when they led their attorney to believe no such contracts existed. A jury could find fraud or obstruction of justice beyond a reasonable doubt on these facts. Certainly they meet the prima facie standard necessary for waiver of privilege.

Production of records in response to grand jury subpoena by an attorney acting on behalf of his client outside the grand jury has become a common part of the practice of criminal law. See, e.g., United States v. Brown, 688 F.2d 1112, 1115-16 (7th Cir. 1982). It is a practice that conserves the time and money of the government and the client. A client who uses this practice and his attorney in order to conceal from the grand jury and the government the existence of subpoenaed documents abuses the attorney-client relationship. When that relationship is employed as a means of committing a fraud, "the seal of secrecy is broken" and the attorney-client privilege is waived. In re Special September 1978 Grand Jury, 640 F.2d at 61.

CONCLUSION

For the foregoing reasons, the government respectfully requests that this Court affirm the trial court's order compelling the testimony of Michael Feldberg.

Respectfully submitted,

ANTON R. VALUKAS
United States Attorney

LAURIE N. FELDMAN
Assistant United States Attorney

JAMES R. FERGUSON
Assistant United States Attorney
of Counsel

knowledge that they existed. The clients clearly intended to conceal their ongoing contracts when they led their attorney to believe no such contracts existed. A jury could find fraud or obstruction of justice beyond a reasonable doubt on these facts. Certainly they meet the prima facie standard necessary for waiver of privilege.

Production of records in response to grand jury subpoena by an attorney acting on behalf of his client outside the grand jury has become a common part of the practice of criminal law. See, e.g., United States v. Brown, 688 F.2d 1112, 1115-16 (7th Cir. 1982). It is a practice that conserves the time and money of the government and the client. A client who uses this practice and his attorney in order to conceal from the grand jury and the government the existence of subpoenaed documents abuses the attorney-client relationship. When that relationship is employed as a means of committing a fraud, "the seal of secrecy is broken" and the attorney-client privilege is waived. In re Special September 1978 Grand Jury, 640 F.2d at 61.

CONCLUSION

For the foregoing reasons, the government respectfully requests that this Court affirm the trial court's order compelling the testimony of Michael Feldberg.

Respectfully submitted,

ANTON R. VALUKAS
United States Attorney

LAURIE N. FELDMAN
Assistant United States Attorney

JAMES R. FERGUSON
Assistant United States Attorney
of Counsel

LNF/hd/wpc