UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
APR 16 2003
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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELOUISE PEPION COBELL, et al., Appellees,	)	No. 03-5063
	)	[consolidated with
v.	)	No. 03-5084 and
	)	No. 03-5097]
GALE A. NORTON, as Secretary of the Interior, et al, Appellants	)	

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED APR 16 2003
CLERK

APPELLANTS' MOTION TO EXPEDITE BRIEFING AND ORAL ARGUMENT

Pursuant to Rule 27, Fed. R. App. P., appellants in Nos. 03-5063 and 03-5097 hereby request that this Court set an expedited briefing and argument schedule in the above-captioned consolidated appeals.

1. This case arises out of claims for an accounting of Indian trust funds. The Court has scheduled expedited briefing and argument in another appeal arising out of the same case. See Appeal No. 02-5374 (argument set for April 24, 2003).

The question presented in Appeal No. 03-5063 is whether the district court erred in holding that otherwise privileged attorney-client communications made in the course of this litigation are discoverable under a "fiduciary exception" to the privilege if they relate to "trust administration." The district court held that the government cannot invoke the attorney-client privilege for "litigation-related communications" with counsel unless it can demonstrate that the communication was made "solely

to protect [the trustee] personally or the government from civil or criminal liability[.]" 212 F.R.D. 24, 30 (D.D.C. 2002).

The court subsequently extended the same reasoning to invocations of the work product privilege. See Order of February 5, 2003, ___ F.R.D. ___, 2003 WL 255970, at *12 (D.D.C. 2003) ("As in the case of attorney-client privilege, this Court views the work product doctrine as applicable only where the material is developed exclusively for purposes other than the benefit of trust beneficiaries, i.e., solely to aid in litigation."). The question presented in Appeal No. 03-5097 is whether this ruling was error.

2. The district court has made clear that its rulings were intended to provide a framework for analyzing all future invocations of the attorney-client and work product privileges. See 212 F.R.D. at 26; Order of February 5, 2003, ___ F.R.D. ___, 2003 WL 255970, at *13. Indeed, the court has stated that attempts to bring further claims of privilege before the court that are inconsistent with its rulings may be subject to sanctions. See Order of March 5, 2003, ___ F.R.D. ___, 2003 WL 733992, at *12 (D.D.C. 2003); Order of February 5, 2003, ___ F.R.D. ___, 2003 WL 255970, at *13.

Because of the importance of the privilege issues and because proceedings in the district court are ongoing, we

respectfully request that the Court set an expedited briefing and argument schedule.

Respectfully submitted.

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APRIL 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of April, 2003, I caused copies of the foregoing motion to be sent to the Court and to the following counsel by hand delivery:

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Alisa B. Klein

United States District Court,
District of Columbia.

Elouise Pepion COBELL, et al., Plaintiffs,
v.
Gale A. NORTON, Secretary of the Interior, et al., Defendants.

Civ.A. No. 96-1285 RCL.

Dec. 23, 2002.

On defendants' motion for a protective order, the District Court, Lamberth, J., held that: (1) attorney-client privilege did not bar deposition question asking trustee's representative what was his understanding of the nature and scope of the trustee's fiduciary duty, after receiving the advice of counsel, as question fell squarely within the fiduciary exception to the attorney-client privilege, and (2) court could not render any ruling regarding defendants' generalized assertion of the work product privilege, without reference to specific documents.

Motion denied.

West Headnotes

[1] Witnesses ⚿198(1)
410k198(1)

Communications between a trustee and its attorneys concerning the administration of the trust fall within the "fiduciary exception" to the attorney-client privilege, pursuant to which trust beneficiaries are entitled to inspect opinions of counsel procured by the trustee to guide him in administration of the trust.

[2] Witnesses ⚿222
410k222

The party that asserts the existence of the attorney-client privilege possesses the burden of demonstrating its applicability.

[3] Witnesses ⚿222
410k222

Where the "fiduciary exception" to the attorney-client privilege is at issue, the proponent of the privilege retains the burden to demonstrate the applicability of the privilege.

[4] Witnesses ⚿222
410k222

Trustee seeking to foreclose a beneficiary's inquiry into trust administration must bear the burden of showing that he or she acted in a capacity that rendered the attorney-client privilege applicable.

[5] Witnesses ⚿199(2)
410k199(2)

Where communications between trustees and their attorneys exclusively concern the administration of the trust, no attorney-client privilege is involved because the trust beneficiaries are the attorneys' clients.

[6] Witnesses ⚿222
410k222

Trustee has burden of demonstrating that fiduciary exception to attorney-client privilege does not apply to communications between trustee and its counsel because trustee seeks legal advice solely in his own personal interest or because the discovery material relates exclusively to non-fiduciary matters.

[7] Witnesses ⚿198(1)
410k198(1)

With regard to litigation-related communications between trustee and its counsel, there is no attorney-client privilege except where a trustee obtained legal advice solely to protect himself personally or the government from civil or criminal liability, an objective that is inherently inconsistent with his or her fiduciary capacity.

[8] Witnesses ⚿198(1)
410k198(1)

Attorney-client privilege did not bar deposition question asking trustee's representative what was his understanding of the nature and scope of the trustee's fiduciary duty, after receiving the advice of counsel; question fell squarely within the fiduciary exception to the attorney-client privilege, which exempts from protection any opinions of counsel procured by a trustee in order to guide him in the administration of the trust.

[9] Federal Civil Procedure ⚿1600(3)
170Ak1600(3)

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For work product protection, it is not necessary to show that documents were prepared solely or primarily in anticipation of litigation; question is whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

[10] Federal Civil Procedure ⚿1600(3)
170Ak1600(3)

Work product rule has no applicability to documents prepared by lawyers in the ordinary course of business or for other nonlitigation purposes. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

[11] Federal Civil Procedure ⚿1600(3)
170Ak1600(3)

Work product that contains the opinions, judgments, and thought processes of an attorney receives nearly absolute protection from discovery and must be produced only if the opposing party shows an extraordinary justification for production. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

[12] Federal Civil Procedure ⚿1600(3)
170Ak1600(3)

District court could not render any ruling regarding defendants' generalized assertion of the work product privilege, without reference to specific documents, as any such ruling would necessarily be an advisory opinion without binding effect. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

25 *MEMORANDUM AND ORDER

LAMBERTH, District Judge.

This matter comes before the Court on defendants' motion for a protective order regarding the application of attorney-client privilege and work-product doctrine [1593], ***26** which was filed on November 5, 2002. Upon consideration of this motion, the opposition thereto, defendants' reply brief, the oral arguments of counsel, and the applicable law, the Court finds that defendants' motion should be denied.

I. BACKGROUND

Defendants seek to prevent discovery relating to "(1) communications to or from their attorneys concerning anticipated or ongoing litigation between beneficiaries and defendants in their capacity as trustees, and (2) documents prepared with, for or by their attorneys because of this litigation." Defs.' Mot. for Protective Order at 1. Although defendants have referenced no specific document or communication with respect to which they are asserting any privilege in their motion, both during oral argument and in their reply brief, defendants indicated that they brought the instant motion in response to a particular question posed by plaintiffs to Associate Deputy Secretary James E. Cason.

On November 5, 2002, while deposing Mr. Cason, plaintiffs' counsel inquired about his understanding of the nature and scope of the Interior Department's fiduciary duty in the management of the trust after discussing the duties and responsibilities of a trustee with counsel. Defense counsel instructed Mr. Cason not to answer the question, and the Special Master-Monitor, sitting as referee, overruled the instruction and directed Mr. Cason to respond. Transcript of Deposition of James E. Cason, November 5, 2002 ("Depo. Tr.") at 40-41. [FN1] The parties subsequently brought the issue before this Court, seeking a determination that would provide guidance not only regarding that single question, but also with respect to anticipated future deposition questions by plaintiffs relating to communications between defendants and their trust counsel.

FN1.

```
Q.              The attorneys have never informed you that court decisions,
                  common law, have an impact on how you manage the trusts; is
                  that a fair statement?
MS. SPOONER:    Objection, protected by the attorney-client privilege, and I'm
                  instructing you not to answer.
MR. KIEFFER:    Overruled.
MS. SPOONER:    I'm sorry?
MR. KIEFFER:    I said overruled. Answer the question, please.
MS. SPOONER:    We need to take this to the Court.
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Defendants assert that the question posed by plaintiffs' counsel to Mr. Cason requires disclosure of information that triggers the attorney-client privilege because all, or virtually all, of the communications between the trustee and counsel, whether related to trust administration or otherwise, occurred during litigation, and thus are "litigation-related" communications. Additionally, defendants claim that although the communications relate to trust administration, they also involve matters *other than* trust administration. Plaintiffs respond that the so-called "fiduciary exception" to the attorney- client privilege defeats the applicability of those privileges; defendants counter that such a proposition is appropriate only to the extent that the communication *exclusively* embodies issues related to trust administration.

II. ANALYSIS

It is apparent from defendants' motion and from their oral argument that they do not seek a determination of privilege with respect to any particular discovery requests other than the question posed to Mr. Cason. Rather, defendants seek a broad ruling as to the "scope of the defendants' common law litigation privileges." [FN2] Transcript of Motions ***27** Hearing, November 5, 2002 ("Hearing Tr."), at 2. Before the Court rules upon the issues raised by defendants' motion, it will be necessary to set forth an explication of the law of privileges as it relates to fiduciaries.

FN2. At oral argument, defendants also asserted a constitutional right to consult with counsel, claiming that if the Court adopts a "fiduciary exception" to the common law privileges, that right will be forfeited. Hearing Tr. at 3. Because this issue has neither been formally raised nor briefed, the Court will not address it, except to note that nothing in the instant opinion vitiates defendants' right to assert their right to counsel. At all times, defendants retain the right to engage in protected communications with counsel about their potential personal liability, civil or criminal, as well as the right to enjoy the benefits of counsel's work product to aid them in responding to litigation directed against them personally. They are also free to communicate with government counsel about non-fiduciary or sovereign matters. What they may not do is employ the fiction that they are acting in the interests of the trust beneficiaries rather than their own in procuring such legal advice.

A. Attorney-Client Privilege

[1] "The attorney-client privilege protects confidential communications made between clients and their attorneys when the communications are for the purpose of securing legal advice or services." *In re Lindsey,* 148 F.3d 1100, 1103 (D.C.Cir.1998). Defendants assert that all communications made between their attorneys and them during the pendency of litigation are protected under this privilege. Generally speaking, this would be true; however, as defendants concede, communications between a trustee and its attorneys concerning the administration of the trust fall within the "fiduciary exception" to the privilege.

The "fiduciary exception" to the attorney client privilege was first recognized in this country by the Delaware Court of Chancery in a seminal 1976 opinion holding that trust beneficiaries are entitled to inspect opinions of counsel procured by the trustee to guide him in administration of the trust. *See Riggs National Bank v. Zimmer,* 355 A.2d 709, 712 (Del.Ch.1976) (*quoting* 2 SCOTT ON TRUSTS § 173, at 1407 (3d ed.1967)). Since that time, federal courts, including this Court, have uniformly recognized the existence of a fiduciary exception. [FN3] The case of *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Star Co.,* 543 F.Supp. 906 (D.D.C.1982) explained the rationale behind this exception:

FN3. *See United States v. Mett,* 178 F.3d 1058, 1062 (9th Cir.1999) ("The Ninth Circuit ... has joined a number of other courts in recognizing a 'fiduciary exception' to the attorney-client privilege."); *In re Long Island Lighting Co.,* 129 F.3d 268, 272 (2d Cir.1997)("*LILCO*") ("[T]he ERISA fiduciary must make available to the beneficiary, upon request, any communications with an attorney that are intended to assist in the administration of the plan."); *Wildbur v. ARCO Chemical Co.,* 974 F.2d 631, 645 (5th Cir.1992) ("[A]n ERISA fiduciary cannot assert the attorney-client privilege against a plan beneficiary about legal advice dealing with plan administration."); *Garner v. Wolfinbarger,* 430 F.2d 1093, 1103-04 (5th Cir.1970) ("[W]here the corporation is in suit against its stockholders on charges of acting inimically to stockholder interests, protection of those interests as well as those of the corporation and of the public require that the availability of the privilege be subject to the right of the stockholders to show cause why it should not be invoked in the particular instance."); *Everett v. USAir Group, Inc.,* 165 F.R.D. 1, 4

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> (D.D.C.1995) ("[I]t is established that a plan administrator cannot assert the attorney-client privilege to protect communications relating to plan administration from disclosure to the trust's beneficiaries because the beneficiaries are the true clients."); *Washington-Baltimore Newspaper Guild v. Washington Star Co.,* 543 F.Supp. 906, 909 (D.D.C.1982) ("When an attorney advises a fiduciary about a matter dealing with the administration of an employees' benefit plan, the attorney's client is not the fiduciary personally but, rather, the trust's beneficiaries."); *Fischel v. Equitable Life Assurance,* 191 F.R.D. 606, 609 (N.D.Ca.2000) ("[W]hile generally, the fiduciary exception applies to matters of plan administration, the attorney-client privilege reasserts itself as to any advice that a fiduciary obtains to protect itself from liability.").

> As a representative for the beneficiaries of the trust which he is administering, the trustee is not the real client in the sense that he is personally being served. And, the beneficiaries are not simply incidental beneficiaries who chance to gain from the professional services rendered. The very intention of the communication is to aid the beneficiaries. The trustee here cannot subordinate the fiduciary obligations owed to the beneficiaries to their own private interests under the guise of attorney-client privilege.

Id. at 909 (quoting *Zimmer,* 355 A.2d at 713-14).

[2][3] The party that asserts the existence of the attorney-client privilege possesses the burden of demonstrating its applicability. *Federal Trade Commission v. TRW, Inc.,* 628 F.2d 207, 213 (D.C.Cir.1980). Not only the privileged relationship but all essential elements of the privilege must be shown "by competent evidence and cannot be 'discharged by mere conclusory or ipse dixit assertions.' " *See Martin v. Valley National Bank of Arizona,* 140 F.R.D. 291, 302 (S.D.N.Y.1991) (internal citation omitted). It follows that where the "fiduciary exception" is at issue, the proponent of the privilege retains the burden to demonstrate the applicability of the privilege.

***28** [4][5] Ultimately, the existence of the privilege hinges on a finding that the trustee asserting the privilege sought advice or engaged in communication that did *not* benefit the trust beneficiaries. The trust beneficiaries should not, however, be required to demonstrate that the trustee was acting in a non-trustee capacity in order to defeat the privilege. *See Washington Star,* 543 F.Supp. at 909 n. 5 (rejecting a requirement of "good cause" to "pierce" the privilege in a trust context). And because privileges must be construed narrowly, the trustee seeking to foreclose a beneficiary's inquiry into trust administration must bear the burden of showing that he or she acted in a capacity that rendered the privilege applicable. *See LILCO,* 129 F.3d at 272 ("[A]n employer acting in the capacity of ERISA fiduciary is disabled from asserting the attorney-client privilege against plan beneficiaries on matters of plan administration"); *Wildbur,* 974 F.2d at 645 ("[A]n ERISA fiduciary cannot assert the attorney-client privilege against a plan beneficiary about legal advice dealing with plan administration"); *Petz v. Ethan Allen,* 113 F.R.D. 494, 497 (D.Conn.1985) (explaining that an ERISA fiduciary may not raise attorney-client privilege against a beneficiary); *Washington Star,* 543 F.Supp. at 908-10. Accordingly, where communications between trustees and their attorneys exclusively concern the administration of the trust, no attorney-client privilege is involved because the trust beneficiaries are the attorneys' clients. *Everett,* 165 F.R.D. at 4; *In re Grand Jury Proceedings, Grand Jury No. 97-11-8,* 162 F.3d 554, 556- 57 (9th Cir.1998).

The more difficult question presented here is whether a privilege exists when the communication does not *exclusively* concern the administration of the trust or other matters implicating the trustees' fiduciary duty.

Defendants assert that, when a trustee communicates with attorneys, "as long as the attorney-client communications concern the litigation, the fiduciary exception to the attorney-client privilege does not apply--even if the communications also touch on trust administration." Defs' Mot. for Protective Order at 3. Therefore, defendants argue, because most of its communications with its attorneys during the pendency of this litigation "have related to litigation," all such communications are entitled to a presumption of immunity to the fiduciary exception. *Id.* However, none of the cases cited by defendants stand for such a proposition. [FN4] It would ***29** be extraordinary if they did, because the adoption of such a rule would gut the fiduciary exception. Trustees could thereafter simply claim that all of their communications with their attorneys "related to litigation" and thus were privileged from discovery.

> FN4. The court in *Everett* did state that "attorney-client privilege ... does attach to attorney-client communications with respect to the nonfiduciary activities of the employer." 165 F.R.D. at 4. However, the

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court denied the employer's motion for a protective order because it had failed to show that any of the documents sought by plaintiffs "relate [d] *solely* to its nonfiduciary activities or to the formation, amendment or termination of the pension plan." *Id.* (emphasis in original).

In *Martin,* a bank trustee had refused to turn over documents pertaining to communications it had made with its attorneys, citing attorney-client privilege. The district court found that the fiduciary exception applied to all documents except those relating to communications about a Labor Department investigation of the trustee. *Martin,* 140 F.R.D. at 327. Responding to the trustee's arguments, the court stated:

> Furthermore, the trustee's allegations, if true, reflect serious failings by the Bank in carrying out its fiduciary obligation as Trustee ... I also note that the communications that would be encompassed within the fiduciary exception do not reflect advice concerning this litigation, and [the trustee] has not shown that the disclosure would reveal any trade secrets or otherwise adversely affect the Trust.

Id. at 326. This little bit of dicta certainly does not stand for the principle that "as long as the attorney-client communications concern the litigation, the fiduciary exception to the attorney-client privilege does not apply--even if the communications also touch on trust administration." Defs' Motion at 3.

The *LILCO* case also contains no suggestion of a presumption against the application of the fiduciary exception. Instead, that case notes that "[t]he sound proposition that may be drawn from *Washington Star* is that when the same lawyer gives advice to the employer (i) as employer on matters that are non-fiduciary under ERISA, and (ii) as plan fiduciary, the privileged consultation on *non*-fiduciary matters does not defeat the fiduciary exception that allows beneficiaries to discover the otherwise privileged communications on fiduciary matters." *LILCO,* 129 F.3d at 272 (emphasis in original).

Even the two cases cited that argued against a broad construction of the fiduciary exception did not find that a presumption should lie against the application of the exception. *Hudson v. General Dynamics,* 73 F.Supp.2d 201 (D.Conn.1999), never mentioned any such presumption. That case simply noted that " '[t]he employer's ability to invoke the attorney-client privilege to resist disclosure turns on whether or not the communication concern a matter as to which the employer owed a fiduciary obligation to the beneficiaries.' " *Id.* at 202 (citing *LILCO,* 129 F.3d at 271). Nor does *Mett* lend support for the creation of such a presumption. That case notes that "beneficiaries are entitled to inspect communications regarding plan administration, whether or not the attorney dispensing the advice is generally consulted regarding nonfiduciary matters," observing that "[a]n employer's retention of two lawyers (one for fiduciary plan matters, one for non-fiduciary matters) would not frustrate a plan beneficiary's ability to obtain disclosure of attorney-client communications that bear on fiduciary matters." *Mett,* 178 F.3d at 1066 (quoting *LILCO,* 129 F.3d at 272).

Moreover, whatever policy arguments can be made in favor of the trustee's need to secure legal advice, the placement of those interests above the beneficiary's need for disclosure is not sound. Clearly, the most heightened duty of loyalty is the one that the fiduciary owes his or her beneficiary. *Varity Corporation v. Howe,* 516 U.S. 489, 506, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996) ("ERISA requires a 'fiduciary' to 'discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries.' ") (citation omitted). And it is that heightened duty that enjoins a trustee to act with an unswerving "eye single" to the interests of the beneficiaries, *Donovan v. Bierwirth,* 680 F.2d 263, 271 (2d Cir.1982), and with "complete and undivided loyalty" to them. *Freund v. Marshall & Ilsley Bank,* 485 F.Supp. 629, 639 (W.D.Wis.1979). Subordinating the interests of the beneficiaries to those of a trustee would offend this rule.

Furthermore, advice concerning legal compliance, alternatives, or strategy is part of the ordinary business of a trust and a trustee, and such legal communications and advice permit no claim of privilege. *Martin,* 140 F.R.D. at 308. A trustee has no "legitimate need" to "shield his actions from those whom he is obligated to serve." *Washington Star,* 543 F.Supp. at 909 n. 5. For this reason, defendants' claim that communications that do not relate exclusively to trust matters are "presumptively immune" to disclosure, Defs.' Mot. for Protective Order at 3, is misguided.

[6] The better method is to place the burden on the trustee--who, after all, is the party with access to the documents--to demonstrate that the fiduciary exception does not apply. Thus, in *Everett v. USAir Group,* an ERISA case, the court refused to grant a protective order absent such a showing:

> USAir, the administrator of the Pension Plan, has not demonstrated that there are attorney-client communications responsive to Document Request

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> No. 5 that relate *solely* to its nonfiduciary activities or to the formation, amendment or termination of the pension plan. Nor has it demonstrated that any such documents that may exist are wholly unrelated to plan administration and have not been used in connection with defendants' role as plan administrator. Accordingly, absent a demonstration by defendants that the attorney-client privilege bars discovery of any particular document sought by Document Request No. 5, defendants must comply within 14 days with the Document Request under the principles announced herein.

165 F.R.D. at 4-5 (emphasis in original).

The reason for placing this burden on the trustee, rather than the trust beneficiaries, is to prevent trustees from shielding information about trust administration from the beneficiaries, who are entitled to that information. The Court notes that if the trust beneficiaries and the trustee personally were viewed as "joint clients" of the trust counsel, the same would result: one joint client cannot invoke the privilege against the other. *Garner v. Wolfinbarger,* 430 F.2d 1093, 1102 (5th Cir.1970), cited in *Martin,* 140 F.R.D. at 319; *see also Washington Star,* 543 F.Supp. at 910 ("An employer cannot, by retaining the same counsel as that used by the plan, defeat disclosure by a plan's attorney of communications between the plan's trustees and the employer. The case law clearly holds that when an attorney represents two parties who later become involved in litigation, neither party may assert the attorney-client privilege."). The fact that the choice of litigation counsel for the trustee in this ***30** case may have been preordained by statute (namely, 28 U.S.C. § § 516 and 547) does not change this result because "the question does not turn on the number of lawyers." *LILCO,* 129 F.3d at 272 ("An employer's retention of two lawyers (one for fiduciary plan matters, one for non-fiduciary matters) would not frustrate a plan beneficiary's ability to obtain disclosure of attorney-client communications that bear on fiduciary matters."). Therefore, it is defendants who must shoulder the burden of demonstrating that the documents at issue solely concern nonfiduciary matters.

[7] The Court will, consistent with logic and prevailing authority, recognize the existence of an attorney-client privilege where a trustee seeks legal advice *solely* in his own personal interest or where the discovery material has been shown to relate *exclusively* to non-fiduciary matters. [FN5] *See LILCO,* 129 F.3d at 273; *Everett,* 165 F.R.D. at 4; *Hudson,* 73 F.Supp.2d at 202-03. But the Court will not immunize every communication with counsel simply because it involved some incidental interest, or benefit distinguishable from, but ancillary to, that of the trust beneficiaries. With regard to litigation-related communications, the Court will not recognize the existence of an attorney-client privilege except where a trustee obtained legal advice *solely* to protect himself personally or the government from civil or criminal liability, an objective that is inherently inconsistent with his or her fiduciary capacity. [FN6]

> FN5. Both the *Zimmer* case and the Restatement (Second) of Trusts § 173 comment b (1957) ("at his own expense and for his own protection") suggest that independent legal advice be sought at the trustee's own personal expense. The Court declines to impose such a requirement on the present record.

> FN6. While the Court concludes that the attorney-client privilege and work product protection may be available as to "any advice a fiduciary obtains in an effort to protect herself from civil or criminal liability," *Mett,* 178 F.3d at 1066, such assertion of the privilege will not necessarily occur without other consequences, at least as to the civil aspect of this litigation. Invocation of a privilege against disclosure under circumstances in which a fiduciary owes a duty of loyalty to beneficiaries may result in the drawing of an inference that the undisclosed communications were adverse to the beneficiaries' interests.

Defendants allude to a well-developed distinction in ERISA jurisprudence between "settlor" and "fiduciary" functions to suggest that the material that they wish to shield from discovery might involve non-fiduciary activities by the trustees that are not inconsistent with their duties as trustees. Such "settlor" functions, as described in an ERISA context, include the creation, amendment, or termination of the trust. [FN7] However, defendants have not articulated any legitimate non-fiduciary functions or activities with which the trustee-delegate might be involved that might be analogous to "settlor" functions under ERISA. Given the paucity of information tendered to support this argument, the Court will not speculate as to what those activities could consist of.

> FN7. *See Lockheed Corp. v. Spink,* 517 U.S. 882, 890, 116 S.Ct. 1783, 135 L.Ed.2d 153 (1996) (affirming the employer's settlor powers to establish, amend and modify the terms of the plans and refusing to extend

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ERISA's fiduciary duties with respect to such actions); *Anderson v. Resolution Trust Corp.,* 66 F.3d 956, 960 (8th Cir.1995) (affirming the plan sponsor's powers to amend or terminate the plan as business decisions, not fiduciary acts); *Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan,* 24 F.3d 1491, 1497-99 (3d Cir.1994) (stating that the determination of compensation for purposes of benefit calculations was not a fiduciary act); *Belade v. ITT Corp.,* 909 F.2d 736, 737-38 (2d Cir.1990) (stating that the exclusion of a specific group of employees was not a fiduciary act).

The Court notes that the instant litigation, unlike cases construing "settlor" functions in the ERISA context, involves the construction of the Indian Trust Fund Management Reform Act of 1994 (25 U.S.C. §§ 4001 *et seq.*), the amendment of which would appear to be the exclusive province of Congress, not the trustee. Thus, the question of whether such non-fiduciary functions would preserve any available privileges in this case is academic. In any event, defendants have not demonstrated that any of the materials that would otherwise be responsive to the discovery relate *solely* to any claimed non- fiduciary activities, consistent with *Everett,* 165 F.R.D. at 4, and *LILCO,* 129 F.3d at 273. Indeed, they have presented no evidentiary showing of ***31** any kind. Accordingly, to the extent that the information that plaintiffs seek relates to the administration of the trust administration, regardless of any pending litigation, the Court affirms that it must be disclosed.

[8] Having established a set of general principles, the Court may now rule on the sole specific discovery issue at hand--namely, defendants' assertion of attorney-client privilege in response to the question posed to James E. Cason during his deposition by plaintiffs' counsel. The question related to Mr. Cason's understanding of the nature and scope of the trustee's fiduciary duty, after receiving the advice of counsel. The information sought in response to the question falls squarely within the fiduciary exception to the attorney- client privilege, which exempts from protection any opinions of counsel procured by a trustee in order to guide him in the administration of the trust. Defendants have made no showing that the information sought in response to the question posed to Mr. Cason relates solely to non-fiduciary matters. Therefore, the Court finds that the information sought by the question is not protected under the attorney-client privilege. [FN8]

FN8. Defense counsel objected to the question solely on the basis that it would allegedly reveal material protected by attorney-client privilege. Accordingly, the Court deems any other possible objections to the question to have been waived.

B. Work Product Rule

Defendants also seek a protective order to prevent the disclosure of documents prepared by its attorneys that relate to this litigation, under the work product rule. The work product rule protects (1) documents and tangible things (2) prepared in anticipation of litigation (3) by or for the attorney for a party. Fed.R.Civ.P. 26(b)(3). The D.C. Circuit has noted the difference between the scope of information protected under the work product rule and under attorney-client privilege, explaining that "[t]he protection for attorney work product is broader than the attorney-client privilege, but less absolute. Work product immunity covers not only confidential communications between the attorney and client. It also attaches to other materials prepared by attorneys (and their agents) in anticipation of litigation." *In re Sealed Case,* 107 F.3d 46, 51 (D.C.Cir.1997). Thus, the Court does not enquire as to whether the information was contained in a confidential communication between client and attorney relating to the representation; rather, it asks whether the documents containing the information were "developed in the course of [the attorney's] preparation of the case." 8 WRIGHT, MILLER & Marcus Federal Practice and Procedure § 2021 (2d ed.1994).

[9][10][11] The D.C. Circuit has never required that documents must be shown to have been prepared solely or primarily in anticipation of litigation. Rather, this circuit is in accord with the vast majority of circuits which have held that "the testing question is whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *In re Sealed Case,* 29 F.3d 715 (D.C.Cir.1994) (quoting *Senate of Puerto Rico v. U.S. Dep't of Justice,* 823 F.2d 574, 586 n. 42 (D.C.Cir.1987)). The work product rule "has no applicability to documents prepared by lawyers in the ordinary course of business or for other nonlitigation purposes." *In re Sealed Case,* 146 F.3d 881, 887 (D.C.Cir.1998) (quoting *Linde Thomson Langworthy Kohn & Van Dyke v. RTC,* 5 F.3d 1508, 1515 (D.C.Cir.1993)). If the rule is shown to apply, the opposing party may nonetheless obtain documents that would otherwise be protected under the rule upon a

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showing that he has "substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the material by other means." Fed.R.Civ.P. 26(b)(3). On the other hand, work product that contains the opinions, judgments, and thought processes of an attorney receives nearly absolute protection from discovery and must be produced only if the opposing party shows an "extraordinary justification" for production. *Washington Bancorporation v. Said,* 145 F.R.D. 274, 276 (D.D.C.1992) ***32** (citing *In re Sealed Case,* 676 F.2d 793, 809 (D.C.Cir.1982)).

[12] The Court cannot analyze, in a vacuum, whether communications or documents to which defendants might wish to assert a work product privilege warrant protection. The Court has before it only a blanket recitation that material prepared by defendants' lawyers "once the plaintiff IIM trust beneficiaries became adversaries of the defendants" constitutes work product. Defs.' Mot. for Protective Order at 7. Lacking concrete facts, any ruling that this Court might render with respect to defendants' assertion of work product privilege would necessarily be an advisory opinion without binding effect. The Court therefore declines to enter a ruling at this time regarding defendants' generalized assertion of the work product privilege. [FN9]

> FN9. The Court notes, however, that in relation to any otherwise discoverable documents or tangible things over which defendants assert the work product rule, but not the attorney-client privilege, the Court may order production of such materials upon a twofold showing: (1) that the opposing party has a "substantial need of the materials in the preparation of the party's case" and (2) that the opposing party is "unable without undue hardship to obtain the substantial equivalent of the materials by other means." Fed.R.Civ.P. 26(b)(3). The Court may not, however, order discovery of so-called "core work product," i.e., documents that contain "the mental impressions, conclusions, opinions, or legal theories" of opposing counsel. *Id.*

C. Deliberative Process Privilege and Other Privilege Issues

As defendants correctly state in their reply brief, absent a factual record, this Court has no basis for ruling on the application of the deliberative process privilege to this phase of the instant litigation. If either party seeks a ruling on this issue, or on any other issue related to the assertion of litigation privileges, it should be presented in proper form. [FN10]

> FN10. Because neither party has filed a motion pursuant to Rule 53(e)(2) of the Federal Rules of Civil Procedure, the issue of the binding effect of the May 12, 1999 Opinion of Special Master Balaran regarding attorney-client privilege, work product, and the deliberative process privilege is not properly before the Court. Accordingly, the Court will make no ruling on that issue at this time.

III. CONCLUSION

Defendants have failed to meet their burden to establish the existence of attorney-client privilege relating to the information sought in response to the question posed to James E. Cason during his deposition on November 5, 2002. Defendants have also failed to provide good cause for the issuance of a protective order with respect to the general categories of: (1) communications to or from defendants' attorneys concerning anticipated or ongoing litigation between beneficiaries and defendants in their capacity as trustees and (2) documents prepared with, for or by defendants' attorneys because of this litigation. Accordingly, and for the reasons stated herein, it is hereby

ORDERED that defendants' motion for a protective order regarding the application of attorney-client privilege and work-product doctrine [1593] be, and hereby is, DENIED. It is further

ORDERED that James E. Cason shall respond to the question posed by plaintiffs' counsel during his November 5, 2002 deposition, namely, "[Your] attorneys have never informed you that court decisions, common law, have an impact on how you manage the trusts; is that a fair statement?"

Any further disputes concerning common-law privileges should be specifically addressed to the Special Master or the Special Master-Monitor, as appropriate, subject to ruling by this Court as provided by Rule 53 of the Federal Rules of Civil Procedure.

SO ORDERED.

ORDER

For the reasons stated in the Report and Recommendation of the Special Master- Monitor on

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"Motion for Protective Order Seeking (1) Stay of Plaintiffs' Obligation to Respond to Interior Defendants' Request for the Production of Documents, dated June 5, 2002; (2) Stay of Threatened Depositions of the Five Named Plaintiffs; (3) Stay of Rule 11 Motion with Respect to Court-Ordered Attorney's Fees (served June 28, 2002)" and ***33** "Defendants' Motion to Compel Discovery and Testimony of Plaintiff Elouise Cobell at Deposition" and "Defendants' Motion for Sanctions Regarding Submission of False or Misleading Affidavits by Plaintiffs' Attorney Dennis M. Gingold," which was filed with this Court on October 22, 2002, it is hereby

ORDERED that plaintiffs' motion for protective order [1373] be DENIED. It is further

ORDERED that defendants' motion to compel discovery [1386] be GRANTED. Accordingly, it is further

ORDERED that within ten (10) days from the date of this Order, plaintiffs shall comply with Interior Defendants' Request for Production of Documents, dated June 5, 2002, by producing to Interior Defendants the documents requested therein. It is further

ORDERED that defendants' motion to compel appearance and testimony of plaintiff Elouise Cobell at deposition [1424] be DENIED as moot; it is further

ORDERED that defendants' motion for an order adopting the Special Master- Monitor's recommendations regarding plaintiffs' production of documents, and ordering plaintiffs' immediate production of documents [1620-1] be DENIED as moot; it is further

ORDERED that defendants' motion to expedite consideration of their motion for an order adopting the Special Master-Monitor's recommendation regarding plaintiffs' production of documents, and ordering plaintiffs' immediate production of documents [1621-1] be DENIED as moot. It is further

ORDERED that defendants' motion for an order (1) adopting those portions of the Special Master-Monitor's recommendation regarding depositions of named plaintiffs, and (2) ordering named plaintiffs to appear and testify at depositions [1626-1] be DENIED as moot. It is further

ORDERED that defendants' motion for expedited consideration of their motion for an order (1) adopting those portions of the Special Master-Monitor's recommendation regarding depositions of named plaintiffs, and (2) ordering named plaintiffs to appear and testify at depositions [1625-1] be DENIED as moot.

SO ORDERED.

212 F.R.D. 24

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Only the Westlaw citation is currently available.

United States District Court,
District of Columbia.

Elouise Pepion COBELL, et al., Plaintiffs,
v.
Gale A. NORTON, Secretary of the Interior, et al., Defendants.

No. CIV.A. 96-1285(RCL).

Feb. 5, 2003.

In action alleging that Secretaries of the Interior and Treasury breached their fiduciary duties by mismanaging Individual Indian Money (IIM) trust accounts, plaintiffs made consolidated motion to adopt Special Master's opinion and holding that deliberative process privilege and work product doctrine would not shield from disclosure material related to administration of the trust, to compel testimony of deponents, and for sanctions. The District Court, Lamberth, J., held that: (1) government failed to properly invoke deliberative process privilege; (2) work product doctrine would protect from discovery only those materials developed exclusively for purposes other than the benefit of trust beneficiaries; and (3) government's assertion of privilege was substantially justified.

Motions granted.

West Headnotes

[1] Witnesses 216(1)
410k216(1)

Government must establish that the information for which deliberative process privilege protection is sought is "predecisional," that is, that it was prepared in order to assist an agency decisionmaker in arriving at his decision, rather than to support a decision already made; accordingly, to approve exemption of a document as predecisional, a court must be able to pinpoint an agency decision or policy to which the document contributed.

[2] Witnesses 216(1)
410k216(1)

Primary reason for denying deliberative process privilege protection to information generated after the adoption of agency policy is to prevent the creation of secret law that is unavailable to the public; even if the document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public.

[3] Witnesses 216(1)
410k216(1)

Implicit in the name of the deliberative process privilege is the assumption that there must have been a process of decision-making, in which the information at issue played a role.

[4] Witnesses 216(1)
410k216(1)

It is not enough, on assertion of deliberative process privilege, to show that the information was conveyed during the deliberative process; instead, the statement or document must have been a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.

[5] Witnesses 216(1)
410k216(1)

Pre-decisional materials are not exempt from disclosure pursuant to deliberative process privilege merely because they are predecisional; they must also be a part of the agency give-and-take of the deliberative process by which the decision itself is made.

[6] Witnesses 216(1)
410k216(1)

Two non-conclusive factors that may assist courts in determining whether or not an opinion or recommendation is deliberative, and thus eligible for deliberative process privilege: (1) the nature of the decisionmaking authority vested in the officer or person issuing the disputed document and (2) the relative positions in the agency's chain of command occupied by the document's author and recipient.

[7] Witnesses 216(1)
410k216(1)

Intra-agency memoranda from subordinate to superior

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on an agency ladder are likely to be more deliberative in character than documents emanating from superior to subordinate, for purposes of eligibility for deliberative process privilege protection from disclosure; conversely, a memorandum from a superior agency official to a subordinate official is more likely not to be considered deliberative.

[8] Witnesses 216(1)
410k216(1)

Deliberative process privilege is not absolute but qualified.

[9] Witnesses 222
410k222

Once the elements of the deliberative process privilege have been met, the burden shifts to the party opposing the privilege to establish that its need for the information outweighs the interest of the government in preventing disclosure of the information.

[10] Witnesses 216(1)
410k216(1)

Discussions of objective facts, as opposed to opinions or recommendations, are not protected by the deliberative process privilege; however, even factual information may be protected if the manner of selecting or presenting those facts would reveal the deliberative process, or if the facts are inextricably intertwined with the policymaking process.

[11] Witnesses 216(1)
410k216(1)

Exception protecting factual information from disclosure under deliberative process privilege cannot be read so broadly as to undermine the basic rule that discussions of objective facts are not protected by the privilege; in most situations factual summaries prepared for informational purposes will not reveal deliberative processes and hence should be disclosed.

[12] Witnesses 216(1)
410k216(1)

If the factual material is severable from the information protected under the deliberative process privilege, the former must be disclosed.

[13] Witnesses 216(1)
410k216(1)

Drafts of agency orders, regulations, or official histories are routinely deemed to be protected by the deliberative process privilege.

[14] Witnesses 220
410k220

Government failed to properly invoke deliberative process privilege for documents submitted with court monitor's report, filed with the district court under seal, and thus dispute regarding whether documents were protected from disclosure could not be addressed, in action alleging Department of Interior had mismanaged Individual Indian Money (IIM) trust, although government would be provided opportunity to properly invoke the privilege; head of bureau or office within Interior Department possessing control over requested information.

[15] Witnesses 216(1)
410k216(1)

[15] Witnesses 220
410k220

Proper invocation of the deliberative process privilege requires: (1) a formal claim of privilege by the head of the department possessing control over the requested information, (2) an assertion of the privilege based on actual personal consideration by that official, and (3) a detailed specification of the information for which the privilege is claimed, along with an explanation why it properly falls within the scope of the privilege.

[16] Federal Civil Procedure 1900
170Ak1900

District court reviews conclusions of law made by the special master de novo.

[17] Federal Civil Procedure 1600(3)
170Ak1600(3)

Work product doctrine would protect from discovery by Individual Indian Money (IIM) trust beneficiaries only those materials developed exclusively for purposes other than the benefit of trust beneficiaries, i.e. solely to aid in litigation, and the litigation anticipated could not be intended to benefit trust beneficiaries; if documents served a dual purpose, the doctrine would not prevent disclosure to beneficiaries.

[18] Federal Civil Procedure 1600(3)

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170Ak1600(3)

On its face, the attorney work product doctrine rule does not give an attorney the right to withhold work product from his own client, and in fact it has been specifically read as not requiring such a result; this result is hardly surprising in view of the evident inapplicability of the rationale for the work-product rule to an attorney's efforts to withhold the fruits of his professional labors from the client, who presumably paid for and was the intended beneficiary of those labors.

[19] Trusts ⚿289
390k289

Trustee possesses an obligation to provide full and accurate information to the trust beneficiaries regarding the administration of the trust; as part of this obligation, the trustee must make available to the beneficiary, on request, any communications with an attorney that are intended to assist in the administration of the trust.

[20] Federal Civil Procedure ⚿1278
170Ak1278

District courts are entrusted with broad discretion regarding whether to impose discovery sanctions, and the nature of the sanctions to be imposed. Fed.Rules Civ.Proc.Rule 37, 28 U.S.C.A.

[21] Federal Civil Procedure ⚿1636.1
170Ak1636.1

Government's assertion of deliberative process privilege and work product doctrine was substantially justified, and thus sanctions were not proper, for discovery matters in action by beneficiaries of Individual Indian Money (IIM) trust funds, alleging mismanagement by the government; at time the privilege and doctrine were asserted, no ruling had established the general applicability of those doctrines to the instant case. Fed.Rules Civ.Proc.Rule 37(a)(4)(A), 28 U.S.C.A.

Keith M. Harper, Lorna K. Babby, Native American Rights Fund, Washington, DC, Dennis Marc Gingold, Washington, DC, Elliott H. Levitas, Kilpatrick Stockton, LLP, Washington, DC, for Plaintiffs.

J. Christopher Kohn, U.S. Dept. of Justice, Commercial Litigation Branch, Ben Franklin Station, Washington, DC, Brian L. Ferrell, U.S. Dept. of Justice, ENRD, Ben Franklin Station, Washington, DC, Mark E. Nagle, Robert Craig Lawrence, Scott Sutherland Harris, U.S. Attorney's Office, Washington, DC, Charles Walter Findlay, III, Ben Franklin Station, Washington, DC, Henry A. Azar, Jr., U.S. Dept. of Justice, Federal Programs Branch, Washington, DC, Seth Brandon Shapiro, Phillip Martin Seligman, Michael John Quinn, U.S. Dept. of Justice, Civil Division/Ben Franklin Station, Washington, DC, Jonathan Brian New, U.S. Dept. of Justice, Civil Division, Federal Programs Branch, Washington, DC, Gino D. Vissicchio, Jennifer R. Rivera, Tracy Lyle Hilmer, U.S. Dept. of Justice, Civil Division, Washington, DC, Sandra Peavler Spooner, David J. Gottesman, Peter Blaze Miller, Cynthia L. Alexander, Mathew J. Fader, John Warshawsky, John J. Siemietkowski, Amalia D. Kessler, U.S. Dept. of Justice, Commercial Litigation Branch, Washington, DC, John Charles Cruden, U.S. Dept. of Justice, Environment & Natural Resources Division, Annandale, VA, John Stemplewicz, U.S. Dept. of Justice, Ben Franklin Station, Civil Division, Washington, DC, John R. Kresse, Timothy E. Curley, U.S. Dept. of Justice, Civil Division-Commercial Litigation Branch, Washington, DC, Dodge Wells, U.S. Dept. of Justice, Washington, DC, Daniel Gordon Jarcho, Herbert Lawrence Fenster, Michael James Bearman, McKenna, Long & Aldridge, LLP, Washington, DC, B. Michael Rauh, Manatt, Phelps & Phillips, LLP, Washington, DC, for Defendants.

MEMORANDUM OPINION

LAMBERTH, District Judge.

***1** This matter comes before the Court on plaintiffs' consolidated motion (1) for an order pursuant to Rule 53(a)(2) of the Federal Rules of Civil Procedure adopting Special Master Alan Balaran's May 11, 1999 opinion and holding that the deliberative process privilege and work product doctrine will not shield from disclosure material related to the administration of the IIM Trust, (2) to compel the testimony of deponents that defendants directed not to answer questions on the basis of deliberative process privilege, and (3) for sanctions pursuant to Rule 37(a)(4)(A), which was filed on December 30, 2002. Also before the Court are five motions relating to the application of the deliberative process privilege to a sealed document attached as an exhibit to the August 8, 2002 Special Report of the Court Monitor.

Each of the motions presently before the Court turns on whether information for which defendants have asserted privilege falls within the scope of the

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deliberative process privilege. Accordingly, before turning to the individual assertions of privilege, the Court will examine the contours of the deliberative process privilege in order to determine the scope of materials that it protects.

I. THE DELIBERATIVE PROCESS PRIVILEGE

A recent case from this Circuit provides a useful overview of the deliberative process privilege:

> The most frequent form of executive privilege raised in the judicial arena is the deliberative process privilege; it allows the government to withhold documents and other materials that would reveal "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." Although this privilege is most commonly encountered in Freedom of Information Act ("FOIA") litigation, it originated as a common law privilege. Two requirements are essential to the deliberative process privilege: the material must be predecisional and it must be deliberative. Both requirements stem from the privilege's "ultimate purpose [, which] ... is to prevent injury to the quality of agency decisions" by allowing government officials freedom to debate alternative approaches in private. The deliberative process privilege does not shield documents that simply state or explain a decision the government has already made or protect material that is purely factual, unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations.
>
> The deliberative process privilege is a qualified privilege and can be overcome by a sufficient showing of need. This need determination is to be made flexibly on a case-by-case, ad hoc basis. "[E]ach time [the deliberative process privilege] is asserted the district court must undertake a fresh balancing of the competing interests," taking into account factors such as "the relevance of the evidence," "the availability of other evidence," "the seriousness of the litigation," "the role of the government," and the "possibility of future timidity by government employees." For example, where there is reason to believe the documents sought may shed light on government misconduct, "the privilege is routinely denied," on the grounds that shielding internal government deliberations in this context does not serve "the public's interest in honest, effective government."

*2 *In re Sealed Case,* 121 F.3d 729, 737-38 (D.C.Cir.1997) (citations and footnotes omitted). An earlier case noted that the rationale for the privilege stems from the recognition by the courts "that the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fish bowl." *Dow Jones & Co. v. Dep't of Justice,* 917 F.2d 571, 573 (D.C.Cir.1990). This Court has stated that the purpose of the privilege is threefold: (1) "protect[ing] candid discussions within an agency," (2) "prevent[ing] public confusion from premature disclosure of agency opinions before the agency established its final policy," and (3) "protect[ing] the integrity of an agency's decision[, in that] the public should not judge officials based on information they considered prior to issuing their final decisions." *Alexander v. FBI,* 192 F.R.D. 50, 55 (D.D.C.2000) (citing *Judicial Watch v. Clinton,* 880 F.Supp. 1, 12 (D.D.C.1995)). It is important to keep these purposes in mind when evaluating the scope of information that the privilege should protect, because it stands to reason that its scope should not exceed the scope of the purposes that it serves.

[1][2] In order to assert the privilege, the government must establish two elements. First, the government must establish that the information for which protection is sought is "predecisional," that is, that it was "prepared in order to assist an agency decisionmaker in arriving at his decision, rather than to support a decision already made." *Petroleum Information Corp. v. U.S. Dep't of the Interior,* 976 F.2d 1429, 1434 (D.C.Cir.1992) (quoting *Renegotiation Bd. v. Grumman Aircraft,* 421 U.S. 168, 184, 95 S.Ct. 1491, 44 L.Ed.2d 57 (1975)). "Accordingly, to approve exemption of a document as predecisional, a court must be able to pinpoint an agency decision or policy to which the document contributed." *Senate of Puerto Rico v. U.S. Dep't of Justice,* 823 F.2d 574, 585 (D.C.Cir.1987) (internal quotation omitted). The primary reason for denying protection to information generated *after* the adoption of agency policy is to prevent the creation of "secret law" that is unavailable to the public. *See Tax Analysts v. IRS,* 117 F.3d 607, 617 (D.C.Cir.1997) ("A strong theme of our [deliberative process] opinions has been that an agency will not be permitted to develop a body of 'secret law' ....") (quoting *Coastal States Gas Corp. v. Dep't of Energy,* 617 F.2d 854, 866 (D.C.Cir.1980)). Additionally, "even if the document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public." *Coastal States,* 617 F.2d at 866.

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[3][4][5][6][7] Second, the government must show that the information at issue was "deliberative" in nature. Implicit in the name of the privilege is the assumption that there must have been a process of decision- making, in which the information at issue played a role. *See Coastal States,* 617 F.2d at 868 ("It is also clear that the agency has the burden of establishing what deliberative process is involved, and the role played by the documents in issue in the course of that process.") (citing *Vaughn v. Rosen,* 523 F.2d 1136, 1146 (D.C.Cir.1975)). It is not enough to show that the information was conveyed during the deliberative process; instead, the statement or document must have been "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters. Put another way, pre-decisional materials are not exempt merely because they are predecisional; they must also be a part of the agency give- and-take of the deliberative process by which the decision itself is made." *Vaughn,* 523 F.2d at 1144. Case law from the D.C. Circuit points to two non- conclusive factors that may assist courts in determining whether or not an opinion or recommendation is "deliberative": (1) the "nature of the decisionmaking authority vested in the officer or person issuing the disputed document" and (2) "the relative positions in the agency's chain of command occupied by the document's author and recipient." *Senate of Puerto Rico,* 823 F.2d at 585 (internal quotations and citations omitted). Thus, for example, "[i]ntra-agency memoranda from 'subordinate' to 'superior' on an agency ladder are likely to be more 'deliberative' in character than documents emanating from superior to subordinate." *Schlefer v. United States,* 702 F.2d 233, 238 (D.C.Cir.1983) (citing cases). Conversely, a memorandum from a superior agency official to a subordinate official is more likely not to be considered "deliberative." *Id.*

*3 [8][9] If the government establishes these two elements with respect to the statement or document at issue, it has demonstrated the existence of the deliberative process privilege. It should be noted, however, that the privilege is not absolute but qualified. *See In re Sealed Case,* 121 F.3d at 737 ("The deliberative process privilege is a qualified privilege and can be overcome by a sufficient showing of need."); *Northrop Corp. v. McDonnell Douglas Corp.,* 751 F.2d 395, 404 (D.C.Cir.1984) ("[U]nlike the absolute state secrets privilege, [the deliberative process privilege] is relative to the need demonstrated for the information."). Accordingly, once the elements of the privilege have been met, the burden shifts to the party opposing the privilege to establish that its need for the information outweighs the interest of the government in preventing disclosure of the information. *See In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency,* 145 F.3d 1422, 1425 (D.C.Cir.1998) (clarifying that if the privilege is determined not to apply, the balancing test is unnecessary). In this Circuit, courts balance the interests by using a five-factor test derived from *Schreiber v. Society for Savings Bancorp, Inc.,* 11 F.3d 217 (D.C.Cir.1993), in which the D.C. Circuit explained that "[a]t a minimum, the court must consider: (i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence, (iii) the 'seriousness' of the litigation, (iv) the role of the government in the litigation, and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable." *Id.* at 220-21.

[10][11][12] It has been said that "general guidelines are of limited utility in this area, for the deliberative process privilege is so dependent upon the individual document and the role it plays in the administrative process." *Senate of Puerto Rico,* 823 F.2d at 585. Nevertheless, courts have established some useful guidelines regarding the sort of information that is likely to fall within the scope of the privilege, as well as the sort of information that is likely to fall outside its bounds. Thus, it is well- established that discussions of objective facts, as opposed to opinions or recommendations, are not protected by the privilege. *See, e.g., In re Subpoena Served Upon Comptroller of Currency and Sec. of Bd. of Governors of Fed. Reserve Sys.,* 967 F.2d 630, 634 (D.C.Cir.1992) ("The bank examination privilege, like the deliberative process privilege, shields from discovery only agency opinions or recommendations; it does not protect purely factual material.") (citing *EPA v. Mink,* 410 U.S. 73, 90, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973)). However, even factual information may be protected if "the manner of selecting or presenting those facts would reveal the deliberative process, or if the facts are 'inextricably intertwined' with the policymaking process." *Ryan v. Dep't of Justice,* 617 F.2d 781, 790 (D.C.Cir.1980) (citing *Montrose Chem. Corp. v. Train,* 491 F.2d 63, 68 (D.C.Cir.1974) and *Soucie v. David,* 448 F.2d 1067, 1078 (D.C.Cir.1971)). "But this exception cannot be read so broadly as to undermine the basic rule; in most situations factual summaries prepared for informational purposes will not reveal deliberative processes and hence should be disclosed." *Paisley v. CIA,* 712 F.2d 686, 699 (D.C.Cir.1983), *vacated in part on other grounds,* 724 F.2d 201 (D.C.Cir.1984). Moreover, if the factual material is severable from the

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information protected under the privilege, the former must be disclosed. *See, e.g., United States v. Exxon Corp.*, 87 F.R.D. 624, 636-37 (D.D.C.1980) (ordering the Department of Energy to excise factual materials from information protected by the privilege and provide the factual information to the opposing party).

*4 [13] Other general conclusions may also be derived from the case law. Drafts of agency orders, regulations, or official histories are routinely deemed to be protected by the privilege. *See, e.g., Dudman Communications Corp. v. Dep't. of the Air Force,* 815 F.2d 1565 (D.C.Cir.1987) (protecting draft manuscript of official history of Air Force involvement in Vietnam); *Arthur Andersen & Co. v. IRS,* 679 F.2d 254 (D.C.Cir.1982) (protecting draft of IRS revenue ruling); *Pies v. IRS,* 668 F.2d 1350 (D.C.Cir.1981) (protecting draft of proposed IRS regulations). Additionally, the D.C. Circuit has stated that the privilege

> covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. Documents which are protected by the privilege are those which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency; "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." We also ask whether the document is recommendatory in nature or is a draft of what will become a final document, and whether the document is deliberative in nature, weighing the pros and cons of agency adoption of one viewpoint or another.

Coastal States, 617 F.2d at 866 (quoting *United States v. Nixon,* 418 U.S. 683, 705, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974)).

II. THE ATTACHMENT C MOTIONS

[14] On August 8, 2002, Court Monitor (now Special Master-Monitor) Joseph S. Kieffer III ("the Monitor") filed a special report with this Court. [FN1] Submitted with the Special Report was a document located at Attachment C that was filed with the Court under seal ("Attachment C"). On October 18, 2002, in response to motions filed by both parties, the Court directed the Monitor to provide counsel for the parties with copies of Attachment C under seal. The Court also ordered counsel to honor the seal on the document, limiting access to Attachment C and any communications about it only to personnel in their offices who would be required to view or discuss the document in order to prepare submissions by counsel. Finally, the Court ordered the parties to file any portion of their future submissions to the Monitor that referred to the content of Attachment C under seal.

In a letter dated October 21, 2002, the Monitor directed the parties to file briefs addressing the further disposition of copies of Attachment C. Defendants filed their brief under seal on October 24, asserting that Attachment C fell within the scope of the deliberative process privilege. [FN2] The next day, plaintiffs filed a reply brief under seal requesting that the Court unseal Attachment C. On November 9, defendants filed a further response in support of their request that Attachment C remain sealed. Defendants filed two further motions requesting that the Court strike references to the content of Attachment C that were made by plaintiffs' counsel during a November 5, 2002 hearing, and in plaintiffs' second reply brief in support of their request that Attachment C be unsealed.

*5 Each of these motions turns on whether the contents of Attachment C fall under the protection of the deliberative process privilege. However, the Court is unable to make a determination regarding the application of the privilege to Attachment C because the government has not properly invoked the privilege.

[15] In this Circuit, the proper invocation of the privilege requires: (1) a formal claim of privilege by the head of the department possessing control over the requested information, (2) an assertion of the privilege based on actual personal consideration by that official, and (3) a detailed specification of the information for which the privilege is claimed, along with an explanation why it properly falls within the scope of the privilege. *Landry v. FDIC,* 204 F.3d 1125, 1135 (D.C.Cir.2000); *see also Northrop Corp.,* 751 F.2d at 405 n. 11 ("Assertion of the deliberative process privilege ... requires a formal claim of privilege by the head of the department with control over the information. That formal claim must include a description of the documents involved, a statement by the department head that she has reviewed the documents involved, and an assessment of the

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consequences of disclosure of the information."); *Wainwright v. Washington Metropolitan Area Transit Authority,* 163 F.R.D. 391, 396 ("To qualify for the privilege, documents must be reviewed by the agency head, who must file a formal declaration of privilege describing the withheld materials and the likely consequence if they were to be disclosed."); *Bigelow v. District of Columbia,* 122 F.R.D. 111, 113 (D.D.C.1988) ("In order to properly invoke the privilege, the head of the agency which controls the information must file a formal claim of privilege which shall describe the documents involved, affirmatively state that he or she has reviewed the documents and set forth an assessment of the likely consequences if the information is disclosed."); *Founding Church of Scientology of Washington, D.C., Inc. v. Director, FBI,* 104 F.R.D. 459, 464 (D.D.C.1985).

In *Landry,* the D.C. Circuit explained why its case law has not construed the term "head of the department" narrowly:

> The procedural requirements are designed to ensure that the privileges are presented in a deliberate, considered, and reasonably specific manner. As we have seen, built into the requirements is the need for actual personal consideration by the asserting official. Insistence on an affidavit from the very pinnacle of agency authority would surely start to erode the substance of "actual personal" involvement. Further, [the privilege advances] important goals; the gains from imposing demands in the interest of careful assertion must be balanced against the losses that would result of imposing superstringent standards.

Landry, 204 F.3d at 1135-36 (internal quotations and citations omitted). Thus, for example, in *Tuite v. Henry,* 98 F.3d 1411, 1417 (D.C.Cir.1996), counsel for the Justice Department's Office of Professional Responsibility, rather than the Attorney General, was permitted to invoke the law enforcement investigatory privilege, the formal requirements of which are virtually identical to those of the deliberative process privilege. In *Landry,* the court permitted the regional director of the FDIC's division of supervision, rather than the head of the FDIC, to assert the deliberative process and law enforcement privileges. *Landry,* 204 F.3d at 1136. In *Koehler v. United States,* 1991 WL 277542 (D.D.C.1991), this Court permitted the commanding general of the U.S. Army Criminal Investigation Command, rather than the Secretary of the Army, to invoke the criminal investigation privilege, the requirements of which are similar to those of the deliberative process privilege. Moreover, in *Alexander v. FBI,* 186 F.R.D. 154, 166-69 (D.D.C.1999), although this Court found that the elements of the law enforcement privilege had not been met, it never stated that it would have been necessary for the Secretary of Defense to assert the privilege, rather than the Inspector General and General Counsel of the Defense Department. Accordingly, it is unnecessary for the Secretary of the Interior herself to file an affidavit in order to assert the deliberative process privilege; rather, it will be sufficient for the head of the bureau or office within the Interior Department that possesses control over the requested information to file the necessary affidavit.

***6** Defendants will be provided with an opportunity to submit an affidavit that conforms with the requirements for proper invocation of the privilege. Plaintiffs will then be afforded an opportunity to submit a statement setting forth the reasons why the information is not privileged, as well as why they need the information contained in Attachment C. Defendants may then file a reply to plaintiffs' statement. The Monitor will determine whether the information is privileged and, if so, whether plaintiffs' need for the information outweighs the interest of the government in preventing disclosure of the information. The Monitor will then issue a recommendation as to whether Attachment C should remain under seal, as well as a recommendation on the five pending motions concerning the disposition of this document. His recommendation will be subject to review by this Court as appropriate, upon objections made by either party.

Future assertions of the deliberative process privilege with respect to documents will be assessed by the Court in accordance with the following procedure. If defendants assert the privilege with respect to any document, plaintiffs must file a motion to compel with either the Special Master or Special Master-Monitor, depending on which official is overseeing discovery involving the document at issue. If defendants file an opposition brief to plaintiffs' motion to compel, defendants may include with it a cross-motion for a protective order. Defendants must submit an affidavit conforming with the requirements for invoking the privilege on or before the date that they file their opposition brief. Failure to submit an affidavit that conforms with these requirements on the date that defendants file their opposition brief will be deemed to constitute a waiver of defendants' objection to production of the document on the basis of the deliberative process privilege. Additionally, on or before the date that defendants file their opposition brief, defendants will be required to submit the document to the Special Master or Special Master-

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Monitor, as appropriate, for in camera inspection. In camera submission will enable the Special Master or Special Master-Monitor to make a timely recommendation to the Court regarding the application of the privilege, and will reduce the burden of defendants because the affidavit need not conform to the "same degree of specificity as in a case where [the Court] was relying on the affidavit [alone] to decide whether valid grounds existed for assertion of the privilege." *Black v. Sheraton Corp. of Am.*, 564 F.2d 531, 543 (D.C.Cir.1977). Plaintiffs will then be afforded an opportunity to file a reply brief with the Special Master or Special Master-Monitor setting forth the reasons why they need the information contained in the document. The Special Master or Special Master-Monitor will then make a decision or recommendation as to the applicability of the privilege to the deposition testimony for which it is being asserted. His decision or recommendation will be subject to review by this Court as appropriate, upon objections made by either party.

III. PLAINTIFFS' MOTION TO COMPEL

*7 Plaintiffs have also moved to compel the deposition testimony of several witnesses for which defendants have invoked the protection of the deliberative process privilege. The two leading commentators on the federal courts have stated that "[a] motion to compel a witness to answer questions put at a deposition should be granted if the questions are relevant and proper and denied if the questions call for privileged information." 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2286 (2d ed.1994). Defendants have made no assertion that the questions propounded by plaintiffs during the depositions at issue were irrelevant or improper. Accordingly, the Court must determine whether the questions called for answers that would reveal information protected under the deliberative process privilege.

As another court has noted, the difficulty inherent in this situation results from the fact that "most of the cases which analyze the deliberative process privilege [concern] the release of *documents* which are allegedly privileged, rather than *testimony* about allegedly privileged documents as in this case." *Scott v. PPG Indus., Inc.*, 142 F.R.D. 291, 293 (N.D.W.Va.1992) (emphasis in original). Nevertheless, this Court has found ample guidance in the decision of another district court faced with the very same question during a case involving complex litigation. In *In re "Agent Orange" Product Liability Litigation*, 97 F.R.D. 427 (E.D.N.Y.1983), the district court adopted a series of procedures governing the assertion of the deliberative process privilege in conjunction with deposition testimony:

> If the government asserts the privilege with respect to a witness at a deposition, the party seeking a response has seven days to submit to the government and the special master a copy of the unanswered questions, together with a detailed statement of litigative need. Seven days after that submission, the government must submit to the parties and the special master an affidavit by an official of the agency on whose behalf the privilege is asserted, stating why the privilege applies and what harm disclosure of the response would cause. In addition, the government must submit to the special master a detailed summary of the responses the witness would have made absent the privilege.

Id. at 430.

This Court agrees with the *Agent Orange* court that these procedures represent a "practical and efficient method for handling possible assertions of the privilege by the government." *Id.* at 429. Accordingly, it will adopt a modified version of these procedures in the instant case. If defendants assert the deliberative process privilege in response to a deposition question, plaintiffs will have seven days to submit to the Special Master or Special Master-Monitor, as appropriate, a copy of the unanswered questions, together with a detailed statement setting out the reasons why they require answers to these questions, and provide a copy of the statement and unanswered questions to defendants. [FN3] Seven days after this submission, defendants will be required to submit to the Special Master or Special Master-Monitor an affidavit that meets the requirements for formal invocation of the deliberative process privilege, and provide a copy to plaintiffs. At the same time that they file this affidavit, defendants will be required to file under seal with the Special Master or Special Master-Monitor a detailed summary of the responses that the witness would have provided if defendants had not asserted the deliberative process privilege. The Special Master or Special Master-Monitor will then make a decision or recommendation as to the applicability of the privilege to the deposition testimony for which it is being asserted. His decision or recommendation will be subject to review by this Court as appropriate, upon objections made by either party.

IV. PLAINTIFFS' MOTION TO ADOPT THE MAY 11, 1999 OPINION OF THE SPECIAL MASTER

A. Introduction

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*8 In a recent opinion, this Court explained that it would defer ruling on the issue of the binding effect of the May 12, 1999 Opinion of Special Master Balaran ("Special Master Opinion") until one of the parties had filed a motion for an order adopting the Special Master Opinion under Rule 53(e)(2) of the Federal Rules of Civil Procedure. Mem. and Order dated December 23, 2002 at 15 n. 10. [FN4] On December 30, 2002, plaintiffs filed such a motion.

[16] The Special Master Opinion addressed issues raised by several motions to compel filed by plaintiffs, and made a series of legal conclusions regarding the applicability of the attorney-client privilege, work product doctrine, and deliberative process privilege. The Court reviews conclusions of law made by the Special Master de novo. *D.M.W Contracting Co. v. Stolz,* 158 F.2d 405, 407 (D.C.Cir.1946); *In re Vitamins Antitrust Litig.,* 211 F.R.D. 1, 3 (D.D.C.2002)

In its December 23 memorandum and order, the Court made findings as to the applicability of the attorney-client privilege in the instant litigation. The Court's findings accord with the conclusions of the Special Master Opinion. Nevertheless, the Court finds that it is unnecessary to adopt the Special Master's conclusions regarding attorney-client privilege because this portion of his opinion has been superseded by the December 23 memorandum and order.

B. Work Product Doctrine

[17] Plaintiffs also request that the Court adopt the conclusions of the Special Master Opinion dealing with the application of the work product doctrine to the instant case. Having reviewed the Master's conclusions de novo, the Court finds that they should be adopted as the law of the case.

[18] Defendants express disagreement with the Master's conclusion that "the only documents as to which work-product protection in this case will be afforded are those which the Defendants have shown were prepared and created solely for use by counsel in anticipation of or in the course of this litigation." Special Master Opinion at 13. The Court acknowledges the apparent contradiction between this conclusion and the Court's recent observation that "[t]he D.C. Circuit has never required that documents must be shown to have been prepared solely or primarily in anticipation of litigation." Mem. and Order dated Dec. 23, 2002 at 13. The Court should have clarified that it was making a general statement about the interpretation of the work product doctrine in this Circuit, and not making a holding in the instant case. A few paragraphs later, the Court explained that it could not

> analyze, in a vacuum, whether communications or documents to which defendants might wish to assert a work product privilege warrant protection. The Court has before it only a blanket recitation that material prepared by defendants' lawyers "once the plaintiff IIM trust beneficiaries became adversaries of the defendants" constitutes work product. Lacking concrete facts, any ruling that this Court might render with respect to defendants' assertion of work product privilege would necessarily be an advisory opinion without binding effect. The Court therefore declines to enter a ruling at this time regarding defendants' generalized assertion of the work product privilege.

*9 *Id.* at 14 (citation omitted). The problem with the typical construction of the work product doctrine is that it was not specifically intended for a situation in which defendants' trust counsel and litigation counsel are one and the same entity. On the one hand, it is clear that the work product doctrine should not shield documents prepared in order to assist in the administration of the trust from the beneficiaries, who are the true client in such an instance:

> On its face, then, the rule does not give an attorney the right to withhold work product from his own client, and in fact it has been specifically read as not requiring such a result. This result is hardly surprising in view of the evident inapplicability of the rationale for the work-product rule to an attorney's efforts to withhold the fruits of his professional labors from the client, who presumably paid for and was the intended beneficiary of those labors.

Martin v. Valley Nat'l Bank of Arizona, 140 F.R.D. 291, 320 (S.D.N.Y.1991). On the other hand, the Court can envision circumstances in which documents and things prepared by counsel would involve strategic considerations in the litigation that are wholly unrelated to trust administration, and that relate solely to defendants' status as litigants, where the work product doctrine would attach.

[19] The fact remains, however, that a trustee possesses an obligation to provide full and accurate information to the trust beneficiaries regarding the administration of the trust. *See In re Long Island Lighting Co.,* 129 F.3d 268, 272 (2d Cir.1997) ("[T]he ERISA fiduciary must make available to the beneficiary, upon request, any communications with an attorney that are intended to assist in the administration of the plan."); *Martin,* 140 F.R.D. at 322 ("The

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common law recognizes an obligation on the part of the trustee to provide full and accurate information to the beneficiary on his management of the trust."). "As part of this obligation, the trustee must make available to the beneficiary, on request, any communications with an attorney that are intended to assist in the administration of the trust." *Martin,* 140 F.R.D. at 322 (citing GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES, § 961 at 11 (rev.2d ed.1983)).

Faced with the conflict between the need of the trustee's attorneys to prepare documents in anticipation of litigation and the requirement that the trustee disclose to its beneficiaries any communications with its attorneys intended to assist in the administration of the trust, the courts have recognized that the work product doctrine is inapplicable to documents prepared to assist a trustee in its fiduciary capacity. [FN5] In *Everett v. USAir Group, Inc.,* 165 F.R.D. 1 (D.D.C.1995), beneficiaries of an ERISA plan filed suit against their employer. [FN6] The beneficiaries asserted that the employer could not invoke the work product doctrine or attorney-client privilege against them because they were the true clients of any attorney who provided advice regarding the ERISA plan. *Id.* at 4. The court found that the employer could assert attorney-client privilege only when it sought legal counsel solely in its role as an employer regarding issues other than administration of the plan. *Id.* The court's conclusion regarding the work product doctrine was similar:

> ***10** Lawyers who act for fiduciaries of an employee benefit plan may assert the work product privilege since the privilege belongs, at least in part, to the attorney. But generally they may not invoke it to shield their attorney work product from their own ultimate clients, the plan beneficiaries. Accordingly, defendants may assert the work product privilege with respect to Interrogatory Nos. 8 and 10 and Document Request No. 5 to the extent that they call for information and documents that were prepared expressly in anticipation of litigation except insofar as they were prepared in anticipation of litigation on behalf of the plan beneficiaries. The burden is on them, however, to demonstrate that the information and documents were in fact prepared in anticipation of such litigation and not for the benefit of the plan beneficiaries.

Id. at 5.

Similarly, in *Martin v. Valley Nat'l Bank of Arizona,* another ERISA case, the employer's former counsel sought to shield documents from the beneficiaries of the ERISA plan by asserting the work product doctrine. The court granted the beneficiaries' motion to compel the documents, explaining that

> [t]he point of the [work product] rule is to protect the integrity of the adversary process. It is therefore not surprising that the very language of Rule 26(b)(3) limits its scope to discovery efforts by another party in the context of litigation. Thus the rule states in relevant part that "*a party* may obtain discovery of documents ... otherwise discoverable under subdivision (b)(1) of this rule and *prepared* in anticipation of litigation or for trial *by or for another party* ... only upon a showing that *the party seeking discovery* has substantial need of the materials." (emphasis added).
>
> On its face, then, the rule does not give an attorney the right to withhold work product from his own client, and in fact it has been specifically read as not requiring such a result. This result is hardly surprising in view of the evident inapplicability of the rationale for the work-product rule to an attorney's efforts to withhold the fruits of his professional labors from the client, who presumably paid for and was the intended beneficiary of those labors.
>
> Indeed, the result for which Webster & Sheffield presses would be strikingly inconsistent with the accepted principle that an attorney is obliged to serve in a fiduciary capacity to protect the client's interests. Having been hired to serve the client, the attorney cannot fairly be authorized to subvert the client's interests by denying to the client those work papers to which the client deems it necessary to have access.

Martin, 140 F.R.D. at 320 (citations omitted).

Additionally, in *Lawrence v. Cohn,* 2002 WL 109530 (S.D.N.Y.2002), beneficiaries of a will filed suit against the executor for federal securities fraud. The beneficiaries sought production of documents prepared by the executor's law firm during an earlier action initiated by the executor to obtain instruction from the court in his fiduciary capacity about how to manage an aspect of the estate, which the firm claimed was protected by the work product doctrine. *Id.* at *4. The court refused to permit the firm to assert the work product doctrine to shield the documents prepared in the earlier proceeding:

> ***11** As for the claimed work-product protection for notes and memoranda pertaining to the [earlier] proceeding, the difficulty for [the firm] is that, insofar as the firm represented Cohn in his

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> fiduciary capacity, it was serving *de facto* as counsel for the estate, and, necessarily, its beneficiaries. Indeed, it was precisely for this reason that Cohn was required to obtain separate counsel to represent him personally.
>
> An attorney may not withhold work product from his own client. Moreover, that principle has been applied to bar such immunity claims by counsel for a fiduciary in the face of the beneficiaries' demand for access. To the extent that [the firm] represented Cohn in his fiduciary capacity, as it plainly did in the [earlier] proceeding, the same result applies here.

Id. at *6 (citations omitted).

As in the case of attorney-client privilege, once the trustee's interest wholly diverges from the interest of the beneficiaries, a fiduciary exception may no longer apply and work product protection may attach. The difficulty in the instant case, of course, is whether the work product doctrine should apply when the documents at issue do not *exclusively* concern the administration of the trust or other matters implicating the trustees' fiduciary duty. In its December 23 memorandum and order, this Court resolved this dilemma with respect to the attorney-client privilege by placing the burden on defendants to demonstrate that they "obtained legal advice *solely* to protect [themselves] personally or the government from civil or criminal liability, an objective that is inherently inconsistent with [their] fiduciary capacity." Mem. and Order dated Dec. 23, 2002 at 10.

As in the case of attorney-client privilege, this Court views the work product doctrine as applicable only where the material is developed exclusively for purposes other than the benefit of trust beneficiaries, *i.e.,* solely to aid in litigation. If the documents serve a dual purpose, the doctrine will not prevent their disclosure to the beneficiaries, consistent with the teachings of *Everett.* To hold otherwise would tempt breaching fiduciaries to shield their misdeeds from scrutiny by claiming that every act exposed them to potential fiduciary liability. The litigation anticipated, moreover, must not be litigation that is itself intended to benefit the trust beneficiaries. *See Everett,* 165 F.R.D. at 5. While the Court does not intend to deter fiduciaries, even those in breach of their obligations, from securing personal legal advice on a confidential basis, it will not afford shelter to any attempts to do so in a manner invisible to the beneficiaries, or at the trust's or beneficiaries' financial expense.

The Court now turns to the question of whether the legal conclusions of the Special Master on this issue are consistent with the Court's own conclusions. The Special Master Opinion concluded, on a more specific and better developed record, that "the only documents which need not be produced because they fall squarely within the rubric of 'work-product' are those prepared for use in this or other pending litigation and which contain the legal theories and opinions of counsel--not as to legal compliance generally, but rather as to specific matters arising in this litigation." Special Master Opinion at 14. The Court finds no reason to disturb this conclusion, and accordingly, it will adopt the conclusions of the Special Master Opinion regarding the work product doctrine as the law of this case.

*12 If further proceedings involving the applicability of the work product doctrine should prove necessary, the Court will expect defendants to identify the documents or information they seek to shield as work product with greater specificity, so that the Court may make an informed determination as to whether they constitute work product. Additionally, defendants should proffer the circumstances and purpose for which any claimed work product was created, as well as the persons for whose benefit the claimed work product was created. If the documents or things relate to items arising specifically in this litigation, and defendants have made an adequate showing that such communications were not created for the IIM beneficiaries' benefit, plaintiffs will then be required to address with specificity why they have a substantial need for the information contained in the documents or things.

C. Deliberative Process Privilege

The instant memorandum opinion determines the metes and bounds of the deliberative process privilege in the instant case, and establishes procedural requirements for the assertion of that privilege. Therefore, the legal conclusions set forth in the Special Master Opinion on this topic have been superseded by the instant opinion. Accordingly, the Court will not adopt the portions of the Special Master Opinion relating to the application of the deliberative process privilege.

V. PLAINTIFFS' MOTION FOR RULE 37 SANCTIONS

[20] The sole remaining issue is plaintiffs' motion for sanctions under Rule 37(a)(4)(A) of the Federal Rules of Civil Procedure. That rule provides, in relevant part,

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that if a motion to compel disclosure or discovery is granted,

> the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

It is well-established that district courts are entrusted with broad discretion regarding whether to impose sanctions under Rule 37, and the nature of the sanctions to be imposed. *Bonds v. District of Columbia,* 93 F.3d 801, 808 (D.C.Cir.1996); *Sturgis v. Am. Ass'n. of Retired Persons,* 1993 WL 518447 (D.C.Cir.1993) (per curiam); *Steffan v. Cheney,* 920 F.2d 74, 75 (D.C.Cir.1990). "The Supreme Court has stated that a party meets the 'substantially unjustified' standard when there is a 'genuine dispute' or if 'reasonable people could differ' as to the appropriateness of the motion." *Alexander v. FBI,* 186 F.R.D. 144, 147 (D.D.C.1999) (quoting *Pierce v. Underwood,* 487 U.S. 552, 565, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988)); *see also* 8A Wright, Miller & Marcus, Federal Practice and Procedure § 2288 (2d ed. 1994) ("Making a motion, or opposing a motion, is 'substantially justified' if the motion raised an issue about which reasonable people could genuinely differ on whether a party was bound to comply with a discovery rule.").

***13** [21] At the time that defendants made their assertions of the work product doctrine and deliberative process privilege, there was no ruling by this Court that had established the general applicability of those doctrines to this case. As explained above, the Court had not adopted the Special Master Opinion at the time that defendants invoked these doctrines. The Court finds that when defendants' assertions were made, the parties could reasonably differ about whether the deposition testimony at issue was protected under the deliberative process privilege, and whether the documents and things at issue constituted work product . Accordingly, the Court concludes that the objections were "substantially justified" for purposes of Rule 37(a)(4)(A), and it will deny plaintiffs' motion for sanctions.

A separate order shall issue this date detailing the legal conclusions and relief granted by the Court.

ORDER

For the reasons stated in the memorandum opinion issued this date, it is hereby

ORDERED that defendants shall have seven (7) days from the date of this Order in which to submit to the Special Master-Monitor ("the Monitor") an affidavit that conforms with the requirements for proper invocation of the deliberative process privilege with respect to Attachment C of the August 8, 2002 Special Report of the Monitor ("Attachment C"). It is further

ORDERED that plaintiffs shall have seven (7) days from the date on which defendants submit the above-mentioned affidavit to the Monitor in which plaintiffs may submit a statement to the Monitor setting forth the reasons for their need of the information contained in Attachment C in the instant litigation. It is further

ORDERED that defendants shall have five (5) days from the date on which plaintiffs submit the above-mentioned statement to the Monitor in which defendants may submit to the Monitor a reply to plaintiffs' statement. It is further

ORDERED that if plaintiffs file with the appropriate special master a motion to compel the production of any document for which defendants have asserted the protection of the deliberative process privilege, then on or before the date that defendants are required to file their opposition brief, defendants shall (1) submit an affidavit to the appropriate special master from the head of the bureau or office having custody of the document that describes the document in general terms, explains why the privilege should apply, and states in detail the harm that would result from disclosure, and (2) submit the document to the appropriate special master for in camera inspection. Any failure to comply with these two requirements on the date that defendants assert an objection based on the deliberative process privilege will be deemed to constitute a waiver of defendants' objection to production of the document on the basis of the deliberative process privilege. If defendants comply with the above-mentioned requirements, then on or before the date that plaintiffs are required to file their reply brief, plaintiffs shall submit a statement with the appropriate special master that sets forth the reasons for their need of the information contained in the document. No further filings by either party will be permitted except by

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express leave of the Court. It is further

*14 ORDERED that plaintiffs' motion to compel testimony of deponents defendants directed not to answer questions on the basis of deliberative process privilege [1691-2] be, and hereby is, GRANTED. It is further

ORDERED that if defendants assert any future objections based on the deliberative process privilege with respect to a witness at a deposition, plaintiffs will have seven (7) days from the date on which defendants made their assertion to submit to the appropriate special master a copy of the unanswered questions, together with a detailed statement setting out the reasons why plaintiffs need answers to these questions. Within seven (7) days from the date that these documents were filed with the Court, defendants shall (1) file an affidavit with the appropriate special master from the head of the bureau or department possessing control over the requested information that contains (a) an assertion of the privilege based on actual personal consideration by that official, (b) a detailed specification of the information for which the privilege is claimed, along with an explanation why it properly falls within the scope of the privilege, and (c) a detailed statement of the harm that would result from disclosure of the information that falls within the scope of the privilege; and (2) file under seal with the appropriate special master a detailed summary of the responses that the witness would have provided if defendants had not asserted the deliberative process privilege. Any failure by defendants to comply with these two requirements within seven (7) days will be deemed to constitute a waiver of the objection. It is further

ORDERED that plaintiffs' motion for an order pursuant to Rule 53(e)(2) adopting Special Master Balaran's May 11, 1999 opinion [1691-1] be, and hereby is, GRANTED in part and DENIED in part. It is further

ORDERED that section II of Special Master Balaran's May 11, 1999 opinion, which is entitled "Work-Product Doctrine," be adopted, pursuant to Rule 53(e)(2) of the Federal Rules of Civil Procedure. It is further

ORDERED that plaintiffs' motion for sanctions pursuant to Rule 37(a)(4)(A) [1691-3] be, and hereby is, DENIED.

SO ORDERED.

FN1. The full title of the August 8 report was "Special Report of the Court Monitor on Potential Evidence Regarding the Alleged Suppression by White House and Department of Justice Attorneys of the Written Testimony of the Special Trustee Prepared for the Senate Committee on Indian Affairs' July 25, 2002 Hearing Regarding the Department of the Interior's Historical Accounting." The Court will refer to this document as "the Special Report."

FN2. The Court is obliged to discuss the basic arguments raised in the sealed briefs of the parties regarding Attachment C in order that it may decide upon their merits. However, the Court will refrain from discussing the content of Attachment C.

FN3. As for assertions of the privilege during depositions that were taken before the Court issued this Memorandum Opinion, plaintiffs will have seven days from the date of this Memorandum Opinion to file with the Special Master-Monitor or Special Master, as appropriate, a copy of the unanswered questions and a detailed statement explaining their need for the answers to these questions. Plaintiffs should serve defendants with copies of both of these documents at the time that they submit them to the Special Master or Special Master-Monitor.

FN4. It should be noted that, as the Court has recently stated, within ten (10) days after being served with notice of the filing of a report by one of the special masters in this case, either party may serve written objections thereto upon the other parties. If there are no objections within the ten-day period, the Court may adopt, modify, or reject the report, or adopt, modify, or reject any individual part thereof. *See* Order dated January 17, 2003 at 1 n. 1. Given the considerable time that had passed since the filing of the May 12, 1999 report, however, the Court elected to waive the ten-day requirement for filing objections with respect to that report.

FN5. The cases cited by defendants do not contradict this proposition. Rather, these three cases represent a refusal by courts to extend the Fifth Circuit's holding in *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir.1970), to the work product doctrine. *See Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1423 (11th Cir.1994) ("[T]he Fifth Circuit

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has held that the *Garner* doctrine does not apply to attorney work product. We agree.") (citation omitted); *In re Int'l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1240 (5th Cir.1982) ("Since the good cause standard is the standard in *Garner*, it follows that *Garner* should not apply to work product discovery."); *Picard Chem. Inc. Profit Sharing Plan v. Perrigo Co.*, 951 F.Supp. 679, 687 (W.D.Mich.1996) ("This Court agrees with those courts that hold that the *Garner* doctrine does not apply to work product immunity.").

In *Garner*, stockholders of a corporation, who were suing the corporation for acting inimically to their interests, claimed that attorney-client privilege did not apply to communications between the corporation and its attorney. *Garner*, 430 F.2d at 1097. The corporation disagreed, claiming that the attorney-client privilege absolutely protected the communications. *Id.* The court adopted neither position, holding instead that the communications would be protected by attorney-client privilege unless the stockholders demonstrated "good cause" for disclosure. *Id.* at 1103-04. It is true that the district court had relied on two English cases treating the corporation-shareholder relationship as analogous to the trustee-beneficiary relationship in reaching its decision. *Id.* at 1102. But the Fifth Circuit made clear that although these cases were "persuasive recognition that there are obligations, however characterized, that run from corporation to shareholder and must be given recognition in determining the applicability of the privilege," they were not "binding precedents." *Id.* More importantly, *Washington-Baltimore Newspaper Guild v. Washington Star Co.*, 543 F.Supp. 906, 909 n. 5 (D.D.C.1982), which established the existence of the fiduciary exception to the attorney-client privilege in this Circuit, explicitly rejected a requirement of good cause to "pierce" the privilege in a trust context. The conclusions of the cases cited by defendants thus hinge upon an analysis that has been expressly rejected by this Court. Additionally, the entities involved in these cases were corporations and their shareholders, not trustees and beneficiaries.

FN6. ERISA is the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1101, *et seq.* The Supreme Court has directed federal courts to read ERISA in light of the common law principles governing trusts. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989).

2003 WL 255970, 2003 WL 255970 (D.D.C.)

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Only the Westlaw citation is currently available.

United States District Court,
District of Columbia.

Elouise Pepion COBELL, et al., Plaintiffs,
v.
Gale A. NORTON, Secretary of the Interior, et al., Defendants.

No. CIV.A.96-1285 (RCL).

March 5, 2003.

Beneficiaries of Individual Indian Money (IIM) trust accounts brought class action suit alleging that the Secretaries of the Interior and Treasury breached their fiduciary duties by mismanaging the accounts. On defendants' motion for a protective order regarding documents requested by a special master-monitor appointed in the case, the District Court, Lamberth, J., held that: (1) discovery rule authorizing issuance of protective orders does not apply to document requests by a special master appointed pursuant to rule governing masters; (2) it was improper for defense counsel to refuse to comply with document request made by special master-monitor on the grounds that documents requested were protected under attorney-client privilege; and (3) defendants' filing of frivolous motion for protective order warranted sanction of paying plaintiffs' reasonable expenses, including attorneys' fees, incurred in opposing the motion.

Motion denied.

West Headnotes

[1] Federal Civil Procedure ⚿1611
170Ak1611

Discovery rule authorizing issuance of protective orders does not apply to document requests by a special master appointed by the court pursuant to rule governing masters, since such requests do not constitute "discovery" within meaning of rules governing discovery between parties. Fed.Rules Civ.Proc., Rules 26(c)3, 53(c), 28 U.S.C.A.

[2] Federal Civil Procedure ⚿1893.1
170Ak1893.1

It was improper for defense counsel to refuse to comply with document request made by special master-monitor on the grounds that documents requested were protected under attorney-client privilege; when monitor issued a request for documents pursuant to his authority as court monitor, monitor was proceeding as an adjunct of the court, and was therefore entitled to production of the documents requested, any claims of privilege notwithstanding; issue of privilege would only become relevant if monitor wished to discuss content of documents in his reports to the court, or provide them to plaintiffs. Fed.Rules Civ.Proc., Rule 53, 28 U.S.C.A.

[3] Federal Civil Procedure ⚿1893.1
170Ak1893.1

Special master-monitor possessed the authority to issue directions to the parties and their counsel in response to any objections asserted during depositions at which he presided, where appointment order provided monitor with the authority to "oversee the discovery process in this case ... to ensure that discovery is conducted in the manner required by the Federal Rules of Civil Procedure and the orders of this Court" and "to regulate all proceedings in every hearing." Fed.Rules Civ.Proc., Rule 53, 28 U.S.C.A.

[4] Federal Civil Procedure ⚿1893.1
170Ak1893.1

Order appointing special master-monitor gave monitor authority to terminate a deposition over which he was presiding, where order provided monitor with the authority to "oversee the discovery process in this case ... to ensure that discovery is conducted in the manner required by the Federal Rules of Civil Procedure and the orders of this Court" and "to regulate all proceedings in every hearing." Fed.Rules Civ.Proc., Rule 53, 28 U.S.C.A.

[5] Federal Civil Procedure ⚿1893.1
170Ak1893.1

Special master-monitor possessed the authority to file a report and recommendation with the court recommending that an order to show cause be issued requiring counsel to answer why his or her conduct should not be referred to the disciplinary panel or why his or her conduct does not warrant sanctions, where appointment order gave monitor authority "at any time, [to] call to the Court's attention any matter that bears on the compliance with any order of this Court or any

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applicable law." Fed.Rules Civ.Proc., Rule 53, 28 U.S.C.A.

[6] Federal Civil Procedure ⚿1278
170Ak1278

Government defendants' filing of frivolous motion for protective order against court-appointed special master in Indian trust litigation, warranted sanction of requiring defense counsel to pay plaintiffs' reasonable expenses, including attorneys' fees, incurred in opposing defendants' motion, especially considering that the motion represented the culmination of a series of displays of obstinacy, recalcitrance, and unprincipled behavior on the part of defense counsel. Fed.Rules Civ.Proc., Rule 37(a)(4), 28 U.S.C.A.

MEMORANDUM AND ORDER

LAMBERTH, District Judge.

***1** This matter comes before the Court on Interior defendants' motion for a protective order regarding documents requested by the Special Master-Monitor ("Monitor") and regarding the rule announced by the Monitor concerning deposition questioning [1747], which was filed on January 23, 2003. Upon consideration of defendants' motion, plaintiffs' opposition thereto, defendants' reply brief, and the applicable law, the Court finds that defendants' motion should be denied.

I. PROCEDURAL BACKGROUND

On April 16, 2001, with the consent of both parties, the Court appointed Joseph S. Kieffer, III, to serve as court monitor in this action. Mr. Kieffer was directed to "monitor and review all of the Interior defendants' trust reform activities and file written reports of his findings," which were to include "a summary of the defendants' trust reform progress and any other matter [he] deems pertinent to trust reform." Order dated April 16, 2001 at 2. Defendants were ordered to "facilitate and assist Mr. Kieffer in the execution of his duties and responsibilities" and to provide him with "access to any Interior offices or employees to gather information necessary or proper to fulfill his duties." *Id.*

On September 17, 2002, the Court found Interior Secretary Gale Norton and Assistant Interior Secretary Neal McCaleb to be in civil contempt for committing several frauds upon the Court. In a memorandum opinion issued that date, the Court ordered a special master to be appointed in the instant case to monitor the status of trust reform. Explaining that there were "no practical means by which this Court alone can monitor the status of trust reform or the defendants' purportedly vast efforts to bring themselves into compliance with their trust responsibilities," the Court determined that the appointment of a special master was "clearly necessary to ensure that this Court and the plaintiffs receive timely, accurate information regarding the status of trust reform and the defendants' efforts to discharge properly their fiduciary duties." Mem. Op. dated Sept. 17, 2002, at 259, 258. In order to ensure that the parties would understand the nature of the duties bestowed upon the special master-monitor, the Court specified that "[t]he special master-monitor shall also oversee the discovery process and administer document production, except insofar as the issues raised by the parties relate to IT security, records preservation and retention, the Department of the Treasury, or Paragraph 19 documents" and that "[a]ll other future discovery matters shall be within the purview of the newly appointed special master-monitor unless the Court specifically directs that they be handled by Special Master Balaran." *Id.* at 261.

The Court entered an order the same date appointing Mr. Kieffer to serve as Special Master-Monitor in this case, pursuant to Rule 53 of the Federal Rules of Civil Procedure. The order declared that "[t]he Special Master-Monitor shall have and shall exercise the power to regulate all proceedings in every hearing before the master-monitor and to do all acts and take all measures necessary or proper for the efficient performance of the master-monitor's duties, as set forth in this order." Order dated Sept. 17, 2002, at 3. This language quoted directly the description of the powers granted to special masters appointed pursuant to Rule 53. Additionally, the appointment order provided that

> ***2** [t]he Special Master-Monitor shall also oversee the discovery process in this case and administer document production--except insofar as the issues raised by the parties relate to IT security, records preservation and retention, the Department of the Treasury, and Paragraph 19 documents--to ensure that discovery is conducted in the manner required by the Federal Rules of Civil Procedure and the orders of this Court. The Special Master-Monitor shall file with the Court, with copies to defendants' and plaintiffs' counsel, his report and recommendation as to any discovery dispute that arises which cannot be resolved by the parties.

Id. at 3-4.

On December 20, 2002, plaintiffs deposed Acting

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Special Trustee Donna Erwin. Towards the end of the deposition, plaintiffs asked Erwin whether Justice Department attorneys had made any factual misrepresentations to the Court during a hearing on December 17. Defense counsel directed Erwin not to answer the question, invoking attorney-client privilege and claiming that the question was harassing. The Monitor determined that the information sought by plaintiffs was not privileged, and that the question was not harassing in nature. Despite the Monitor's determination, defense counsel ordered Erwin not to answer the question. Because of the repeated objections of defense counsel, the deposition ended without Erwin providing an answer to the question.

On January 2, 2003, citing the incident that had occurred at the end of the Erwin deposition, the Monitor informed defendants:

> The result of defendants' counsel's refusal to accept the authority of the Special Master-Monitor to regulate the depositions, in my opinion, has been to put plaintiffs' counsel at a severe disadvantage due to plaintiffs' counsel's acceptance of the direction of the Special Master-Monitor even in the presence of the defendants' counsel's active objection to and refusal to follow it. This conduct cannot continue without further erosion of the Court's authority and the resultant inability of plaintiffs to conduct effective Phase 1.5 trial discovery.

Defs.' Mot. for a Protective Order as to Discovery by the Special Master- Monitor and as to the Rule Announced by the Special Master-Monitor Concerning Deposition Questioning ("Mot. for Protective Order"), Ex. T, at 3. Citing the above-mentioned language from the Court's September 17, 2002 order, the Monitor informed defendants that during future depositions, if defense counsel refused to comply with instructions issued by the Monitor pursuant to his authority under Rule 53 to regulate all proceedings in every hearing before him, the Monitor would consider terminating the deposition and filing a report and recommendation with the Court. *Id.* The Monitor explained that such a report could include a recommendation that the Court issue an order to defense counsel to show cause why his or her conduct should not be referred to the Disciplinary Panel of the U.S. District Court for the District of Columbia for review and appropriate action under Rule 8.4(d) of the District of Columbia Rules of Professional Conduct, [FN1] or why the conduct of defense counsel did not warrant sanctions under Rule 37(a)(4)(A) of the Federal Rules of Civil Procedure. [FN2] *Id.*

***3** On December 18, 2002, during a deposition overseen by the Monitor, Office of Historical Accounting Director Bert Edwards noted that he had "seen a letter from [Special Trustee] Slonaker that says an historical accounting was not possible. I believe that was May 5, but I'm not sure." Transcript of Deposition of Bert Edwards, December 18, 2002, at 219. Edwards also stated that he had received a letter from Slonaker, in response to a memorandum from the Office of Historical Trust Accounting (OHTA), which stated that "the judgment accounts that we did constitute historical accounting." *Id.* On December 22, 2002, the Monitor wrote to defense counsel requesting copies of the letter and memorandum "and any other correspondence between Mr. Slonaker and his staff and Mr. Edwards and his staff regarding the judgment accounts and the OHTA's personnel's request for the Special Trustee's opinion or comments about the judgment accounts' qualification as an historical accounting." Mot. for Protective Order, Ex. D, at 2. The Monitor explained that he sought the documents pursuant to his authority under his appointment order "to monitor the status of trust reform and the Interior defendants' efforts as they relate to the duties declared by the Court and prescribed in the 1994 Act." *Id.*

On December 31, 2002, defense counsel responded to the Monitor's request by providing the Monitor with the letter and selected portions of the memorandum that he had requested. Asserting that two attachments of the memorandum "may be privileged," defense counsel stated that defendants would "provide a supplemental response upon further review of this material." Mot. for Protective Order, Ex. E, at 2. Defense counsel also stated that defendants would ascertain whether they possessed any of the other correspondence sought by the Monitor and would provide a further response. *Id.*

The next day, the Monitor issued another written request for the documents he had sought in his December 22 letter. The Monitor discussed the conclusions reached in the Court's December 23 ruling concerning the application of the attorney-client privilege to the instant litigation. Mot. for Protective Order, Ex. F, at 2-3. The Monitor then informed defendants that, based on Edwards's description of the documents in question during his deposition, there was no reason to believe that the documents were protected under attorney-client privilege. *Id.* at 2. Accordingly, the Monitor made a second request for the documents, asking that they be delivered to him by January 3. *Id.* at 3.

On January 3, defense counsel responded to the

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Monitor's second request. After summarizing the previous communications, defense counsel stated: "To the extent you have now assumed the authority to investigate the accuracy of Mr. Edwards's deposition testimony, or the adequacy of the judgment accountings, we believe your actions exceed those that have been (or could be) authorized by the Court." Mot. for Protective Order, Ex. G, at 2. Defense counsel concluded with the following declaration:

> ***4** We attempted to accommodate your December 22 request because it was not obviously inconsistent with your authority and it sought specific documents that were readily accessible. As your subsequent request suggests that you intend to undertake an inquiry that may be improper, and to which we therefore cannot consent, we request that you provide us (1) notice of the precise scope of the inquiry you intend to undertake; and (2) an explanation of exactly how this inquiry is authorized by the court order appointing you.

Id.

The Monitor made a third request for the documents in a letter dated January 6. Mot. for Protective Order, Ex. H. The following day, defense counsel responded that defendants required further time to evaluate the Monitor's requests, and reiterated a "concern that your inquiry was no longer limited to your monitoring trust reform but now included an investigation into Mr. Edwards' credibility, which we maintain is beyond the scope of your powers as Special Master-Monitor." Mot. for Protective Order, Ex. I, at 1. The Monitor made a fourth request for the documents in a letter dated January 8, and explained that failure to produce the documents by the close of business that day would be construed as a refusal by defense counsel to produce the documents. Mot. for Protective Order, Ex. J, at 2. In a one-paragraph memorandum sent the same date, defense counsel informed the Monitor: "Whether we will produce or not produce those documents is still a matter under consideration and we will provide a supplemental response as soon as possible." Mot. for Protective Order, Ex. K.

On January 15, 2003, twenty-four days after the Monitor's original request, the Monitor issued a fifth written request for the documents. Two days later, defense counsel informed the Monitor that defendants would be "unable to comply with your request ... because [the documents] are protected by the attorney client privilege, the deliberative process privilege and the work product doctrine." Mot. for Protective Order, Ex. O. Defense counsel also claimed that

> [t]he Department of Justice has not yet made a final decision as to whether the Defendants will appeal from [the Court's December 23, 2002 opinion regarding attorney-client privilege]. Until that decision is made, we cannot disclose matters protected by the attorney client privilege because we must avoid taking action that would waive the privilege. Plaintiffs have recently sought a ruling by the Court on the applicability of the deliberative process and the matter is now awaiting the Court's ruling. Until it is finally resolved, we cannot waive the privilege by disclosing deliberative information.

Id. [FN3]

On January 23, defendants filed the instant motion, seeking a protective order against the Monitor. Plaintiffs filed their opposition brief on February 14, seeking an award of sanctions against defendants pursuant to Federal Rule of Civil Procedure 26(c).

II. ANALYSIS

A. Defendants' Motion for a Protective Order

***5** [1] Rule 26(c) of the Federal Rules of Civil Procedure provides that "[u]pon motion by a party or by the person from whom discovery is sought" and "for good cause shown," a district court "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Defendants seek an order from this Court pursuant to Rule 26(c) that "(1) relieves them of any obligation to respond to discovery propounded by the Special Master-Monitor ... and (2) proscribes the Special Master-Monitor from implementing a rule he has announced that would enable him from making dispositive substantive rulings at depositions and to compel witnesses, under threat of potential disciplinary action against their counsel, to answer questions over the objections and instruction of their counsel." Mem. in Support of Mot. for Protective Order at 1. The Court will examine each of these provisions in turn.

1. The Monitor's Document Requests

Before the Court may proceed to the merits of defendants' motion, it must first determine a threshold issue: whether Rule 26, which sets forth "general provisions governing discovery" applies to the actions of special masters appointed under Rule 53. Defendants have failed to direct this Court to any case, statute, or secondary authority that would support such a radical interpretation of the Federal Rules of Civil Procedure. Defendants' motion does include a footnote asserting that "[t]he protections afforded litigants under

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Federal Rule 26(c) (and Rule 45(c) in the case of subpoenas) apply to all types of discovery." Mem. in Support of Mot. for Protective Order at 12 n. 7. But this assertion sidesteps the question of whether document requests by a special master constitute "discovery" for the purpose of the Federal Rules. [FN4]

The power of a special master to request the production of documents from a party stems from Rule 53(c) of the Federal Rules of Civil Procedure, which provides that special masters "may require the production before the master of evidence upon all matters embraced in the [order of] reference, including the production of all books, papers, vouchers, documents, and writings applicable therein." There is nothing in any of the provisions of Rule 53 indicating that this power constitutes "discovery" that would be regulated by the provisions of Rule 26. Moreover, it would certainly be bizarre for the actions of a court-appointed judicial official to be governed by the provisions of the Federal Rules that regulate the actions of parties engaged in discovery. The sheer oddity of the situation only increases if, as in the instant case, the special master also functions as a discovery master, with the responsibility of overseeing the discovery process engaged in by the litigants.

Instead of examining this threshold issue, defendants engage in a screed against the Monitor, culminating in the preposterous allegation that "[r]ather than adhere to the discovery oversight and trust reform monitoring roles for which he was appointed, the Special Master-Monitor has become an active *participant* in the discovery process, thereby making the Court tantamount to a litigant in this case." Mem. in Support of Mot. for Protective Order at 13 (emphasis in original). [FN5] To listen to defendants, one would think that the Court had done something revolutionary in appointing a special master with the power to request documents from a party. But Rule 53(c) clearly permits special masters to request documents that will assist them in the performance of their court-appointed duties, and the courts have certainly never considered such authority to be unusual or improper. *See, e.g., In re Kosmadakes,* 444 F.2d 999, 1004 (D.C.Cir.1971) (approving a Rule 53 special master's decision to ignore expenditures of a fiduciary who had failed to comply with the special master's request for all relevant documents concerning the property in question within 15 days); *Ruiz v. Estelle,* 679 F.2d 1115, 1170 (5th Cir.1982), *amended in part and vacated in part,* 688 F.2d 266 (5th Cir.1982) ("The Special Master shall have unlimited access to the records, files and papers maintained by the Texas Department of Corrections to the extent that such access is related to the performance of the Special Master's duties of monitoring compliance. Such access shall include all Departmental, institutional, and inmate records, including but not limited to medical records. The Special Master may obtain copies of all such relevant records, files and papers."). Additionally, in the instant case, Special Master Balaran has repeatedly requested documents from defendants that would assist him in his duties as special master, without a word from either party that such requests were improper or exceeded the scope of his authority. Therefore, the Court finds that the provisions of Rule 26(c) only possess meaning in a discovery context, and manifestly do not apply to document requests issued by a Rule 53 special master. Although this finding obviates the need for any further consideration of the present motion, the Court will nevertheless examine the claims alleged therein to determine whether any action by the Court is warranted in response to these claims.

***6** [2] In addition to challenging the authority of the Monitor to engage in activities clearly contemplated by the express language of Rule 53(c), defendants also claim that the ability of the Monitor to request documents has "created an inherent conflict with his Court-ordered authority to oversee and administer the discovery process." Mem. in Support of Mot. for Protective Order at 16. However, the only evidence that defendants present of this "inherent conflict" is the fact that, after defense counsel's first refusal to comply with his request for documents, the Monitor noted that, in his opinion, there was no reason to believe that the documents he had requested were protected under attorney-client privilege:

> OHTA's requests to either its legal trust advisory firm or its Legal Advisor are described by Mr. Edwards as requests to review "*the historical accounting* work" and "*the relevant legal authorities on appropriate reporting to trust beneficiaries.*" These requests and the responses included in the memorandum's fourth and fifth attachments involve in whole the examination of the fiduciary duties of the Secretary--the Trustee delegate--to her IIM account holder trust beneficiaries. Because the requests were made to attorneys working for the Secretary and Mr. Edwards does not make the communications privileged[,] as the Court has now clearly held. Nor would the attorneys' responses to these requests if they, in part, discussed litigation-related matters involving the judgment accounts' "historical accounting."

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Mot. for Protective Order, Ex. F, at 2 (emphasis in original) (footnote omitted). Defendants imply that in making this statement, the Monitor was issuing a ruling on the propriety of her assertion of attorney-client privilege, and thus improperly intertwining his separate roles as discovery master and court monitor. But the Monitor never stated that he was ruling on the propriety of his own request, or making any finding of law as to the propriety of defendants' assertion of attorney-client privilege. Instead, the Monitor simply observed that Edwards's description of the documents clearly demonstrated that they were communications between a trustee and its attorneys concerning the administration of the trust, and pointing out that on December 23, the Court had ruled that such documents fell within the fiduciary exception to the attorney-client privilege.

Indeed, the propriety of the Monitor's request has nothing to do with the issue of whether the documents were privileged because, as explained above, the Monitor is a judicial official whose requests for documents do not constitute "discovery." Accordingly, the sole relevance of the privilege issue pertains to whether, after the Monitor had received the documents, it would be appropriate for him to disclose the contents of the documents, either in his reports or to plaintiffs. All that defendants were required to do to preserve her claim of privilege was to turn over the documents to the Monitor accompanied by a cover letter explaining that defendants were asserting attorney-client privilege over the documents. Then, before the Monitor could discuss their contents in his reports, or provide them to plaintiffs, it would be necessary for him to prepare a report and recommendation as to the application of the privilege, which would be ruled on by the Court after considering defendants' comments and objections to the report.

***7** It is therefore apparent that it is defendants who are mistaken about the nature of the respective roles of the Monitor. In his capacity as discovery master, the Monitor makes determinations as to the propriety of discovery requests *by the parties* including the applicability of asserted privileges. But when, acting in his capacity as court monitor, the Monitor requests one of the parties to produce documents related to any of the "matters embraced in the [order of] reference" *to him,* the Monitor is not making a discovery request. Therefore, neither the Monitor nor the Court need make any ruling at the time of the Monitor's request concerning any claim of privilege by the party from whom the documents are requested. In other words, when the Monitor issues a request for documents pursuant to his authority as court monitor, the Monitor is proceeding as an adjunct of the Court, and is therefore entitled to production of the documents requested, any claims of privilege notwithstanding. The issue of privilege only becomes relevant if the Monitor wishes to discuss the content of the documents in his reports to the Court, or provide them to plaintiffs. In such an instance, if the party from whom the Monitor received the documents has asserted any form of privilege, the Monitor may not discuss the contents of the documents in his reports, or provide them to plaintiffs, unless he first prepares a report and recommendation for the Court regarding the applicability of the privileges asserted, and the Court has determined that the documents are not privileged. Thus, it is the Court, not the Monitor, who makes all determinations regarding the assertions of privilege over documents requested by the Monitor in his capacity as court monitor, after considering the comments and objections of the parties to the Monitor's report and recommendation.

Therefore, it was improper for defense counsel to refuse to comply with a document request made by the Monitor on the grounds that the documents requested were protected under attorney-client privilege. The proper course of action would have been to comply with the Monitor's request, while simultaneously informing the Monitor that defendants were asserting attorney- client privilege with respect to the requested documents. Instead, defense counsel repeatedly refused to turn over documents requested by the Monitor pursuant to his order of reference, and challenged the authority of the Monitor to make such requests. Moreover, when the Monitor informed defense counsel that he believed she was acting in bad faith, and that further refusals to comply with his requests could result in referrals to this Court for disciplinary action, defense counsel responded that

> [s]uch threats and accusations are wrong, the plain intent being to chill the performance of defense counsel's ethical obligation to represent the United States zealously. The choice Mr. Kieffer seeks to force Government attorneys to make--abandon discovery objections they are ethically bound to assert on behalf of their clients, or face a recommendation for personal disciplinary action--is intolerable and has no place in our system of jurisprudence.

***8** Mem. in Support of Mot. for Protective Order at 18.

In sum, there is no conflict between the Monitor's duty to monitor the status of trust reform--which includes

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the authority to request documents that will assist him in the preparation of his reports to the Court--and his authority to "oversee the discovery process in this case ... to ensure that discovery is conducted in the manner required by the Federal Rules of Civil Procedure and the orders of this Court." Defendants have pointed to no instances in which the Monitor's oversight authority over the discovery process has interfered in any way with his monitoring duties. Indeed, it would be surprising if any such conflict were to arise, given the fact that courts frequently assign a number of tasks to special masters in institutional reform cases like to the present case, including both monitoring duties and the authority to oversee discovery. *See, e.g., Gary W. v. State of Louisiana,* 601 F.2d 240, 245 (5th Cir.1979) (finding that the special master's duties to monitor implementation of court decree, and serve as fact finder and hearing officer accorded with the authority provided under Rule 53(c)); *Halderman v. Pennhurst State Sch. & Hosp.,* 612 F.2d 84, 111-12 (3d Cir.1979) , *rev'd on other grounds,* 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981) ("[T]he Commonwealth is simply incorrect in asserting that the scope of a master's duties is narrow. As one commentator has properly noted, '(m)asters may be delegated the authority to issue subpoenas, hear grievances, take sworn testimony, and make formal or binding recommendations, including contempt findings, to the court.' In employment discrimination cases, for example, court-appointed administrators, who have the same powers as masters, have made frequent and successful use of rather wide-ranging powers. Authorized to take all action necessary to implement the decree and to remedy breaches of compliance, these administrators have performed negotiating and investigatory functions, and have issued recommendations for future implementation.") (internal citations omitted) *Nat'l Ass'n of Radiation Survivors v. Turnage,* 115 F.R.D. 543, 560-61 (N.D.Cal.1987) (appointing special master to monitor defendant's compliance with its court-approved plan for meeting discovery requests and to serve as discovery master).

Finally, defendants allege that "[i]t is unnecessary and unduly burdensome to the Interior Defendants, for the Special Master-Monitor to be conducting pretrial discovery into areas that were or could be the subject of discovery by the Plaintiffs, particularly given the magnitude of the document discovery conducted by Plaintiffs to date." Mem. in Support of Mot. for Protective Order at 19. This contention is without merit. First, as explained above, the Monitor's document requests do not constitute "pretrial discovery." Second, the Court has scrutinized defense counsel's communications with the Monitor without finding any claim that the Monitor's requests are unduly burdensome. Instead, prior to filing defendants' motion for a protective order, the only complaint by defense counsel about the Monitor's requests was that they were allegedly improper. Third, defendants are free to request extensions of time from the Monitor to respond to his document requests, just as defendants are free to request similar extensions from the Court to respond to any of plaintiffs' discovery requests. *See* Order dated Feb. 6, 2003 (granting defendants' motion for an extension of time to respond to plaintiffs' discovery requests). Defendants have made no showing that the Monitor would refuse to consider an appropriate motion for an extension of time to respond to document requests that he has issued.

***9** In sum, because the Monitor's document requests do not constitute "discovery," there is no basis for the issuance of a protective order relieving defendants of any obligation to respond to his requests, even if the Court were inclined to issue such an order. Additionally, defendants have failed to present any evidence indicating that the Monitor has failed to keep separate his duties as discovery master and court monitor, made unduly burdensome document requests from defendants, or become a "de facto litigant" in this case. [FN6] Accordingly, the Court will not issue an order that would render the Monitor completely unable to request documents that would assist him in his role as court monitor.

2. The Monitor's Rule Concerning Depositions

After seeking an order circumscribing the Monitor's ability to perform his duties as court monitor, defendants next petition the Court for a protective order limiting the Monitor's authority as discovery master. [FN7] As explained above, the Court has found that there is no basis for the issuance of a protective order under Rule 26(c) against a special master. Nevertheless, the Court will examine defendants' claims in order to determine whether any responsive action by the Court is warranted

Defendants claim that the Monitor's "assertion of the authority to immediately resolve substantive discovery disputes as they arise during depositions is contrary to the express directive of the Court, set forth in the Appointment Order, requiring the Special Master-Monitor to submit any such issue to the Court for resolution." Mem. in Support of Mot. for Protective Order at 21. Defendants also allege that "[n]ot only does [the Monitor] seek to deprive the Interior

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Defendants of having substantive disputes that arise during depositions decided by the Court after a fair hearing, he intends to punish counsel for the Interior Defendants for even taking a position that differs with his own." *Id.* at 22.

The Court must determine whether the proposal of the Monitor exceeds the authority vested in him by his order of appointment. The Monitor issued his proposal in a letter dated January 2, 2003:

> [I]n future depositions, should counsel refuse to abide by my direction on discovery disputes that are unquestionably within my authority to resolve as granted to me by the Court in its September 17, 2002 Order, including but not limited to the regulation of deposition questioning, consideration will be given to terminating the deposition and filing a Report and Recommendation to the Court recommending an Order to Show Cause be issued requiring counsel to answer why his or her conduct should not be referred to the Disciplinary Panel of the U.S. District Court for the District of Columbia for review and appropriate action pursuant to Rule 8.4(d) of the District of Columbia Rules of Professional Conduct and why his or her conduct does not warrant personal monetary sanctions pursuant to Federal Rule of Civil Procedure 37(A)(4).

***10** Mot. for Protective Order, Ex. T, at 3 (footnote omitted). The Monitor explained that he considered this rule to be necessary because in a recent deposition, defense counsel had "refused to permit the Acting Special Trustee to answer plaintiffs' counsel's questions even following my ruling on the appropriateness of the questions and direction that the witness answer them." *Id.* at 2.

The refusal of defense counsel to permit Acting Special Trustee Donna Erwin to answer questions as to whether her co-counsel had lied to the Court during a recent hearing resulted in the filing of a motion to compel this testimony. The Court subsequently determined that in response to the questions put forth by plaintiffs, defense counsel had repeatedly made frivolous assertions of attorney-client privilege. *See* Mem. and Order dated Feb. 7, 2003, at 27. Additionally, the Court found that during the Erwin deposition, defense counsel had repeatedly attempted to restrict the scope of plaintiffs' questioning by asserting, without any factual basis, that the Court had only permitted the deposition to proceed because of its purported assumption that plaintiffs' questions would be limited to inquiry into facts that go to the creation of plaintiffs' plans. *Id.*

Therefore, the proposal by the Monitor emerged as a response to what the Monitor perceived (and the Court has found) to be unscrupulous tactics on the part of defense counsel to obstruct a legitimate inquiry into whether her co- counsel had lied to the Court. Viewed in its proper context, the Monitor's proposal emerges as an admirable response to a situation that had arisen during a recent deposition, during which defense counsel had interfered with the Monitor's ability to carry out his duties as discovery master, as set forth in his order of appointment.

The Court must examine the language of that order to determine whether the Monitor's proposal would exceed the authority that the Court has vested in him. Under the terms of his appointment order, the Monitor was given the authority to "oversee the discovery process in this case and administer document production ... to ensure that discovery is conducted in the manner required by the Federal Rules of Civil Procedure and the orders of this Court." Order dated Sept. 17, 2002 at 4. The Monitor was also ordered to "file with the Court, with copies to defendants' and plaintiffs' counsel, his report and recommendation as to any discovery dispute that arises which cannot be resolved by the parties." *Id.* Additionally, the Court ordered the Monitor to "periodically file reports with the Court, with copies to defendants' and plaintiffs' counsel, that bring to the Court's attention all discovery disputes encountered in this case ... [and that] apprise the Court of the status of the Special Master- Monitor's report and recommendation as to all such disputes." *Id.* The Monitor was also given the authority "to regulate all proceedings in every hearing before the master-monitor and to do all acts and take all measures necessary or proper for the efficient performance of the master-monitor's duties, as set forth in this order" and "at any time, [to] call to the Court's attention any matter that bears on the compliance with any order of this Court or any applicable law." *Id.* at 3, 4.

***11** [3] The question raised by defendants' motion is best analyzed as a series of discrete issues. The first issue is whether the terms of the Monitor's appointment order permit him to regulate deposition questioning. The order provides the Monitor with the authority to "oversee the discovery process in this case ... to ensure that discovery is conducted in the manner required by the Federal Rules of Civil Procedure and the orders of this Court" and "to regulate all proceedings in every hearing before the master-monitor and to do all acts and take all measures necessary or proper for the efficient performance of the master-monitor's duties." It

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would be difficult to conclude that the authority vested in the Monitor to "oversee the discovery process" and "regulate all proceedings in every hearing" before him does not include the power to regulate deposition questioning. The Court therefore finds that the Monitor possesses the authority to issue directions to the parties and their counsel in response to any objections asserted during the depositions at which he presides.

The second issue is the extent to which the Monitor's appointment order authorizes him to resolve any dispute about the directions he issues to the parties and their counsel in response to questions propounded during a deposition. On the one hand, the Monitor is authorized to "regulate all proceedings in every hearing before the master-monitor and to do all acts and take all measures necessary or proper for the efficient performance of the master-monitor's duties." On the other hand, the Monitor has been ordered to "file with the Court, with copies to defendants' and plaintiffs' counsel, his report and recommendation as to any discovery dispute that arises which cannot be resolved by the parties." In a report and recommendation issued on November 15, 2002, the Monitor acknowledged that the appointment order "does not provide or does not detail what would be considered a discovery dispute and what would not." Report and Recommendation of the Special Master-Monitor on the Extent of the Authority of the Special Master-Monitor to Regulate All Phase 1.5 Trial Discovery Proceedings and the Need for Clarification of the September 17, 2002 Order Appointing the Special Master-Monitor ("November 15 Report") at 10. The Monitor requested that the Court issue a supplemental order clarifying the above-mentioned language in his appointment order. *Id.* at 11-12. However, such an order might be construed as a modification of the appointment order, from which the Court will refrain while the Monitor's appointment order is on appeal to the D.C. Circuit.

However, the Court has reason to believe that its decision to refrain from ruling on the extent of the Monitor's authority to resolve discovery disputes will not prove fatal to the discovery process in this litigation. As defendants themselves concede,

> not all discovery disputes actually necessitate immediate rulings and in some instances do not require resolution at all. Objections that are initially (and often reflexively) asserted are usually not pursued at all or are mooted by subsequent events. For example, the mere occurrence of an "objection" during a deposition or in responding to a document request, does not, in the first instances, require intervention by the Special Master-Monitor. The ordinary practice in depositions where a special master is not used is to proceed with the examination with the objection noted and deferring the "dispute" for later reflection. The party making the objection or seeking discovery may or may not find it necessary to pursue the objection.

***12** Interior Defs.' Resp. and Objections to November 15 Report at 11. The Court agrees that the ordinary practice during depositions in the instant case when an objection is raised should be to proceed with the examination with the objection noted by the Monitor unless, pursuant to Rule 30(d)(1), counsel properly instructs the deponent not to answer "when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4)." [FN8] Of course, as recently demonstrated, the Court will consider the possibility of imposing sanctions in response to an improper instruction by counsel directing a deponent not to answer a question.

[4] The third issue is whether the terms of the Monitor's appointment order permits him to terminate a deposition over which he is presiding. It would seem obvious that the power vested in the Monitor to "oversee the discovery process in this case ... to ensure that discovery is conducted in the manner required by the Federal Rules of Civil Procedure and the orders of this Court" and "to regulate all proceedings in every hearing before the master-monitor and to do all acts and take all measures necessary or proper for the efficient performance of the master-monitor's duties" necessarily entails the power to determine when a deposition should be terminated. After all, if under Rule 30(d)(4), parties and deponents are afforded the authority to suspend depositions in order to move for an order to terminate the deposition upon a showing that an examination is being conducted in bad faith or to annoy, embarrass, or oppress the deponent or party in an unreasonable manner, it would seem unremarkable to bestow a similar authority upon the special master overseeing the deposition. The Court therefore finds that the Monitor possesses the authority to determine when a deposition over which he is presiding should be terminated.

[5] The final issue is whether the terms of the Monitor's appointment order permits him to file a report and recommendation with the Court recommending that an order to show cause be issued requiring counsel to answer why his or her conduct should not be referred to the Disciplinary Panel or why his or her conduct does not warrant sanctions under Rule 37. Given the authority of the Monitor "at any

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time, [to] call to the Court's attention any matter that bears on the compliance with any order of this Court or any applicable law," the Court concludes that it is manifestly within the scope of the Monitor's powers to recommend to the Court that a show cause order be issued, if the Monitor has reason to believe that counsel has violated any law, including the Federal Rules of Civil Procedure and the District of Columbia Rules of Professional Conduct. [FN9] Taking into account the recent conduct of defense counsel, the Court considers the authority of the Monitor to file such a report and recommendation to constitute a necessary corrective to any unethical or obstructive behavior engaged in by counsel during discovery proceedings.

***13** In sum, the Court finds that each of the individual provisions of the Monitor's proposal, with the exception of resolving disputes concerning directions issued to counsel in response to questions propounded during a deposition, are permissible under the authority vested in the Monitor pursuant to his appointment order. Accordingly, during all future depositions, the Monitor may issue directions to the parties and their counsel in response to any objections asserted during depositions at which he presides. The ordinary practice should be for the examiner to continue with his or her examination, and for the Monitor to note the objection. However, if counsel instructs the deponent not to answer, and explains that the instruction is necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4), the examiner should proceed to the next question unless counsel decides to permit the witness to answer the previous question. Additionally, during the course of any deposition, if the Monitor believes that counsel for either party or the deponent is engaging in conduct that seriously interferes with the proper administration of the deposition-- i.e., akin to the conduct of defense counsel during the December 20, 2002 deposition of Donna Erwin--the Monitor should remind the offending person or persons that the Monitor may, in his discretion, terminate the deposition. If the offending person or persons does not cease from the offending behavior, the Monitor may, in his discretion, terminate the deposition and/or file a report with the Court concerning the offending behavior in question. Such a report may, inter alia, include a recommendation that the Court issue an order to show cause requiring the offending person or persons to explain why his or her conduct should not be referred to the Disciplinary Panel for review and appropriate action, or why his or her conduct does not warrant sanctions pursuant to Rules 30(d)(3) or 37(a)(4)(A) of the Federal Rules of Civil Procedure.

The Court also finds no reason why any portion of defendants' motion for a protective order should be granted. Accordingly, the Court will deny defendants' motion in full.

B. Sanctions Under Rule 26(c)

[6] In their opposition brief, plaintiffs request that the Court award sanctions under Rule 26(c) of the Federal Rules of Civil Procedure against defendants if the Court denies defendants' motion. Pls.' Opp. Br. at 15-16. Rule 26(c), which governs protective orders, provides in relevant part that "[i]f the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion." Rule 37(a)(4), in turn, provides in relevant part that

> [i]f the motion is denied, the court ... shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

***14** This Court has recently observed, regarding Rule 37(a)(4), that

> "[t]he Supreme Court has stated that a party meets the 'substantially unjustified' standard when there is a 'genuine dispute' or if 'reasonable people could differ' as to the appropriateness of the motion." *Alexander v. FBI,* 186 F.R.D. [144] at 147 [(D.D.C.1999)] (quoting *Pierce v. Underwood,* 487 U.S. 552, 565[, 108 S.Ct. 2541, 101 L.Ed.2d 490] (1988)); *see also* 8A Wright & Miller, Federal Practice and Procedure § 2288 (2d ed. 1994) ("Making a motion, or opposing a motion, is 'substantially justified' if the motion raised an issue about which reasonable people could genuinely differ on whether a party was bound to comply with a discovery rule."). "[A] party's position is not substantially justified if there is no legal support for it, if the party concedes the validity of his opponent's position after causing everyone time and money, or, worse, defies an unequivocally clear obligation." *Boca Investerings P'ship v. United States,* 1998 WL 647214 at *2 (D.D.C.1998), *rev'd on other grounds,* [314 F.3d 625,] 2003 WL 69563 (D.C.Cir.2003). There is no

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requirement that the court find that counsel acted in bad faith. *Alexander v. Interim Legal Servs., Inc.*, 1997 WL 732432 (D.D.C.1997) (citing *Devaney v. Continental Ins. Co.*, 989 F.2d 1154, 1162 (11th Cir.1993)).

Mem. and Order dated Feb. 5, 2003 at 22. Therefore, the task for the Court is to determine whether reasonable people could genuinely differ as to the appropriateness of defendants' motion for a protective order.

Defendants have failed to cite any case in which a party sought a protective order against a court-appointed special master. Nor has the Court been able to locate any case, statute, or secondary authority that even hint at any circumstances under which the filing of a motion for a protective order against a special master would be appropriate. It would certainly seem improper to issue such an order, given that the duties assigned to special masters may sometimes include the authority to rule on the parties' motions for protective orders, and even to issue such orders. *See, e.g., Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287, 1293 (8th Cir.1997) (referencing motion for protective order that had been denied by the special master); *Adriana Int'l Corp. v. Thoeren*, 913 F.2d 1406, 1409 (9th Cir.1990) (same); *In re "Agent Orange" Product Liab. Litig.*, 94 F.R.D. 173, 174 (E.D.N.Y.1982) (appointing special master with the authority to "[r]ule on all applications for any protective orders in this litigation and, in appropriate circumstances, grant requests for modification of, or exceptions to, such protective orders"); *In re "Agent Orange" Product Liab. Litig.*, 96 F.R.D. 582 (E.D.N.Y.1983) (approving protective order issued by special master precluding dissemination to the media of certain documents produced during discovery). In fact, the notion that a court would issue a protective order against a judicial official is so bizarre that the sole conclusion for a reasonable person to reach is that a demand for the issuance of such an order is patently frivolous. The Court therefore finds that reasonable people could not genuinely differ as to the appropriateness of defendants' motion.

***15** Before imposing sanctions, however, the Court must also determine whether other circumstances would render an award of sanctions against defendants unjust. In making this determination, it will be useful to examine the circumstances that led up to the filing of defendants' motion. The correspondence between the Monitor and defense counsel demonstrates that in response to the Monitor's repeated requests for documents to assist him in his monitoring duties, defense counsel repeatedly stonewalled in response to the Monitor's requests and challenged the Monitor's legitimate authority, prior to filing the motion for a protective order. Additionally, during the course of a deposition ordered by this Court, defense counsel repeatedly made baseless assertions of attorney-client privilege, ignoring the finding of the Special Master-Monitor that plaintiffs' questions were appropriate, in an attempt to obstruct plaintiffs' legitimate inquiry into whether her co-counsel had lied to the Court during a recent hearing. It was this unethical conduct that led the Monitor to propose the rule that defendants have challenged in the motion presently before the Court. In short, the filing of defendants' motion represents the culmination of a series of displays of obstinacy, recalcitrance, and unprincipled behavior on the part of defense counsel.

The Court fails to discern any circumstances in relation to the present matter that would make an award of sanctions against defendants and their counsel unjust. In fact, the Court concludes that it would be unjust *not* to sanction defendants and their counsel for wasting plaintiffs' time and resources by requiring them to respond to a completely frivolous motion. Accordingly, the Court will order sanctions to be imposed. As in its February 5 opinion, the Court will not prevent the United States from reimbursing defense counsel, if it elects to do so.

III. CONCLUSION

As a direct result of defendants' filing of a frivolous motion, the Court and plaintiffs were unnecessarily required to expend time and effort. Defense counsel also wasted the Monitor's time by refusing to respond to his document requests, and refusing to abide by a reasonable rule promulgated by him in response to counsel's obstructionist behavior. Another district court, faced with similarly unprincipled conduct by an attorney for the government, imposed sanctions against her, explaining that

> [i]f the defendants' ability to defend themselves fully can be compromised by government misconduct without an appropriate remedy, then the integrity of the judicial process is damaged. The government, acting through one of its representatives, cannot place the defendants at a disadvantage, argue against dismissal, and walk away from the situation immune from accountability.

United States v. Horn, 811 F.Supp. 739, 754 (D.N.H.1992), *rev'd in part*, 29 F.3d 754 (1st Cir.1994). This Court fully agrees with the district

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court's conclusion. Accordingly, it is hereby

***16** ORDERED that defendants' motion for a protective order as to discovery by the Special Master-Monitor and as to the rule announced by the Special Master-Monitor concerning deposition questioning [1747-1] be, and hereby is, DENIED. It is further

ORDERED that, pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, defendants and their counsel, Sandra P. Spooner, Assistant Attorney General Robert D. McCallum, Deputy Assistant Attorney General Stuart E. Schiffer, and Justice Department attorneys J. Christopher Kohn and John T. Stemplewicz shall pay to plaintiffs all reasonable expenses, including attorneys' fees, that plaintiffs incurred in opposing defendants' motion for a protective order. It is further

ORDERED that within thirty (30) days of the date of this opinion, plaintiffs shall submit to the Court an appropriate filing detailing the amount of reasonable expenses and attorneys' fees incurred in opposing defendants' motion for a protective order. Any response to this filing shall be submitted to the Court within thirty (30) days thereafter. It is further

ORDERED that defendants' motion for leave to supplement their motion [1779-1] be, and hereby is, DENIED as moot.

SO ORDERED.

FN1. Rule 8.4(d) of the D.C. Rules of Professional Conduct provides that "[i]t is professional misconduct for a lawyer to engage in conduct that seriously interferes with the administration of justice."

FN2. Rule 37(a)(4)(A) of the Federal Rules of Civil Procedure rule provides, in relevant part, that if a motion to compel disclosure or discovery is granted,

> the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

FN3. Defendants filed a notice of appeal of the Court's December 23, 2002 order on February 21, 2003. The Court issued a ruling on the applicability of the deliberative process privilege on February 5, 2003.

FN4. Indeed, the secondary commentary and case law that defendants cite in support of this assertion have nothing to do with document requests made by special masters. The section of *Moore's Federal Practice* that serves as defendants' primary citation states, in its entirety: "Rule 26(c) applies to all types of discovery, including written discovery such as interrogatories, requests for production of documents, and requests for admissions. Rule 26(c) has even been applied in connection with a court- ordered medical examination." 6 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 26.101[2][a] (3d ed.1997) (footnote omitted). As for the two cases cited by defendants, both involve motions to quash subpoenas issued by special masters that had been authorized by the courts in question to conduct hearings involving the parties. *See Halderman v. Pennhurst State Sch. & Hosp.*, 559 F.Supp. 153 (E.D.Pa.1982) (denying in part motion to quash subpoenas duces tecum issued under Rule 45 to compel attendance of state officials at a hearing to determine whether mentally retarded class members should be transferred from state-run hospital); *Pathe Labs., Inc. v. du Pont Film Mfg. Corp.*, 3 F.R.D. 11 (S.D.N.Y.1943) (denying motion to quash subpoena duces tecum issued under Rule 45 to produce records before a hearing master authorized to determine the issue of plaintiff's damages). The distinctions from the instant case barely warrant mentioning, but it will suffice to note that the Monitor is not a hearing master, and has not issued any subpoena to defendants, under Rule 45 or any other rule.

FN5. Apparently not content with impugning the authority of the Monitor, defense counsel inserts a footnote tacitly accusing the Court of unethical behavior: "This development is even more troubling in light of the Court's statement, in its January 17, 2003 Memorandum and Order, that it meets regularly with the Special Master-Monitor to, *inter alia,* instruct 'the Monitor which task he should perform next ....' " *Id.* at 13 n. 9. Given the recent conduct of defense counsel in this litigation, it is certainly ironic that defense counsel would presume to lecture the Court

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on the subject of legal ethics.

FN6. In the portion of defendants' motion accusing the Monitor of having become a "de facto litigant," defendants also claim that [t]he Special Master-Monitor has now gone even further and embarked upon an investigation of the Government's regulations and policies concerning the provision of private legal representation at Federal expense as they have been applied to Mr. Slonaker. In so doing, he has broadened the reach of his discovery demands to now include a Deputy Assistant Attorney General who oversees a Government office with no responsibility for this litigation. Under even the most liberal reading of the Order appointing him, such matters are well outside the scope of his authority.
Mem. in Support of Mot. for Protective Order at 15. Though defendants falsely claim that the Monitor has made "discovery demands" on a deputy assistant attorney general, the letters appended by defendants to their motion tell a different story. On January 2, 2003, the Monitor informed defense counsel of his concerns about defense counsel's statement to former Special Trustee Slonaker that "because it appears that your interests may not be entirely consistent with those of the United States, you may wish to obtain your own counsel" in conjunction with the instant case. Mot. for Protective Order, Ex. P, at 1-2. Defense counsel apparently forwarded the Monitor's letter to Deputy Assistant Attorney General Jeffrey S. Bucholtz, who responded to the Monitor's concerns in a letter dated January 10, 2003. Mot. for Protective Order, Ex. Q. Bucholtz closed his letter by asking the Monitor to "[p]lease contact [him] if you have any additional questions." *Id.* at 4. In a letter dated January 15, 2003, the Monitor responded, thanking Bucholtz for his letter and asking a series of followup questions. Mot. for Protective Order, Ex. R. The Monitor's letter did not characterize these questions as interrogatories put to Bucholtz, nor did the Monitor request that Bucholtz send any documents or other items to him. The fact that defense counsel would misrepresent a legitimate inquiry by the Monitor, in response to an invitation for followup questions, as the issuance of "discovery demands" on a deputy assistant attorney general only confirms the Court's fear that the Justice Department attorneys in charge of the instant litigation have lost any sense of perspective about the manner in which this litigation should be conducted.

FN7. Apparently, were it up to defendants, the Special Master-Monitor would just be "special."

FN8. Rule 30(d)(4) states, in relevant part, that
[a]t any time during a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c) ... Upon demand of the objecting party or deponent, the taking of the deposition must be suspended for the time necessary to make a motion for an order.

FN9. In this context, it is worth calling attention to Rule 30(d)(3) of the Federal Rules of Civil Procedure, providing that "[i]f the court finds that any impediment, delay, or other conduct has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof."

2003 WL 733992, 2003 WL 733992 (D.D.C.)

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