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§ 7.4 Privilege and Evidentiary Issues

§ 7.4.1 Scope of Attorney-Client Privilege

Cavallaro v. United States¹

When an accountant is neither retained by a party (or that party's attorney) nor necessary, or at least highly useful, for an effective consultation between the party and his lawyer, any communications made or documents prepared with or by that accountant are outside the scope of the attorney-client privilege.

Defendants William and Patricia Cavallaro were the owners of Knight Tool Co., Inc. ("Knight"). Their three sons were the owners and sole shareholders of Camelot Systems, Inc. ("Camelot"), a manufacturer and distributor of a glue-dispensing machine used by photo companies such as Kodak.² For both periodic corporate matters and matters of their estate, the Cavallaros were represented by the law firm of Hale and Dorr. While they were receiving legal advice from Hale and Dorr, their sons began receiving tax-planning advice for Camelot from the accounting firm of Ernst & Young. At the onset of that relationship, an officer of Camelot signed an engagement letter and returned it to Ernst & Young, which provided that "all advice and other services [provided by Ernst & Young pursuant to the engagement] are solely for the benefit of Camelot . . . and not for the benefit of anyone other than the corporation and its shareholders." *Id.* at 240–41.³

¹ 284 F.3d 236 (1st Cir. 2002).

² In addition to paying its own employees, Knight paid the salaries of Camelot's employees, and was Camelot's biggest supplier.

³ A subsequent draft of an invoice from Ernst & Young, which explicitly included tax services rendered pursuant to the engagement letter on behalf of Camelot, also referred to services rendered to Knight. In addition, the invoice was mailed to Mrs. Cavallaro at Knight *Id.* at 241. The district court, nonetheless, concluded that Ernst & Young was paid by, and worked solely for, Camelot and its shareholders. *Cavallaro v. United States*, 153 F. Supp. 2d 52, 58 (Mass. 2001).

On December 15, 1994, Ernst & Young sent a letter to Mr. Cavallaro recommending the merger of Knight and Camelot, and suggested a strategy for minimizing transfer tax liability.⁴ On December 19, 1994, the Cavallaros, their sons, another Camelot accountant, accountants from Ernst & Young, and at least one attorney from Hale and Dorr met to discuss the possibility of a merger. *Id.* at 242. The Cavallaros claimed that from that time on Ernst & Young began assisting Hale and Dorr with respect to providing advice on transfer tax issues. At the December 1994 meeting, Hale and Dorr represented only the Cavallaros.

Ernst & Young advised that, upon merger, as much as 85% of the shares of the merged entity would go to the Cavallaros. The Cavallaros ultimately did not follow the recommendations of Ernst & Young with regard to the reallocation of ownership after the merger. *Id.* at 242. Instead, in May 1995, they executed affidavits, prepared by Hale and Dorr, stating that Knight had transferred, for no compensation, its glue-dispensing machine technology to Camelot when Camelot was formed in 1987. *Id.*⁵ This claimed, undocumented transfer was important to the premerger valuation of the companies and hence to the correct postmerger distribution of shares. *Id.* at 243.

Knight merged into Camelot on December 31, 1995. *Id.* As part of the merger, the Cavallaros received 19% of Camelot's stock. This allocation was based on Ernst & Young's December 31, 1995, valuation of the companies, which incorporated the alleged, but undocumented, technology transfer.⁶ On July 1, 1996, the merged corporation was sold for approximately \$97 million. *Id.* The 1995 merger, based on the 1995 valuation, resulted in a distribution of assets to the Cavallaros' sons that substantially reduced the Cavallaros' transfer tax liabilities. *Id.*

Subsequent to the sale of the merged entity, the IRS launched an investigation to determine whether the Cavallaros had manufactured a prior gift to their children to avoid transfer taxes. *Id.* As part of the investigation, the IRS issued a third-party record-keeping summons to Ernst & Young requesting broad categories of records in Ernst & Young's possession concerning the Cavallaros, their sons, or their corporations. *Id.*⁷ The Cavallaros

⁴ According to the court's opinion:

The letter explained that the IRS would scrutinize the pre-merger values of Knight and Camelot to determine the proper allocation of the post-merger sale proceeds between the Cavallaros and their sons. The pre-merger values were important because they would be the benchmark for determining whether the Cavallaros had disguised a gift to their sons in the form of post-merger stock and, if so, the size of that gift and the resulting transfer tax liability. Ernst & Young stated that the pre-merger profit disparity between Knight and Camelot did not reflect the values of the companies . . . The IRS, Ernst & Young said, would likely attribute most of the value of the post-merger corporation to the Cavallaros, which would defeat the tax saving goal of allocating most of the profits of the pre-merger corporations to their sons . . . It would be hard to justify Camelot taking more than a small amount of the allocated proceeds from a sale of the businesses. *Id.* at 241–42.

⁵ The Cavallaros supplemented the affidavits with a confirmatory bill of sale, also dated May 1995, purporting to confirm the previously undocumented gift from Knight to Camelot. *Id.* at 243.

⁶ This valuation was at odds with the Ernst & Young's 1994 suggestion that Camelot shares would form only a small part of the post-merger corporation's value. *Id.*

⁷ Essentially three categories of documents were at issue: (1) documents pertaining to the December 19, 1994, meeting; (2) subsequent transfer tax communications arising from the December 19 meeting; and (3) documents related to communications addressing the 1995 merger of Knight and Camelot. *Id.* at 239.

moved to quash the summons as calling for privileged materials. Specifically, they argued that (1) the summoned documents were privileged because Ernst & Young was assisting Hale and Dorr in rendering legal advice beginning on December 19, 1994, and therefore the documents fell under the *Kovel* doctrine; and (2) the documents fell within the common-interest rule. *Id.* at 243–44. The district court rejected both of these arguments and denied the Cavallaros’ motion to suppress the documents. *Id.* at 244. On appeal, the First Circuit addressed each of these contentions separately.

Kovel Doctrine⁸

The First Circuit began by laying out the essential elements of the attorney-client privilege:

- (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications 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.

Id. at 245 (citing 8 J.H. Wigmore, Evidence § 2292, at 554 (McNaughton rev. 1961)).

Generally, disclosing attorney-client communications to a third party undermines the privilege. *Cavallaro*, 284 F.3d at 246–47. In *United States v. Kovel*, the Second Circuit held that, because “the complexities of modern existence prevent attorneys from effectively handling clients’ affairs without the help of others,” the attorney-client “privilege must include all the persons who act as the attorney’s agents.” 296 F.2d 918, 921 (2d Cir. 1961). This logic applies to accountants when “the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit.” *Id.* at 922.⁹ However, the communication with the accountant must be made “for the purpose of obtaining legal advice from the lawyer,” and “[i]f what is sought is not legal advice but only accounting service . . . , or if the advice sought is the accountant’s rather than the lawyer’s, no privilege exists.” *Id.*

On the record before it, the First Circuit concluded that it had not been shown that Ernst & Young was hired to assist Hale and Dorr in providing legal advice. *Cavallaro*, 284 F.3d at 248. The court found that under *Kovel*, to sustain a privilege, an accountant must be “necessary, or at least highly useful, for the effective consultation between the client and the lawyer,” and there was no evidence that Ernst & Young was employed for that purpose. *Id.* at 247–48. Indeed, the bulk of the evidence supported the claim that at the time of the December 1994 meeting and thereafter, Ernst & Young acted as an agent for the sons or Camelot, but not for Hale and Dorr, the Cavallaros, or Knight. *Id.* at 248.¹⁰

⁸ Although the First Circuit has not expressly adopted the *Kovel* doctrine, the court assumed arguendo that it would adopt the *Kovel* test or a similar standard. *Cavallaro*, 284 F.3d at 247, n.6.

⁹ The “necessity” requirement means more than just useful and convenient. The involvement of the third party must be nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications. *Cavallaro*, 284 F.3d at 249.

¹⁰ The Cavallaros claimed that following the December 1994 meeting, Ernst & Young assisted Hale and Dorr by, among other things, “reviewing the factual basis of Hale and Dorr’s analysis to help determine whether it [was] consistent with the accounting records that Ernst & Young had reviewed.” *Id.* In support of this contention, they offered evidence of the invoice sent by Ernst & Young to Mrs. Cavallaro at Knight that included charges for services provided to Knight. However, the court concluded that such evidence was not

Common-Interest Doctrine¹¹

The common-interest doctrine is typically understood to apply when two or more clients consult or retain an attorney on particular matters of common interest. *Id.* In such a situation, the communications between each of them and the attorney are privileged against third parties. *Id.* Similarly, the privilege applies to communications made by the client or the client's lawyer to a lawyer representing another in a matter of common interest. *Id.* "The common interest doctrine, like the rule announced in *Kovel*, is not an independent basis for privilege, but an exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to a third party." *Id.* at 250. Therefore, the First Circuit held that the resolution of the Cavallaros' *Kovel* argument resolved their common-interest claim as well. *Id.* Since, under *Kovel*, an accountant's presence during communications between a lawyer and his client will destroy the privilege if the accountant is not "necessary, or at least highly useful," it follows that the client cannot resurrect the privilege by adding another party and that party's accountant to the mix. *Cavallaro*, 284 F.3d at 250.

United States v. Peitz¹²

An internal Securities and Exchange Commission ("SEC") memorandum, prepared prior to and independently of the preparation of a criminal case, but which addresses a defendant's liability in the criminal matter, is protected under the government's attorney-client privilege.

As a result of their misrepresentations to investors and misappropriation of investor funds, six defendants were charged with eight substantive counts of wire fraud. *Id.* at *2–3. In addition, several of the defendants, including Peter A. Loutos, Sr., were charged with other various securities law violations. *Id.* at *3. Prior to their indictment, the SEC filed a civil action in the Northern District of Texas alleging that certain of the defendants in the criminal action (not including Loutos) had defrauded investors utilizing a fictitious "prime bank security" investment that never existed. *Id.* at *3–4. A judgment was obtained against all defendants in the SEC action. *Id.* at *4.

In connection with the civil case, an internal SEC memorandum discussing the case was sent to the SEC from the Central Regional Office. *Id.* at *5. While preparing his defense to the criminal charges, Loutos became aware of the SEC memorandum, and sought a copy. *Id.* at *4. The memorandum recommended that the SEC take action against various entities and individuals, including all of the defendants in the criminal case other than Loutos, though the memorandum did make two direct references to Loutos, who was the attorney for one of the other defendants at the time. *Id.* at *6.¹³ Apparently believing,

"contemporaneous documentation" of the relationship between the parties at the December 1994 meeting (i.e., the bill was drafted after the services were rendered). As a result, that meeting did not trigger any form of attorney-client privilege between Ernst & Young and the Cavallaros. *Id.*

¹¹ The common interest doctrine is also referred to as the "joint defense," "joint client," or "allied lawyer" doctrine. *Id.* at 250.

¹² No. 01 CR 852 (WTH), 2002 U.S. Dist. LEXIS 17750 (N.D. Ill. Sept. 20, 2002).

¹³ In subsequent proceedings, the government contended that the SEC civil investigation and lawsuit had been conducted separately from the criminal prosecution. It was concluded, however, that there had

since it recommended no action against him, that the memorandum would be helpful, Loutos contended that he was entitled to view it under Rule 16(a)(1)(C) of the Federal Rules of Criminal Procedure.¹⁴ *Id.* at *8. The government contended that the memorandum was not subject to disclosure because it contained enforcement recommendations from the legal staff to the SEC and, thus, was protected by the attorney-client privilege. *Id.* at *19–20 (citing *Feshbach v. SEC*, 5 F. Supp. 2d 774, 784 (N.D. Cal. 1997)).¹⁵

Loutos raised various arguments to defeat the claims of attorney-client privilege. Citing several circuit court decisions, he contended that the attorney-client privilege does not apply to a communication with a government attorney in a criminal case. *Id.* at *20 (citing *In re Witness Before Special Grand Jury 2000-2*, 288 F.3d 289, 293–94 (7th Cir. 2002), and *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir.), *cert. denied*, 521 U.S. 1105 (1997)). The district court distinguished these cases because they involved the question of whether a government attorney’s advice was privileged as against a grand jury subpoena in a criminal investigation of government officials. The court reasoned that none of the circuits deciding those cases held that the attorney-client privilege for a government agency has absolutely no application in a criminal case. *Id.* at *21–22.

Taking a somewhat more pragmatic approach, the district court concluded that the government-asserted privilege is not absolute in a criminal case and considerations of the requesting party’s need for the information and the agency’s need for confidentiality should be weighed in the balance. *Id.* at *22. Here, many of the facts contained in the memorandum had been alleged in the indictment, and nothing in the memorandum appeared to be anything that would be especially helpful to the preparation of Loutos’ defense. *Id.*¹⁶ Thus, the likely limited value to the defendants would not justify overriding the attorney-client privilege in that case. *Id.* at *23.

§ 7.4.2 Contact with Adverse Parties Represented by Counsel

United States v. Grass¹⁷

Noncustodial, pre-indictment contact by a government attorney with a party known to be represented by counsel falls under the “authorized by law” exception to the no-contact rule of the Pennsylvania Rules of Professional Conduct.

Defendants Martin L. Grass and Franklin C. Brown were former officers and directors of Rite Aid Corporation. Grass resigned as Rite Aid’s CEO on October 18, 1999,

been cooperation between the two teams, including permitting the prosecution access to the SEC investigative file. *Id.* at *8.

¹⁴ Rule 16(a)(1)(C) requires that the prosecution, upon request, provide “documents” within the prosecution’s “possession, custody, or control . . . which are material to the preparation of the defendant’s defense.” Fed. Rules Crim. Proc. R. 16(a)(1)(C) (2003). To be discoverable under Rule 16, the document must be material (i.e., it must enable the accused to substantially alter the quantum of proof in his favor). *Peitz*, 2002 U.S. Dist. LEXIS at *8–9. The court held that the memorandum at issue met the materiality requirement of Rule 16(a)(1)(C), but would still not be subject to disclosure if it was privileged. *Id.* at *19.

¹⁵ “It has been held that the enforcement recommendations from legal staff to the SEC are protected by the attorney-client privilege.” *Id.* at *20 (citing *Feshbach v. SEC*, 5 F. Supp. 2d 774, 784 (N.D. Cal. 1997)).

¹⁶ A copy of the SEC memorandum was provided to the court *in camera*. *Id.* at *5.

¹⁷ Nos. 1:CR-02-146-01, 1:CR-02-146-02 (SHR), 2003 U.S. Dist. LEXIS 646 (M.D. Pa. Jan. 13, 2003).

and shortly thereafter Rite Aid's new leadership launched an internal investigation into allegations of fraudulent misconduct during Grass's tenure. Additional investigations regarding the same allegations were subsequently initiated by the Securities Exchange Commission ("SEC") and the Federal Bureau of Investigation ("FBI").¹⁸ FBI Agent George Delaney and Assistant United States Attorney Kim Douglas Daniel ("AUSA Daniel") led the FBI's criminal investigation. *Id.* at *2–4.

On February 12, 2001, Brown consented to an interview with the government that was scheduled to take place on April 4, 2001. *Id.* at *4. Brown's consent was conditioned on his receipt in advance of a written list of the topics that would be discussed at the interview. At some point after receiving the list but prior to April 4, Brown informed AUSA Daniel through his attorney that he had changed his mind and would refuse to be interviewed. *Id.*

Prior to Brown's change of heart, AUSA Daniel and Agent Delaney met with Timothy Noonan, a former Rite Aid president and colleague of Brown and Grass. At the meeting, Noonan agreed to wear a secret recording device to record future conversations with Brown and Grass concerning the pending investigations. *Id.* at *5. Thereafter, from March 13, 2001, until May 21, 2001, Noonan tape-recorded many conversations he had with Brown and Grass, all under the approval and authorization of AUSA Daniel. *Id.* at *10.¹⁹ In preparation for each of his meetings with Brown and/or Grass, Noonan received instructions from Agent Delaney that he should try to steer the conversation in the direction of the investigations, but that he should avoid entering into discussions concerning either Brown's or Grass's communications with their respective attorneys. *Id.* at *7, 7 n. 3. In addition, on one occasion Agent Delaney gave Noonan a fake letter purportedly signed by AUSA Daniel and addressed to Noonan's retained counsel. *Id.* at *6. The fake letter contained essentially the same information that was included in the list of topics previously given to Brown. *Id.* Prior to one of his early meetings with Brown, Agent Delaney told Noonan to use the letter in the meeting as a prop to guide his conversation with Brown to the topics listed in the letter. *Id.* at *6–7.

After their indictment, Brown and Grass made a motion to suppress all the taped conversations obtained by Noonan. They claimed that AUSA Daniel had obtained these tapes in violation of Rules 4.2²⁰ and 8.4(a)²¹ of the Pennsylvania Rules of Professional Conduct, in that he used Noonan as his surrogate to communicate with Brown and Grass after he knew that they were represented by counsel. *Id.* at *12.²² The government contended that the contact did not violate Rule 4.2 because (1) neither Grass nor Brown

¹⁸ These investigations, as well as the internal investigation conducted by Rite Aid, also concerned acts involving Brown.

¹⁹ At the time Noonan recorded their conversations, neither Brown nor Grass were under indictment. *Id.* at *11.

²⁰ Rule 4.2, also known as the "no contact" rule, prohibits an attorney from communicating "about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." Pa. R. Prof'l Conduct Rule 4.2 (2002).

²¹ Rule 8.4(a) provides that it is professional misconduct for an attorney to knowingly assist another in violating the rules of professional conduct. Pa. R. Prof'l Conduct Rule 8.4(a) (2002).

²² Both of these Rules contain identical language to that of the ABA Model Rules of Professional Conduct. *See* ABA Model R. of Prof'l Cond. 4.2, 8.4(a).

was a “party,” as no indictment had issued at the time Noonan recorded the conversations, and (2) even if either were a “party,” the communications were “authorized by law.” *Id.* at *14.

In 1998 Congress enacted the McDade Amendment, later codified in 28 U.S.C. § 53(B), which provides, in relevant part, that all attorneys for the federal government shall be subject to the laws and rules of the state in which he or she practices. *See* 28 U.S.C. § 53B (2003). For the purposes of application of this rule, the legislation does not define what those standards are, when they attach, or what is an appropriate remedy to impose if government lawyers breach those rules. *Grass*, 2003 U.S. Dist. LEXIS at *14.²³

In support of its argument that AUSA Daniel had not violated Rule 4.2, the government cited *United States v. Balter*, 91 F.3d 427 (3d Cir. 1996). In that pre-*McDade* case, the Third Circuit affirmed the district court’s refusal to suppress recordings of noncustodial conversations between a government agent and the defendant made after the government learned that the defendant was represented by counsel. *Id.* at 436. The *Grass* court noted that the portion of the court’s opinion in *Balter* holding that the New Jersey version of the no-contact rule does not attach until after initiation of formal legal proceedings was not applicable to the present case. *Grass*, 2003 U.S. Dist. LEXIS, at *16. Although the language of the Pennsylvania and New Jersey no-contact rules is virtually identical, Pennsylvania, unlike New Jersey, has no caselaw limiting the application of the Pennsylvania no-contact rule to post-indictment contacts. *Id.* To the contrary, the commentary to Pennsylvania Rule 4.2 states that the Rule covers “any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.” Pa. R. Prof’l Conduct 4.2 official cmt. Therefore, the defendants were “parties” within the meaning of Rule 4.2 *Grass*, 2003 U.S. Dist. LEXIS at *16.

As for whether the contact between Noonan and defendants, as directed by AUSA Daniel, was “authorized by law” and therefore permissible under Rule 4.2, the court observed that, with the exception of the Second Circuit, every other court of appeals that has considered the issue has held that the no-contact rule does not prevent noncustodial pre-indictment communications by undercover agents with represented parties which occur in the course of legitimate criminal investigations. *Id.* at *17–18 (citing *United States v. Ryan*, 903 F.2d 731, 739 (10th Cir. 1990); *United States v. Sutton*, 255 U.S. App. D.C. 307, 801 F.2d 1346, 1366 (D.C. Cir. 1986); *United States v. Dobbs*, 711 F.2d 84, 86 (8th Cir. 1983)).²⁴ The Second Circuit, in *United States v. Hammad*, 858 F.2d 834 (2d Cir.

²³ The district court concluded that the McDade Amendment itself provided no substantive basis for relief:

The McDade Amendment’s lone function was to make state rules of professional responsibility applicable to the conduct of Government attorneys. That legislation did not state what those rules were, nor did it amend the well-established contours of those rules . . . To adopt Defendants’ argument would be tantamount to reading the McDade Amendment as amending all fifty states’ rules of professional responsibility as they apply to Government attorneys. Absent a clear indication from Congress that it intended to do so, the court will not read such an awesome power into the McDade Amendment’s humble command that attorneys for the Government ‘shall be subject to State laws and rules . . . governing attorneys in each State . . . to the extent and in the same manner as other attorneys in that State.’ *Id.* at *30–31.

²⁴ The court concluded that the enactment of the McDade Amendment had no effect on the “authorized by law” exception to the no-contact rule, and, thus, cases decided prior to its effective date were relevant. *Grass*, 2003 U.S. Dist. LEXIS at *19, n.5.

1988), suppressed incriminating statements made by targets of an investigation prior to indictment when elicited in a misleading manner by a government attorney who knew that the parties were represented by counsel. *Id.* at 839. The court found *Hammad* not to be persuasive because the use of a fake letter did not nearly reach the level of egregious conduct found by the *Hammad* court. *Grass*, 2003 U.S. Dist. LEXIS at *25.²⁵

Finally, the district court concluded that permitting pre-indictment investigative contact as “authorized by law” was consistent with the legislative intent of the authors of the original no-contact rule based on the following commentary to the ABA Model Rule of Professional Responsibility:

Communications authorized by law also include constitutionally permissible investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of civil enforcement proceedings, when there is an applicable judicial precedent that either has found the activity permissible under this Rule or has found this Rule inapplicable.

Grass, U.S. Dist. LEXIS at *20. (citing Model Code of Prof'l Conduct R. 4.2 cmt. 2 (1983)). The court reasoned that because there was judicial authority for AUSA Daniel's pre-indictment contact, according to the above commentary, such contact was “authorized by law” so long as it was constitutionally permissible. *Grass*, U.S. Dist. LEXIS at *20. As no claim had been made that pre-indictment contacts had violated the constitutional rights of either defendant, AUSA Daniel's directions to the agent did not violate Rule 4.2. *Id.* at 44 *70.²⁶

²⁵ In *Hammad*, as in *Grass*, the government attorney used fake documents and had his informant falsely indicate to the targets of the investigation that the informant himself was still under investigation. However, in *Hammad* the false document created and used was a counterfeit grand jury subpoena bearing the forged signature of the Clerk of the Court. *Id.* Moreover, the court in *Hammad* explicitly stated that generally, “the use of informants by government prosecutors in a pre-indictment, non-custodial situation, *absent the type of egregious misconduct that occurred in this case*, will [] fall within the “authorized by law” exception to [the no-contact rule] and therefore will not be subject to sanctions.” *Id.* at 839–40 (emphasis added).

²⁶ The court, nonetheless, went on to consider whether suppression of the tapes would have been an appropriate remedy and concluded that it would not be, for two main reasons. First, since defendants had demonstrated a willingness to share information with a person who was not one of their attorneys, thereby essentially waiving their right to treat as privileged that information, the purpose behind the no-contact rule (i.e., the protection of the confidential nature of the attorney-client relationship) would not be vindicated by the suppression of the Noonan tapes. *Id.* at *38. Second, suppression in this case would do little to deter illegal or improper conduct on the part of government attorneys, because even if the court found that AUSA had violated Rule 4.2, his conduct certainly did not reach the level of egregiousness that would induce the court to punish the government by preventing it from presenting the fruits of its investigation. *Id.* at 39.