Maintaining Client Confidences and Secrets in the Face of Subpoena

By Janet L. Hoffman & Shannon L. Riordan

While most attorneys assume that their notes from client and witness interviews, as well as their mental impressions and resulting work product, will be protected from disclosure in all circumstances, counsel must take care to ensure client confidences and secrets are adequately protected in the face of a subpoena.[1]

Numerous scenarios can arise where counsel is served with a subpoena to produce a client file, or to even testify regarding a client's confidential information. Employees, consulting experts, and other professionals retained by counsel, including accountants and public relations firms, may also be subpoenaed for client information. For example, counsel may be subpoenaed to testify regarding the state of mind of a client when a contract is signed or to detail what was said at a meeting between business partners. When a subpoena is issued relating to confidences of a current client, the attorney is in a particularly difficult position because compliance with the subpoena may result in the attorney becoming a witness against her client and the potential destruction of the attorney-client relationship.[2] The following article reflects some of the significant obstacles counsel may face and the best strategies for protecting client information in these circumstances.

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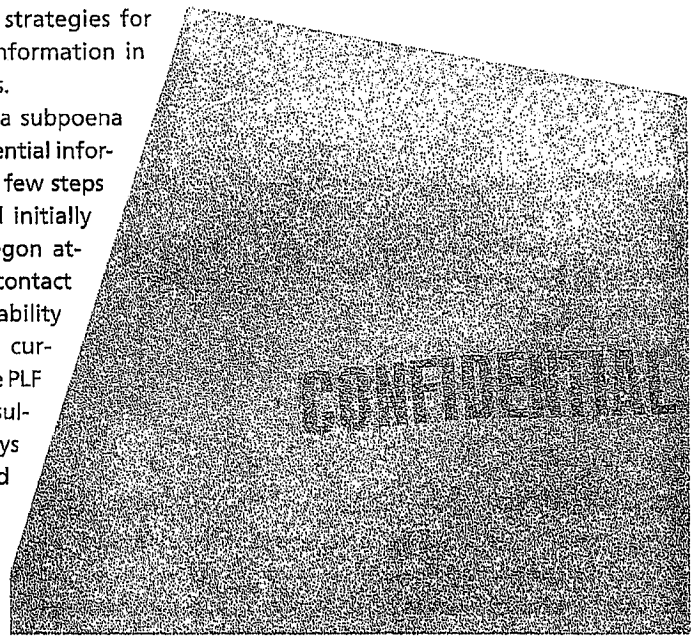

If served with a subpoena for a client's confidential information there are a few steps an attorney should initially undertake. An Oregon attorney should first contact the Professional Liability Fund (PLF). Under current PLF policies, the PLF will provide a consultation for attorneys who have received subpoenas to testify or to provide client files relating to former or current clients. Additionally, an attorney should immediately contact the client to determine whether the client provides consent to the disclosure or whether they desire the confidences to be maintained. Assuming confidentiality is desired, both the attorney and client may separately move to quash the subpoena, with the client as intervenor in the matter.

The question then becomes how to best protect the client's confidences and secrets in the face of a subpoena. The first part of this article outlines the attorney's ethical duty to make all non-frivolous arguments in opposing a subpoena for client confidences, the second part highlights the best legal strategies for prevailing on a motion to quash a subpoena for client confidences, and in conclusion we offer several practical tips for maintaining client confidentiality during the representation so as to have the strongest legal arguments if faced with a subpoena for client confidences and secrets.

Attorney's Ethical Duty to Oppose Subpoenas for Client Confidences and Secrets

At the outset, it's important to review the Oregon ethical duties relating to client confidences and secrets. The duty to protect "confidences and secrets" of the client is one of the most important duties a lawyer owes to a client. It is so important that it has been engrafted into both the Oregon Revised Statutes

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and the Oregon Rules of Professional Conduct. ORS 9.460(5) provides that an attorney shall "[m]aintain inviolate the confidence, and at every peril to the attorney, preserve the secrets of the clients of the attorney[.]"

Under ORPC 1.6, a lawyer must not "reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."[3] The Oregon Supreme Court has adopted a definition to aid in the interpretation of ORPC 1.6. ORPC 1.0(f) provides:

> "Information relating to the representation of a client denotes both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."

Notably, ORPC 1.0(f) encompasses both information protected by the attorney-client privilege (client confidences), as well as any other client information that the client has requested be kept confidential and of which disclosure would negatively impact the client (client secrets). Thus, the duty to protect information provided to an attorney extends beyond information protected by the attorney-client privilege, and in fact has been interpreted very broadly by the Oregon Supreme Court to include information in the public record.[4] The Oregon Supreme Court saw fit to provide specifically that this duty encompasses "other information gained in a ... professional relationship that the client has requested be held inviolate or the disclosure of which ... would be likely to be detrimental to the client." An attorney would therefore violate ORPC 1.6 and 1.0(f) if he or she disclosed this information without the client's consent.

To review the basic legal doctrines protecting client confidences, attorney-client privilege protects confidential communications between attorney and client made in order to obtain legal assistance.

Accordingly, when faced with a subpoena that requires disclosure of client confidences, an attorney has an ethical obligation to limit the subpoena on all available grounds and may not reveal a broad range of information relating to the representation of a client until ordered to do so by a court or appropriate tribunal.[5]

Legal Strategies for Prevailing on Motion to Quash Subpoena

Attorneys typically have several legal bases for opposing a subpoena for client confidences. In addition to relying on the ethical rules prohibiting the disclosure of client secrets, an attorney should also assert attorney-client privilege and work-product protections as appropriate when moving to quash.[6] In arguing that materials or testimony sought are protected by the relevant privilege, protection or ethical rule, counsel may need to request *in camera* review of any underlying documents and attorney affidavits for the judge to make any necessary factual determinations regarding the claims of confidentiality.[7] *In camera* review does not waive any privilege or protection.[8]

Of course, an attorney will be most likely to prevail in quashing a subpoena when all client confidences have been maintained to the greatest degree possible throughout the representation; however, an effective advocate must be prepared to present the strongest legal arguments for maintaining confidentiality. To review the basic legal doctrines protecting client confidences, attorney-client privilege protects confidential communications between attorney and client made in order to obtain legal assistance.[9] In Oregon, attorney-client privilege is established by Rule 503 of the Oregon Evidence Code, while the federal rule is grounded in the common law. It is well-established that "voluntary disclosure to a third party waives the attorney-client privilege even if the third party agrees not to disclose the communications to anyone else."[10] The privilege is not waived, however, by disclosures made between counsel, counsel's representatives, the client, and client's representatives.[11]

Work product protection shields from discovery tangible and intangible materials prepared by a party or a party's representative in anticipation of litigation.[12] The doctrine encompasses "documents and tangible things" and "opinions and impressions" of attorneys and their representatives.[13] Indeed, because intangible work product often includes attorney opinions, impressions, legal theories and conclusions, it is often afforded heightened protection under both Oregon and federal law.[14]

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Using Attorney-Client Privilege to Maintain Client Confidences

In many instances, there will be a challenge to the privilege when a third party is present during the communication between counsel and client. In that case, an adversary will argue that what is being sought by subpoena has been voluntarily disclosed to third parties and is therefore not protected by attorney-client privilege. For example, an adversary would argue that the presence of the client's brother at the client meeting waived attorney-client privilege as to what was discussed at the meeting.

While Rule 503 protects only those communications that the lawyer and client treat as confidential, the rule and its commentary expressly contemplate that effective representation sometimes requires the inclusion of certain third parties in confidential lawyer-client communications. Specifically, Rule 503 defines "confidential communication" to include those communications between a lawyer and client and other persons "to whom disclosure is in furtherance of the rendition of professional legal services to the client."[15] The rule's commentary expressly anticipates that such other persons will include family members, business partners, and others whose presence during the lawyer-client communication may be necessary to further the interest of the client in the consultation with his attorney, especially when the subject matter of the communication is a matter of joint concern with the other person.[16] Note, however, that the commentary's list of persons that could be considered necessary to the furtherance of legal services is not exhaustive, and arguments could be made that a wide variety of individuals are necessary to best provide counsel with the information counsel needs to effectively represent the client.

Accordingly, practitioners should focus on the necessity of the third party's presence to further the provision of legal services, when arguing that attorney-client privilege has not been waived. Business associates, close friends and family are often necessary to further both (1) the lawyers' receipt of complete information about matters affecting decisions in the representation and (2) the lawyers' provision of legal advice to the client regarding those decisions. Both these purposes are central to the provision of legal advice.[17]

Accordingly, practitioners should focus on the necessity of the third party's presence to further the provision of legal services, when arguing that attorney-client privilege has not been waived.

A similar issue arises when counsel has provided materials containing client confidences to individuals retained by counsel to assist in the furtherance of legal advice, such as accountants, public relations firms and other consulting experts. Adversaries will surely argue that such documents, including drafts of documents ultimately intended for public disclosure, are not privileged. Attorney-client privilege, however, is held to cover communications made to certain agents of an attorney, including accountants hired to assist in the rendition of legal services.[18] As to such agents, "[w]hat is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer."[19] Accordingly, "[i]nformation provided to an accountant by a client at the behest of his attorney for the purposes of interpretation and analysis is privileged to the extent that it is imparted in connection with the legal representation."[20] This analysis has been extended in other jurisdictions to include communications between counsel and public relations firms, when the public relations firm had been hired by counsel and had a sufficiently close nexus to the attorney's role in advocating on behalf of the client before a court or other decision-making body.[21]

Using Work-Product Protection to Maintain Client Confidences and Secrets

While attorney-client privilege provides an absolute privilege against disclosure and work-product protection can be overcome by a showing of necessity in some instances, work-product protection can still be used to protect client confidences when attorney-client privilege has been waived by disclosure to third parties.[22] Work-product protection exists not to protect client confidences, as does the attorney-client privilege, but to support the fundamental adversarial nature of our legal system—in other words, one party should not benefit from the work product of another.[23] Because the doctrinal basis for work-product protection differs from that for the attorney-client privilege, work-product protection is not compromised by disclosure to third parties "unless the [disclosure] has substantially increased the opportunities for potential adversaries to obtain the information."[24]

Attorneys will rarely provide tangible work product directly to adversaries. The closer question becomes when an attorney has provided materials related

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to client confidences to a third party and whether that disclosure has made it more likely for a potential adversary to obtain the information.

For example, courts have split on whether materials prepared in anticipation of litigation, but provided to independent auditors to assess litigation risk, waives the work-product protection. In *Medinol Ltd. v. Boston Scientific Group*, the court found that work-product protection for board minutes discussing outside counsel's internal investigation had been waived by the disclosure to auditors because the auditor necessarily performed an independent watchdog function, and therefore no common interest existed between the auditor and company.[25] Conversely, in *Merrill Lynch & Co., Inc. v. Allegheny Energy, Inc.*, the court found that disclosure of internal investigative reports to an independent auditor did not waive work-product protection because the auditor was not an adversary or conduit to a potential adversary.[26] The *Allegheny* court noted the different outcome in *Medinol*, and explained that *Medinol* turned on the fact that there was no pertinent litigation purpose in providing the board minutes to the auditor.[27] The *Allegheny* court rejected this approach, and held that no common litigation purpose between the client and the third party was needed, but instead it was enough that "they both seek to prevent, detect, and root out corporate fraud."[28] Notably, the *Allegheny* court also explained that the auditor was under an ethical and professional obligation to maintain confidentiality, and therefore there was little likelihood that the material would be disclosed to a true litigation adversary.[29] Accordingly, when arguing that providing tangible work product to a third party has not waived work-product protection, counsel should focus on any common interest between the client and the third party and the facts surrounding the disclosure, including whether any confidentiality agreement was entered into or was required under the professional standards of the third party.

"Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness."

The subpoena for counsel to testify as a witness against a client is particularly troublesome, yet there are strong defenses to such a subpoena. Work-product doctrine can be used as a basis to object to any subpoena which would require an attorney to testify regarding her recollection of what was said at a meeting that she attended as a legal advisor. The Supreme Court has pointedly discussed the inappropriateness of turning counsel into a fact witness. As explained in *Hickman*, the work-product privilege safeguards, among other things, "personal recollections ... formed by an adverse party's counsel in the course of his legal duties."[30] The Supreme Court has observed that "not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney...."[31] As the *Hickman* Court recognized, forcing an attorney to disclose his recollection of oral statements is disfavored because the impressions are so influenced by the attorney's role that his memory may be inaccurate:

> "[A]s to oral statements made by witnesses to [the attorney]..., whether presently in the form of his mental impressions or memoranda, we do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production. The practice forces the attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses' remarks. Such testimony could not qualify as evidence; and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness. The standards of the profession would thereby suffer."[32]

Further, forcing counsel to play the role as witness interferes with counsel's role as officer of the court. Accordingly, practitioners should zealously defend against such a subpoena and argue that the facts an attorney would be called upon to testify to regarding any client meeting or witness interview are inextricably linked with her mental impressions and other work performed in her role

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as counsel, and are therefore protected work product.

Using Ethical Rules to Maintain Client Confidences and Secrets

Notably, however, an attorney facing a subpoena for client confidences should not abandon opposition to the subpoena because the client has disclosed the confidences to third parties inconsistent with maintaining attorney-client privilege or work-product protection. A client's disclosure of the secrets to others does not waive his counsel's independent duty to preserve those secrets. ORPC 1.6 offers a broader and different protection of confidential communication than does the evidentiary rule of privilege.[33] Waiver or inapplicability of the privilege does not allow the lawyer to disclose other client information that the client has asked be kept secret or that would embarrass or injure the client if revealed.[34]

The Oregon Supreme Court has been consistent in interpreting a lawyer's obligation to maintain confidential information very broadly. In *In re A.*, the Oregon Supreme Court held that information about a person's death, while available in the public record, was nevertheless a secret of the client when the disclosure of the information would prejudice the client.[35] Thus, even public information can fall within the duty under ORPC 1.6 and ORS 9.460(5) under some circumstances. Therefore, any argument that the presence of third parties somehow takes the information shared by a client to their attorney outside of the attorney's ethical duty to maintain a client's confidences should be rebutted if any argument can be made that the disclosure would be prejudicial to the client. As the court noted in *In re A.*, a lawyer's duty to the court "involves also the steadfast maintenance of the principles which the courts themselves have evolved for the effective administration of justice, one of the most firmly established of which is the preservation undisclosed of the confidences communicated by his clients to the lawyer in his professional capacity."[36]

Waiver or inapplicability of the privilege does not allow the lawyer to disclose other client information that the client has asked be kept secret or that would embarrass or injure the client if revealed.

Whether a court will find persuasive the argument that ethical rules protect the information sought by an adversary, and therefore any such efforts at compelled disclosure should be rejected, may depend on the context in which the client information is being sought. For example, a pre-existing statutory duty to provide information that is covered as a client secret has been found to trump any ethical rules requiring confidentiality,[37] while a subpoena for an attorney's testimony has been found to be "unreasonable or oppressive" when compliance with the subpoena would potentially destroy the attorney-client relationship based on the relevant ethical rules.[38]

Practical Strategies for Maintaining Client Confidences and Secrets During the Representation

Of course, the best defense to any subpoena for client confidences is to anticipate that current and future adversaries may seek information that an attorney may presume to be protected, including an attorney's recollection of client meetings, witness interviews and internal investigation reports. Well-prepared practitioners will implement case management strategies that contemplate the contours of the applicable legal and ethical doctrines related to confidentiality. As a practical matter, that means educating the client as to the importance of confidentiality, using care when disclosing confidential materials to any third parties, and being aware of the potential for becoming a witness when attending meetings with clients and third parties. Counsel should also clearly define at the outset the purpose behind any third parties' being present at client meetings and whether materials provided to third parties are for the furtherance of legal advice and are intended to remain confidential.

Endnotes

1 By way of caveat, this article is not intended to be applied in instances where information is sought in a criminal case by a criminal defendant. In this case the Due Process Clause, Confrontation Clause, compulsory process rights, and other constitutional guarantees may trump other privileges. *See* Janet Hoffman and Carrie Menikoff, *When the Accused Knocks, the Constitution Answers,* Litigation Journal, Spring 2007, Vol. 26, No. 1.

2 *See In re Bergeson*, 425 F.3d 1221, 1226 (9th Cir. 2005) (noting that the district court found that the attorney-client relationship would be destroyed if the attorney were forced to testify at grand jury be-

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cause the attorney would become a witness against her client, in violation of ORPC Rule 3.7).

3 ORPC 1.6(b) provides:

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;
(2) to prevent reasonably certain death or substantial bodily harm;
(3) to secure legal advice about the lawyer's compliance with these Rules;
(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
(5) to comply with other law, court order, or as permitted by these Rules; or
(6) to provide the following information in discussions preliminary to the sale of a law practice under Rule 1.17 with respect to each client potentially subject to the transfer: the client's identity; the identities of any adverse parties; the nature and extent of the legal services involved; and fee and payment information. A potential purchasing lawyer shall have the same responsibilities as the selling lawyer to preserve information relating to the representation of such clients whether or not the sale of the practice closes or the client ultimately consents to representation by the purchasing lawyer.

"many authorities have concluded that the duty of confidentiality compels lawyers who are faced with a subpoena or request for client information to assert on behalf of the client all non-frivolous claims that the information is protected from disclosure"

4 *See* Section B.3, below, for further discussion of the Oregon Supreme Court's broad interpretation of "information relating to the representation of a client."

5 *See* ABA Formal Op. 94-385 (1994); Helen Hierschbiel, *Client Information Subpoenas*, Oregon State Bar Bulletin, June 2008 (noting that although Oregon has no relevant case law or ethics opinions directly on point "many authorities have concluded that the duty of confidentiality compels lawyers who are faced with a subpoena or request for client information to assert on behalf of the client all non-frivolous claims that the information is protected from disclosure" and it is safe to assume the same is true in Oregon).

6 Although not the subject of this article, counsel for clients under criminal investigation should additionally assert, as applicable, their client's state constitutional right to counsel under Article I, section 11 and the related federal constitutional rights under the Fifth, Sixth and Fourteenth Amendments when moving to quash a subpoena for client confidences, whether the subpoena stems from civil or criminal proceedings.

7 *Frease v. Glazer*, 330 Or. 364 (2000) (*in camera* review is appropriate where the applicability of a privilege or privileges is at issue).

8 *Frease v. Glazer*, 330 Or. 364 (2000) (stating that *in camera* review does not destroy privilege).

9 *Fisher v. United States*, 425 U.S. 391, 403 (1976), citing 8 J. Wigmore, *Evidence* § 2292; *see also* OEC Rule 503.

10 *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1427 (3d Cir. 1991); *see also* OEC Rule 511.

11 *See* OEC Rule 503(2)(a)-(e).

12 *See* ORCP 36B(3).

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13 *See* Kirkpatrick, *Oregon Evidence*, §503.14[1] (5th ed. 2007) (work product includes communications in anticipation of litigation whether or not reduced to writing); *State v. Bockorny*, 125 Or. App. 479, 485-86 (1993) (*Bockorny I*) (protection applied to attorney's discussions of opinions and theories), *on recons.* 126 Or. App. 504 (*Bockorny II*), *rev. den.* 319 Or. 150; (1994). *See also Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947) (recognizing work-product privilege for memoranda, statements and mental impressions of attorneys); Wright & Miller, *Federal Practice and Procedure*, § 2024 (2d ed. 1987) (West 2008) ("'[i]t is clear from *Hickman* that work product protection extends to both tangible and intangible work product'") (quoting In re Cendant Corp. Securities Litigation, 343 F.3d 658, 662 (3d Cir. 2003)).

14 *See* ORCP 36B(3) ("the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney ... concerning the litigation" even when substantial need and undue hardship are shown); Wright & Miller, *Federal Practice and Procedure*, § 2024 (since intangible work product includes thoughts and recollections of counsel, it is often eligible for the special protection accorded opinion work product).

15 OEC 503(1)(b). The definition in its entirety reads: "'Confidential communication' means a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.*

"the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney ... concerning the litigation" even when substantial need and undue hardship are shown

16 *See* OEC Rule 503, comment ("The rule allows some disclosure beyond the immediate circle of lawyer and client and their representatives without impairing confidentiality, as a practical matter. It permits disclosure to persons 'to whom disclosure is in furtherance of the rendition of professional legal services to the client,' contemplating that these will include a 'spouse, parent, business associate, or joint client.'"); *see also Kevlik v. Goldstein*, 724 F.2d 844, 849 (1st Cir. 1984) (holding that presence of adult defendant's father in conference between defendant and attorney to provide "support and guidance" was consistent with intent to make communications confidential and therefore did not destroy privilege).

17 *See State v. Jancsek*, 302 Or. 270, 274 (1986) ("Lawyers can act effectively only when fully advised of the facts by the parties whom they represent[.]"); *State v. Durbin*, 335 Or. 183 (2003) ("The purpose of the ... privilege '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.'") (quoting State *ex rel OHSU v. Haas*, 325 Or. 492, 500 (1997) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

18 *United States v. Kovel*, 296 F.2d 918 (2d Cir.1961).

19 *Id.* at 922.

20 *United States. v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989).

21 *See In re Grand Jury Subpoenas Dated March 24, 2003 Directed to (A) Grand Jury Witness Firm and (B) Grand Jury Witness*, 265 F.Supp.2d 321, 326 (S.D.N.Y. 2003) (holding that confidential communications between public relations firm and counsel were protected by the attorney-client privilege to the extent that they took place for the purpose of giving or receiving legal advice); *but see Calvin Klein Trademark Trust v. Wachner*, 124 F.Supp.2d 207 (S.D.N.Y. 2000) (holding that a draft press release and accompanying memo requesting comment from counsel prepared by public relations firm was not expert or legal advice and was, therefore, discoverable).

22 Note, however, that the majority view is that a non-party to current litigation cannot assert work production in that litigation. *See* Wright & Miller, *Federal Practice and Procedure*, § 2024 (Documents prepared for one who is not a party to the

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present suit are wholly unprotected by Rule 26(b)(3) even though the person may be a party to a closely related lawsuit in which he will be disadvantaged if he must disclose in the present suit.).

23 *See* Wright & Miller, *Federal Practice and Procedure*, § 2024.

24 *Goff v. Harrah's Operating Co.*, 240 F.R.D. 659, 661-62 (D. Nev. 2007) (internal quotation marks omitted); *see also United States v. MIT*, 129 F.3d 681, 687 (1st Cir.1997) (stating that "work product protection is provided against 'adversaries,' so only disclosing material in a way inconsistent with keeping it from an adversary waives work product protection").

25 214 F.R.D. 113, 116-17 (S.D.N.Y. 2002).

26 229 F.R.D. 441 (S.D.N.Y. 2004).

27 *Id.* at 446.

28 *Id.* at 448.

29 *Id.*

30 *Hickman v. Taylor*, 329 U.S. 495, 510 (1947).

31 *Id.* at 510-11.

32 329 U.S. at 512-13.

33 *See State v. Keenan/Waller*, 307 Or. 515, 519 (1989).

34 *See In re Lackey*, 333 Or. 215, 227 (2002) (stating that "even if the information was no longer privileged because of its prior, authorized disclosure ... it still could be held a "secret" if the client had requested that it be held inviolate or if the disclosure would be embarrassing or likely be detrimental to the client.").

35 276 Or. 225 (1976).

36 *Id.* at 237 n.2.

37 *United States v. Blackman*, 72 F.3d 1418 (9th Cir. 1995).

38 *In re Bergeson*, 425 F.3d 1221 (9th Cir. 2005).

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