UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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S.W., et al.,

Plaintiffs,

- against -

CITY OF NEW YORK, et al.,

Defendants.

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ORDER

CV 2009-1777 (ENV)(MDG)

Plaintiffs, who allege they were classified as special needs children, bring this civil rights action against the City of New York (the "City"), the Administration for Children's Services and several foster care agencies to recover damages for the severe abuse they suffered at the hands of their foster care mother. Plaintiffs move for a protective order to shield the disclosure of 7 DVDs depicting various interviews of the plaintiffs conducted by counsel and their staff and corresponding transcripts of some of those interviews. Ct. doc. 64. Plaintiffs contend, and the City denies, that the materials are protected by the attorney-client privilege and/or the attorney work product doctrine. Id.; ct. doc. 67.

## FACTUAL BACKGROUND

Plaintiffs describe the DVDs and corresponding transcripts in dispute as depicting the following: 1) the initial client interviews of plaintiffs R.E., T.G., T.L. and J.L. conducted by

counsel on March 4, 2008 (the "attorney-client interviews"); 2) interviews of plaintiffs T.G., S.B., T.L., J.L., C.B., R.E., L.J., J.G., S.W. and J.B. conducted by a paralegal between October 2, 2008 and January 28, 2009 for use in a focus group presentation (the "paralegal-client interviews"); 3) a focus group presentation which consisted of excerpts of the paralegal interviews with corresponding slides containing legal argument (the "focus group presentation"); and 4) excerpts of the focus group presentation that were shared with a news organization (the "media video"). See ct. doc. 64-1.

The attorney-client interviews are of the initial meeting between certain of the plaintiffs and attorneys Howard Talenfeld, Jennifer Pearl, John Walsh and/or paralegal Gina Giovanni. Plaintiffs claim that the purpose of the interviews was to obtain and provide legal advice concerning potential claims arising out of the abuse of the plaintiffs while in the custody of their foster care mother. The March 4, 2008 video of the interview has not been disclosed to anyone other than the attorneys, their agents and the plaintiffs.

The paralegal-client interviews are separate interviews of each plaintiff by a paralegal at the direction and request of plaintiffs' counsel. "These individual statements were taken with the intent to provide Plaintiffs' counsel with personalized information from each Plaintiff to provide counsel with material for a focus group presentation, governed by a confidentiality

agreement, in order to assist counsel with case evaluation and litigation and trial strategy." Pl.s' Mem. of Law at 8. These videos also have not been disclosed to any third-party.

The focus group presentation consists of "a compilation of strategically selected clips from" the paralegal-client interviews and corresponding legal argument that were shown to a focus group in February 2009 under a confidentiality agreement. "Plaintiffs' counsel arranged for and organized the focus group to act as a mock jury to permit counsel to evaluate the strength of Plaintiffs' case, while providing valuable insight as to trial strategy and for planning purposes." Id. at 10.

The media video is a condensed and edited version of the focus group presentation and was provided to an employee of a network news organization under an oral agreement of confidentiality. Under the oral agreement, the news organization could view the video but could not disclose or otherwise use the video without the express permission of plaintiffs' counsel. Plaintiffs' counsel never gave that consent and the news organization returned the video to counsel, along with a confirmation that it did not make or retain copies of the video.

## DISCUSSION

### I. Attorney-Client Privilege

"A party invoking the attorney-client privilege must show (1) a communication between client and counsel that (2) was

intended to be and was in fact kept confidential, and (3) was made for the purpose of obtaining or providing legal advice." In re County of Erie, 473 F.3d 413, 419 (2d Cir. 2007); United States v. Constr. Prods. Research, Inc., 73 F.3d 464, 473 (2d Cir. 1996); see Fisher v. United States, 425 U.S. 391, 403 (1976). In order to merit protection, the "predominant purpose" of the communication must be to render or solicit legal advice. See In re County of Erie, 473 F.3d at 420. The burden of establishing the applicability of the privilege and all of its elements rests with the party claiming protection. See In re Grand Jury Proceedings, 219 F.3d 175, 182 (2d Cir. 2000); Constr. Prods., 73 F.3d at 473-74.

A. Attorney-client Interviews

I find that the attorney-client interviews are a quintessential example of attorney-client privileged material. The video consists of communications between client and counsel that were intended to be and were in fact kept confidential and were made for the purpose of obtaining legal advice.

Nevertheless, the City argues that the videos are discoverable because the privilege does not “shield [] facts under Upjohn.” Ct. doc. 67 at 6. While the City is correct that the privilege does not protect from disclosure the underlying facts revealed in the interviews, the privilege does shield the communications themselves even though they contain facts. As the Supreme Court recognized in Upjohn v. U.S., “[t]he client cannot

be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney." 449 U.S. 383, 395-96 (1981) (quoting Philadelphia v. Westinghouse Electric Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962)).

The City further argues that the privilege does not apply because the plaintiffs could not have expected that the interviews would remain confidential in light of counsel's dissemination of other interviews to the media. Ct. doc. 67 at 6. However, counsel's disclosure of the media video to a news organization in May 2009 could not have affected the plaintiffs' expectations of confidentiality when they were interviewed in March 2008. Since I find that the attorney-client interviews are protected from disclosure by the attorney-client privilege, I need not discuss the application of the attorney work product doctrine to this video.

Finally, the City argues that plaintiffs' counsel waived protection for any interviews that were used in creating the summary biographies filed with the Court prior to a discovery conference. However, in light of the representation of plaintiffs' counsel that those biographies were compiled from plaintiffs' interrogatory responses and a review of the records, ct. doc. 77 at 5, there is no basis to find waiver.

II. Work Product Doctrine

Federal Rule of Civil Procedure 26(b)(3) embodies the federal work-product doctrine which provides qualified protection to "documents and tangible things . . . prepared in anticipation of litigation or for trial" from discovery. Fed. R. Civ. P. 26(b)(3); see Hickman v. Taylor, 329 U.S. 495, 511 (1947); Constr. Prods., 73 F.3d at 473. This work includes notes, memoranda, witness interviews, and other materials whether they are created by an attorney or by an agent for the attorney. U.S. v. Nobles, 422 U.S. 225, 238-39 (1975); Hickman, 329 U.S. at 510-11. Documents prepared in anticipation of litigation are those that, "in light of the nature of the document and the factual situation in the particular case . . . can fairly be said to have been prepared or obtained because of the prospect of litigation." United States v. Adlman, 134 F.3d 1194, 1202 (2d Cir. 1998).

The party asserting work-product protection bears the burden of establishing its applicability. See Constr. Prods., 73 F.3d at 473. Although the work-product doctrine protects the opinions, theories and strategies of an attorney, the protection extends to facts as well. See In re Grand Jury Subpoena Dated Oct. 22, 2001, 282 F.3d 156, 161 (2d Cir. 2002). Fact work product encompasses "factual material, including the result of a factual investigation." In re Grand Jury Subpoena Dated July 6, 2005, 510 F.3d 180, 183 (2d Cir. 2007). "[O]pinion work product reveals the mental impressions, conclusions, opinions, or legal theories of an

attorney or other representative, and is entitled to greater protection than fact work product." Id. If a party seeks disclosure of protected documents, the party must demonstrate a "substantial need" for fact work-product and a "highly persuasive showing of" need for opinion work product. See In re Grand Jury, 219 F.3d at 190-91.

A. Paralegal-client Interviews and Focus Group Presentation

The paralegal-client interviews and the focus group presentation were created because of litigation and are entitled to work product protection. The interviews themselves were conducted by a paralegal at the direction of counsel to provide material for the focus group presentation which was designed to assist counsel in shaping case and trial strategy. See In re Cendant Corp. Sec. Litig., 343 F.3d 658, 665 (3d Cir. 2003) ("'Modern trial consulting methods typically consist of many techniques such as witness preparation, and mock trials, that clearly could not be framed as falling outside of the work product rule.'") (quoting Dennis Pl. Stolle et al., The Perceived Fairness of the Psychologist Trial Consultant, 20 Law and Psychol. Riv. 139, 169 (1996)). That excerpts of these videos were later used for a purpose other than litigation does not mean that they lose protection under the work-product doctrine. See Adlman, 134 F.3d at 1202.

The City argues that plaintiffs have waived any work product protection by disclosure of the focus group presentation.

However, "the work-product doctrine is distinct from and broader than the attorney-client privilege." In re Grand Jury Proceedings, 219 F.3d 175, 182 (2d Cir. 2000) (citing Hickman, 329 U.S. at 508 and quoting Nobles, 422 U.S. at 238 & n. 11). "Unlike the attorney-client privilege, the work-product privilege is not necessarily waived by disclosure to any third party; rather, 'the courts generally find a waiver of the work product privilege only if the disclosure substantially increases the opportunity for potential adversaries to obtain the information." Int'l Design Concepts, Inc. v. Saks, No. 05 Civ. 4754, 2006 WL 1564684, at *2 (S.D.N.Y. June 6, 2006); Falise v. American Tobacco Co., 193 F.R.D. 73, 80 (E.D.N.Y. 2000) (quoting In re Pfizer Inc. Sec. Litig., No. 90 Civ. 1260, 1993 WL 561125, at *6 (S.D.N.Y. Dec. 23, 1993)); see Tilberg v. Next Mgmt Co., No. 04CIV7373, 2005 WL 3543701, at *1 (S.D.N.Y. Dec. 28, 2005); Medinol, Ltd. v. Boston Scientific Corp., 214 F.R.D. 113, 114-15 (S.D.N.Y. 2002). The determination of whether there is a waiver depends on the circumstances. Nobles, 422 U.S. at 239-40. The purpose of the work-product doctrine "is to protect material from an opposing party in litigation, not necessarily from the rest of the world generally." United States v. Am. Tel. & Tel. Co., 642 F.2d 1285, 1299-1300 (D.C. Cir. 1980). Even where the attorney-client privilege has been waived, documents "shown to others" may still be protected as attorney work-product so long as "there was some good reason to show it." Adlman, 134 F.3d at 1199-1200 & n.4; see

U.S. v. Stewart, 287 F. Supp. 2d 461, 469 (S.D.N.Y. 2003) (holding that defendant did not waive work-product protection by forwarding copy of e-mail to daughter that she originally sent to her attorney).

The work product doctrine is designed to "preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy 'with an eye toward litigation, free from unnecessary intrusion by his adversaries.'" Adlman, 134 F.3d at 1196 (quoting Hickman, 329 U.S. at 510-11). Since the focus group was effectively acting as a consultant to counsel, communications with the focus group are within the scope of attorney work product protection. See In re Cendant, 343 F.3d at 667-68; Haugh v. Schroder Investment Mgmt., No. 02 CIV. 7955, 2003 U.S. Dist. LEXIS 14586, at *15 (S.D.N.Y. Aug. 25, 2003); Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53, 55 (S.D.N.Y. 2000). The focus group was governed by a confidentiality agreement and was engaged to assist counsel with litigation strategy. Disclosure of portions of the paralegal-client interviews to the focus group under these circumstances did not substantially increase the likelihood that defendants would gain access to the material.

The City also argues that it has a substantial need for the information contained in the materials that are protected work product. The City reasons that since the interviews depicted in the videos took place closer in time to the events at issue in the litigation, any deposition they take of the plaintiffs will be

inferior. However, the same argument could be made with respect to every client interview in every litigation. It is not necessary for defense counsel to invade the privacy of plaintiffs' counsel's work product in order to procure plaintiffs' testimony. See Hickman, 511 U.S. at 513 (despite denial of production of oral witness statements, counsel "need not be unduly hindered in the preparation of his case, in the discovery of facts or in his anticipation of his opponent's position"); A.I.A. Holdings, S.A. v. Lehman Bros., Inc., 97 Civ. 4978, 2002 WL 31385824, at *9 (S.D.N.Y. Oct. 21, 2002) ("[a] witness's availability for a deposition defeats a claim of substantial need for work product material"). Even under the lower threshold applicable to fact work product, I find that the City has not met its burden of showing a substantial need for the material at issue.

The City argues that limiting disclosure to the plaintiffs' answers to counsel's questions would remove any concerns implicated by the work product doctrine. However, the work product doctrine applies to materials prepared by the client as well as materials created by an attorney. See Lugosch v. Conegel, No. Civ. 00-CV-0784, 2006 WL 931687, at *16 (N.D.N.Y. Mar. 7, 2006); Tilberg v. Next Mgmt Co., No. 04CIV7373, 2005 WL 3543701, at *1 (S.D.N.Y. Dec. 28, 2005); Bank of New York v. Meridien BIAO Bank Tanzania Ltd., No. 95 CIV. 4856, 1996 WL 490710, at *2 (S.D.N.Y. Aug. 27, 1996); Fed. R. Civ. P. 26(b)(3) (documents prepared by or for a "party or by or for that other party's

representative"). Moreover, the City's proposal ignores that counsel's strategy and mental impressions underlying the questions may be revealed by the plaintiffs' answers to those questions.

B. Media Video

Since the work product doctrine is designed to protect against the disclosure of materials created for the purpose of litigation strategy, it does not ordinarily shield materials for media purposes from disclosure. See Calvin Klein, 198 F.R.D. at 55. However, since the media video contains excerpts of the focus group presentation that this Court has found to be attorney work product, the question then is whether plaintiff's counsel have waived work product protection by providing the media video to an employee of a news organization under an oral agreement that the video not be used or disclosed without further authorization. Although there is no evidence that the media video itself was disseminated by the news organization, presumably, counsel could reasonably anticipate that employees of the news organization would view the video and later report on the "story." Even if no portion of the media video was shown to the public, counsel substantially increased the potential that the substance of its work product would be disclosed to their adversaries. The sharing of attorney work product with a news organization neither demonstrates an interest in maintaining confidentiality nor appears to be intended to serve any purpose related to actual or contemplated litigation by the plaintiffs. Rather, "[d]elivering

the [video] to [a third party] was a deliberate, affirmative and selective strategic decision to disclose this information for another benefit other than aiding the lawyer pitched in the battle of litigation." NXIVM Corp. v. O'Hara, 241 F.R.D. 109, 142 (N.D.N.Y. 2007) (disclosure of protected report to a retained public relations company) (citing In re Grand Jury Proceedings, 219 F.3d 175, 192 (2d Cir. 2000)). "[A] waiver of work product protection occurs when the covered materials are used in a manner that is inconsistent with the protection." Granite Partners, L.P. v. Bear Stearns & Co. Inc., 184 F.R.D. 49, 55 (S.D.N.Y. 1999). Here, the circumstances for finding waiver are more compelling than in NXIVM Corp. since the release of work product was to a new organization not employed by plaintiffs whose interest in reporting on newsworthy events do not completely coincide with plaintiffs' interest in this case. Since I find that plaintiffs have waived work product protection as to any protected material contained in the media video, plaintiff must produce a copy of the media video.

The City argues that the disclosure of the media video waived the attorney-client privilege or work product protection for the other materials discussed above. I do not find such a broad waiver is warranted here. Since the determination of the scope of waiver is guided by concerns of fairness, courts should "consider whether a party has made affirmative and selective use of privileged documents, as well as the underlying purposes for the

work product doctrine. McGrath v. Nassau County Health Care Corp., 204 F.R.D. 240, 245 (E.D.N.Y. 2001) (citation omitted). Although the Second Circuit has not enunciated criteria for determining the scope of any work product waiver, it has never endorsed a broad subject matter waiver. Rather, it has required courts to make "particularized findings" regarding the connection between disclosures that led to a waiver finding and the materials required to be disclosed. See In re Grand Jury Proceedings, 219 F.3d at 192. Even where waiver of some protected work product results from a client's testimony in a proceeding, the Second Circuit has recognized "that work-product not communicated to the client remains shielded." Id.

Since plaintiffs' selective disclosure of the protected work product material was made extrajudicially and has not been used in this litigation, plaintiffs did not "create a risk of legal prejudice" to defendants. Cf. In re von Bulow, 828 F.2d 94, 101-03 (2d Cir. 1987) (waiver of attorney-client communications disclosed in a book). Thus, I find, as a matter of fairness, that plaintiffs need not produce the undisclosed portions of the focus group presentations or attorney client interviews. Id.

## CONCLUSION

For the foregoing reasons, plaintiffs' motion for a protective order is granted in part and denied in part.

**SO ORDERED.**

Dated: Brooklyn, New York
June 4, 2010

/s/
MARILYN D. GO
UNITED STATES MAGISTRATE JUDGE