SUPREME COURT OF NEW JERSEY
DOCKET NO. 70,999

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MARTIN E. O'BOYLE, Plaintiff-Petitioner, v. BOROUGH OF LONGPORT and THOMAS HILTNER in his capacity as Borough of Longport Clerk and Custodian of Records, Defendants-Respondents.	CIVIL ACTION ON APPEAL FROM THE DECISION OF THE APPELLATE DIVISION DATED MAY 12, 2012 SUPERIOR COURT-APPELLATE DIVISION DOCKET NO. A-2698-10T2 SAT BELOW: HON CARMEN H. ALVAREZ, J.A.D. HON. ANTHONY J. PARRILLO, J.A.D. HON. STEPHEN SKILLMAN, J.A.D.

BRIEF OF *AMICUS CURIAE* DRI—THE VOICE OF THE DEFENSE BAR IN SUPPORT OF DEFENDANTS-RESPONDENTS

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae DRI—The Voice of the Defense Bar ("DRI") is an international organization comprising more than 23,000 attorneys who defend businesses and individuals in civil litigation. DRI addresses issues germane to defense attorneys and works to improve the civil justice system in America. DRI has long been a voice in the ongoing effort to make the civil justice system fairer, more efficient, and—where national issues are involved—consistent. To promote these objectives, DRI participates as amicus curiae in cases such as this one that raise issues of importance to its membership and to the judicial system.

DRI's members regularly address issues regarding the scope of the work-product doctrine in the context of jointly defending the interests of multiple parties. That real-world experience informs DRI's view that the Appellate Division appropriately concluded that the work-product doctrine protects the documents at issue here from disclosure. However, DRI respectfully submits that the Appellate Division reached the correct result for the wrong reason. The Appellate Division followed the minority rule and applied the waiver rules governing attorney-client privilege to the work-product doctrine. DRI urges this Court to affirm the Appellate Division's result, but apply the

majority approach to waiver of the work-product doctrine in doing so. The majority approach better achieves the doctrine's goal of allowing attorneys to prepare their cases without fear of their work falling into opposing counsel's hands. Accordingly, applying the majority approach here will aid the legal profession in its efforts to represent the citizens of New Jersey and promote the efficient administration of the adversarial system of justice.

PRELIMINARY STATEMENT

This case presents important issues regarding when disclosure results in the waiver of the work-product doctrine's protections. The Appellate Division has adopted an approach that assumes that disclosure waives work-product protection in the same manner that it waives the attorney-client privilege. But the Appellate Division's analysis does not address the differing policies underlying the work-product doctrine and the attorney-client privilege. DRI submits that those underlying policies merit a completely different analysis of waiver for the work-product doctrine.

The work-product doctrine is intended to ensure that parties have the ability to develop and pursue litigation strategies without sharing that information with their adversaries. The attorney-client privilege is intended to

promote the free flow of information between clients and their attorneys by providing clients assurance that disclosure of those communications can never be compelled by anyone. Intentional and voluntary disclosure of attorney-client communications is repugnant to the purpose of keeping such communications confidential against the world. But disclosure of work product to third parties does not necessarily make it more likely that an adversary will obtain that information. For that reason, most courts analyze waiver of the attorney-client privilege and the work-product doctrine differently. In most jurisdictions, disclosure only waives work-product protection if it makes it substantially more likely that the work product will be obtained by an adversary.

DRI recommends that the Court adopt the majority approach to determining whether disclosures waive work-product protection. This approach is consistent with the history and purposes of the doctrine.

If the Court adopts the majority approach to work-product-doctrine waiver, consideration of the common-interest rule is unnecessary. If, however, the Court decides to address the common-interest rule, DRI submits that the approach adopted by the Appellate Division in Laporta v. Gloucester County Board of Education and reiterated in this case strikes the appropriate

balance between the attorney-client privilege and the needs of parties to share information in pursuit of a common purpose.

PROCEDURAL HISTORY

Plaintiff Martin E. O'Boyle filed this lawsuit seeking access to certain documents under the Open Public Records Act ("OPRA") and the common-law right of access to public documents. (Verified Compl. 4-5, 14A-17A.) Specifically, O'Boyle sought copies of various letters and documents exchanged by David Sufrin, counsel to at least one former Longport official and several Longport residents engaged in litigation with O'Boyle, to Emmanuel Argentieri, counsel to the Borough of Longport. (Id. at 3, 14A.)

O'Boyle requested that the trial court resolve his lawsuit in a summary proceeding. (See 6/28/10 Letter from Judge Johnson to Walter M. Luers and Pacifico Agnellini.) The court held that all the items sought were protected from disclosure by attorney-client privilege. (12/3/10 Hr'g Tr. 18-21 (attached to Pet. for Certification).) The court also held that the enclosures to the September 29, 2009 correspondence, and the documents provided to Argentieri by Sufrin, reviewed by Argentieri on October 14, 2009, were not public records subject to disclosure under OPRA or the common-law right of access. (See id. at 17-21.). The

court entered an order dismissing O'Boyle's lawsuit. (12/20/10 Order 3, 10A.) O'Boyle appealed.

The Appellate Division affirmed. O'Boyle v. Borough of Longport, 462 N.J. Super. 1, 9-10, 13 (App. Div. 2012) . The Appellate Division held that even if the documents were public records, the work-product doctrine protected the documents from disclosure because the common-interest rule applied. Id. at 9-12. Specific to the common-law right of access, the Appellate Division also held that O'Boyle failed to make the showing of need required for disclosure under that right. Id. at 13-14. Lastly, the Appellate Division ruled that the trial court did not err by not reviewing *in camera* the enclosures to the September 29, 2009 correspondence, and the documents provided to Argentieri by Sufrin, reviewed by Argentieri on October 14, 2009. Id. at 14-15.

This Court granted certification. On December 26, 2012, the Court contacted DRI and invited it to submit an amicus curiae brief in this matter.

STATEMENT OF FACTS

DRI relies upon the summary of the facts stated in the Appellate Division's opinion.

ARGUMENT

I. The work-product doctrine should protect documents and information prepared for litigation that are shared with similarly situated parties.

A majority of jurisdictions have concluded that the protection afforded by the work-product doctrine is not waived by disclosure to third parties so long as the disclosure is not inconsistent with maintaining the secrecy of work product against adversaries. In this way, the analysis of work-product-protection waiver differs from waiver of communicative privileges like the attorney-client privilege. The history and purpose of the work-product doctrine both in New Jersey and nationally demonstrates why this distinction has developed. Analysis of decisions of other jurisdictions demonstrates that the majority view that disclosure alone does not waive the protection of the work-product doctrine is more consistent with the doctrine's purposes than the minority view, which the Appellate Division has adopted. See Laporta, 340 N.J. Super. at 254

. Accordingly, DRI respectfully recommends that the Court adopt the majority analysis of waiver of the work-product doctrine.

A. The development of the work-product doctrine demonstrates that it is not a communicative privilege defined by the relationship of parties to a communication.

The modern work-product doctrine has its roots in the protections provided by the attorney-client privilege. K.L. v. Evesham Twp. Bd. of Educ., 423 N.J. Super. 337, 354 (App. Div. 2011).

As a branch of attorney-client privilege, the courts protected documents authored by clients for use in pending or anticipated litigation. E.g., Robertson v. Commonwealth, 25 S.E.2d 352, 360 (Va. 1943)
; Advisory Comm. on Rules for Civil Procedure, Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States 40-47 (1946) (collecting cases) [hereinafter "1946 Advisory Comm. Report"]. Over time, some courts began expanding this protection to include other items in a lawyer's files. See 1946 Advisory Comm. Report 40-47. As the Third Circuit put it, the "results of the lawyer's use of his tongue, his pen, and his head, for his client" or the "work product" of the lawyer should be shielded from discovery. Hickman v. Taylor, 153 F.2d 212, 223 (3d Cir. 1945)
, aff'd
329 U.S. 495 (1947).

Recognizing that trend, in 1946, the Federal Rules Advisory Committee proposed protection for "any writing" created by or for a party "in anticipation of litigation or in preparation for trial," unless protecting the writing would "unfairly prejudice" the other party. 1946 Advisory Comm. Report 39-40. The United States Supreme Court declined to adopt the Committee's proposed amendment. Instead, one year later, the Court incorporated what has become known as the work-product doctrine into federal common law in the landmark case of Hickman, 329 U.S. at 510-11.

In Hickman, a tugboat sank, killing five crewmen. Id. at 498. Anticipating a lawsuit, the tugboat owner hired an attorney to investigate. Ibid. The attorney interviewed the survivors and potential witnesses, and in some cases drafted memoranda summarizing the interviews. Ibid. The representatives of the deceased crewmen all filed lawsuits against the owner, and sought copies of the memoranda and witness statements. Ibid. The owner refused to provide copies. Ibid. The trial court ordered the owner to produce the documents. Id. at 499. The Third Circuit Court of Appeals reversed, holding that the documents were protected as part of the "work product of the lawyer." Id. at 500.

The United States Supreme Court affirmed and recognized the work-product doctrine for the first time. The Supreme Court distinguished between the work-product doctrine and the

attorney-client privilege, noting that "the memoranda, statements and mental impressions in issue in this case fall outside the scope of the attorney-client privilege and hence are not protected from discovery on that basis." Id. at 508. The Court recognized the work-product doctrine at least in part because the attorney-client privilege failed to protect those materials. The Court concluded that such materials "fall[] outside the arena of discovery and contravene[] the public policy underlying the orderly prosecution and defense of legal claims." Id. at 510.

The Court identified the principles of protecting the mental impressions of counsel and protecting the ability of counsel to represent their clients effectively as undergirding the then-new work-product doctrine:

> In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. . . . Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect

> on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served. [Id. at 510-11.]

Justice Jackson echoed this sentiment in his concurrence, famously stating "Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary." Id. at 516.

In 1948, New Jersey adopted a court rule codifying the work-product doctrine. Discovery: New Jersey Work Product Doctrine, 1 Rutgers-Cam. L.J. 346, 347-48 n.11 (1969) . That rule provided, in pertinent part, as follows:

> "The deponent shall not be required to produce or submit for inspection any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation and in preparation for trial unless the court otherwise orders on the ground that a denial of production or inspection will result in an injustice or undue hardship; nor shall the deponent be required to produce or submit for inspection any part of a writing which reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or, except as provided in Rule 3:35, the conclusions of an expert." [Stivali v. Space, 9 N.J. Super 462, 465 (Cty. Ct. 1950) (quoting R. 3:26-2, N.J. Court Rules, 1948).]

The Rule restated the "the principles laid down as to the substantially identic[al] federal rules in the Hickman case." Schwartz v. Pub. Serv. Coordinated Transp., 64 A.2d 477, 480

(Cty. Ct. 1949)

. The Rule was seen as providing even broader work-product protection than Hickman. Id. at 481. ("Indeed, the New Jersey Rules, if anything, are more highly protective of the lawyer's work product than is the United States Supreme Court."); Crisafulli v. Pub. Serv. Coordinated Transp., 7 N.J. Super. 521, 523 (Cty. Ct. 1950)

("This principle, protecting generally the 'work product' of an attorney, has been reiterated under the much more explicit provisions of the above New Jersey rule, which in fact broadened the applicability of such principle.").

In 1970, the United States Supreme Court followed suit and adopted Federal Rule of Civil Procedure 26(b)(3), partially codifying and extending the work-product protection Hickman provided. See United States v. Deloitte LLP, 610 F.3d 129, 136 (D.C. Cir. 2010)

(noting that the common-law work-product doctrine articulated in Hickman and its progeny supplements the work-product protections of Rule 26(b)(3)). Similar to the New Jersey Rule, Federal Rule of Civil Procedure 26(b)(3) presently provides:

> (3) Trial Preparation: Materials.
>
> (A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its

> representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:
>
> > (i) they are otherwise discoverable under Rule 26(b)(1); and
> >
> > (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.
>
> (B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation. [Fed. R. Civ. P. 26(b)(3).]

The current version of the New Jersey rule is similar to the federal rule. New Jersey Court Rule 4:10-2(c) states:

> (c) Trial Preparation; Materials. Subject to the provisions of R. 4:10-2(d), a party may obtain discovery of documents, electronically stored information, and tangible things otherwise discoverable under R. 4:10-2(a) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other

> representative of a party concerning the litigation. [R. 4:10-2(c).]

Like the federal rule, the New Jersey rule does not codify the protection that Hickman provides intangible work product. See In re Seagate Tech., LLC, 497 F.3d 1360, 1376 (Fed. Cir. 2007) ; United States v. 266 Tonawanda Trail, 95 F.3d 422, 428 n. 10 (6th Cir. 1996)

. Thus, a portion of the work-product doctrine is still governed by the common law, as opposed to court rule.

Thus, although the roots of the work-product doctrine arise from the attorney-client privilege, from inception the work-product doctrine's protections differ from that privilege. Hickman, 329 U.S. at 508-13 (holding that while attorney-client privilege did not protect the documents, the work-product protection did); In re Chevron Corp., 633 F.3d 153, 164-65 (3d Cir. 2010)

(work-product doctrine and attorney-client privilege "serve different purposes" and provide different protections). Most importantly, the work-product doctrine does not provide protection from disclosure based on nature of the relationship between two parties to a communication, but rather from the context in which documents and their intangible equivalents are created.

B. Because the work-product doctrine does not provide protection based on the need for communication between attorneys and clients, the doctrine continues to provide protection following many kinds of third-party disclosure.

Most courts have concluded that the differences in function between the attorney-client privilege and the work-product doctrine affect the analysis of whether disclosure waives the protections of each. In re Chevron Corp., 633 F.3d 153, 164-65 (3d Cir. 2011); United States v. Mass. Inst. of Tech., 129 F.3d 681, 687 (1st Cir. 1997)

("[T]he cases approach uniformity in implying that work-product protection is not as easily waived as the attorney-client privilege."); Deloitte LLP, 610 F.3d at 139-40; Sandra T.E. v. S. Berwyn Sch. Dist. 100, 600 F.3d 612, 621-22 (7th Cir. 2010) ; In re Seagate Tech., LLC, 497 F.3d at 1372-75; In re Qwest Commc'ns Int'l. Inc., 450 F.3d 1179, 1185-1186 (10th Cir. 2006) ; In re Grand Jury Subpoenas Dated Oct. 22, 1991, and Nov. 1, 1991, 959 F.2d 1158, 1166 (2d Cir. 1992)

; Shields v. Sturm, Ruger & Co., 864 F.2d 379, 382 (5th Cir. 1989); In re Martin Marietta Corp., 856 F.2d 619, 624 (4th Cir. 1988); Tackett v. State Farm Fire & Cas. Ins. Co., 653 A.2d 254, 260-261 (Del. 1995)

; Visual Scene, Inc. v. Pilkington Bros. plc., 508 So. 2d 437, 442 (Fla. Dist. Ct. App. 1987); McKesson HBOC, Inc. v. Adler, 562 S.E.2d 809, 813 (Ga. Ct. App. 2002); Waste Mgmt., Inc. v.

Int'l Surplus Lines Ins. Co., 579 N.E.2d 322, 326 (Ill. 1991) ; Am. Zurich Ins. Co. v. Montana Thirteenth Judicial Dist. Court, 280 P.3d 240, 248 (Mont. 2012); In re Election of Nov. 6 1990 for Office of Atty. Gen. of Ohio, 567 N.E.2d 243, 244 (Ohio 1991) ; accord 8 Charles Alan Wright, Arthur R. Miller & Richard R. Marcus, Federal Practice and Procedure § 2024 (3d ed.) (collecting cases).

Generally, the attorney-client privilege is waived by voluntarily and intentionally sharing the privileged communications with a third party. Chevron, 633 F.3d at 165; In re Grand Jury Subpoenas Duces Tecum Served by Sussex Cnty. Grand Jury on Farber, 241 N.J. Super. 18, 31 (App. Div. 1989) . "Voluntary disclosure waives the attorney-client privilege because it is inconsistent with the confidential attorney-client relationship." Deloitte LLP, 610 F.3d at 140. One exception to the rule that disclosure results in waiver is the common-interest rule. In re State Comm'n of Investigation Subpoena No. 5441, 226 N.J.Super. 461, 466 (App. Div. 1988) ; See In re Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120, 126 (3d Cir. 1986) (discussing "joint defense privilege"). Under the common-interest rule, disclosure of attorney-client privileged communications to third parties to further a common interest

does not waive the privilege. In re State Comm'n, 226 N.J. Super. at 466.

In contrast, most courts have concluded that work-product protection is not waived by disclosure to a third party unless the disclosure is inconsistent with the adversary system. Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1428 (3d Cir. 1991)
; United States v. Am. Tel. & Tel. Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980)
("[Although] a voluntary disclosure to a third person will generally suffice to show waiver of the attorney-client privilege, it should not suffice in and of itself for waiver of the work product privilege."); See, e.g., In re Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 306, n.28 (6th Cir. 2002)
; Gundacker v. Unisys Corp., 151 F.3d 842, 848 (8th Cir. 1998)
; Mass. Inst. of Tech., 129 F.3d at 687; In re Steinhardt Partners, L.P., 9 F.3d 230, 235 (2d Cir. 1993)
; Shields, 864 F.2d at 382; In re Doe, 662 F.2d 1073, 1081 (4th Cir. 1981); McKesson HBOC, Inc. v. Adler, 562 S.E.2d 809, 813 (Ga. Ct. App. 2002); Am. Zurich Ins. Co. v. Montana Thirteenth Judicial Dist. Court, 280 P.3d 240, 248-49 (Mont. 2012); Harris v. Drake, 99 P.3d 872, 879 (Wash. 2004)
.

8 Wright, Miller, Kane, & Marcus, supra, § 2024 (citing cases) ("Thus, the result should be that disclosure of a document to third persons does not waive the work product immunity unless it has substantially increased the opportunities for potential adversaries to obtain the information." (footnote omitted)); Edward J. Imwinkelried, The New Wigmore: Evidentiary Privileges, § 1.3.11 (Aspen 2013)

(citing cases). Consistent with the purpose of the work-product doctrine, these courts treat as dispositive to the waiver analysis whether work product was kept away from adversaries. Westinghouse, 951 F.2d at 1428; Chevron, 633 F.3d at 165 ("[I]t is only in cases in which the material is disclosed in a manner inconsistent with keeping it from an adversary that the work-product doctrine is waived."). For example, under the majority approach, work product can be disclosed to an independent party, such as an auditor, without waiving the work-product protection. Deloitte LLP, 610 F.3d at 140. But, where work product is disclosed to an adversary, the work-product protection is waived. Montgomery Cnty. v. MicroVote Corp., 175 F.3d 296, 304 (3d Cir. 1999)

; Mass. Inst. of Tech., 129 F.3d at 687 ("[O]nly disclosing material in a way inconsistent with keeping it from an adversary waives work product protection."); In re Chrysler Motors Corp. Overnight Evaluation Program Litig., 860 F.2d 844, 846 (8th Cir.

1988)

("Disclosure to an adversary waives the work product protection as to items actually disclosed, even where disclosure occurs in settlement." (quotation omitted)).

In short, under the majority approach, disclosure to third parties only results in a waiver of the work-product protection when the disclosure is to an adversary or materially increases the likelihood of disclosure to an adversary. Ecuadorian Plaintiffs v. Chevron Corp., 619 F.3d 373, 378 (5th Cir. 2010) ("Although work product immunity is not automatically waived by disclosure of protected material to third parties, disclosure does waive protection if it 'has substantially increased the opportunities for potential adversaries to obtain the information.'" (quoting 8 Wright, Miller, Kane, & Marcus, supra, § 2024)); Rockwell Int'l Corp. v. U.S. Dept. of Justice, 235 F.3d 598, 605 (D.C. Cir. 2001) ("[While t]he mere showing of a voluntary disclosure to a third person . . . should not suffice in itself for waiver of the work-product privilege, disclosure of work-product materials can waive the privilege for those materials if such disclosure, under the circumstances, is inconsistent with the maintenance of secrecy from the disclosing party's adversary." (citations and quotations omitted)). This approach is driven by the policy behind the work-product rule: preventing "a learned profession"

from "perform[ing] its functions either without wits or on wits borrowed from the adversary." Hickman, 329 U.S. at 516 (Jackson, J., concurring).

A minority of courts ignore the policy rationales driving the different approaches to third-party waiver and hold that third-party waiver functions in the same manner for both the attorney-client privilege and the work-product doctrine. B & C Trucking Co. v. Holmes & Narver, Inc., 39 F.R.D. 317, 319 (D. Haw. 1966)
; United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 465 (E.D. Mich. 1954); D'Ippolito v. Cities Serv. Co., 39 F.R.D. 610, 610 (S.D.N.Y. 1965)
; Ariz. Indep. Redistricting Comm'n v. Fields, 75 P.3d 1088, 1100-01 (Ariz. Ct. App. 2003)
; Ritter v. Jones, 207 P.3d 954, 960-61 (Colo. Ct. App. 2009)
; Tobaccoville USA, Inc. v. McMaster, 692 S.E.2d 526, 531 (S.C. 2010)
; Axelson, Inc. v. McIlhany, 798 S.W.2d 550, 553-54 (Tex. 1990)
; 2 Thomas E. Spahn, The Attorney-Client Privilege and the Work Product Doctrine ¶ 8.2102 (2007)
. A leading treatise notes that "[d]ecisions to this effect confuse the work-product immunity with the attorney-client privilege." 8 Wright, Miller & Marcus, supra, § 2024.

The Appellate Division has adopted the minority approach, albeit without analysis. In Laporta, the Appellate Division considered whether disclosure to third parties waives work-product protection. 340 N.J.Super. at 261-62. The Appellate Division noted that the concept of waiver is not addressed in Rule 4:10-2(c), but that the waiver of privileges generally is addressed in New Jersey Rule of Evidence 530. Id. at 261. The court stated that under Rule 530, "a privilege is waived if 'without coercion and with knowledge of his right or privilege, [a person] made disclosure of any part of the privileged matter or consented to such a disclosure made by anyone.'" Ibid. (quoting N.J.R.E. 530). The court noted that "not every disclosure constitutes a waiver of privilege." Ibid. The court then turned to the common-interest rule to determine whether disclosure of work product to a third party resulted in waiver of the work-product protection. Id. at 261-63.

The Laporta court itself discusses something like the majority approach to waiver of work-product protection after its common-interest rule discussion:

> We agree with defendants that a party should feel free to turn over evidence of crimes to the government without fearing that to do so will result in privileged and confidential information falling into the hands of one's adversary in a related or contemplated civil proceeding. Generally, when such privileged information is turned over to a non-adversary who has a legitimate interest in

> the information . . . there is no waiver unless it can be shown that there was a "conscious disregard" of the possibility that an adversary would gain access to the material. In re John Doe, 662 F.2d 1073, 1081 (4th Cir. 1981), cert. denied, 455 U.S. 1000, 102 S. Ct. 1632, 71 L.Ed.2d 867 (1982); see also Shields v. Sturm, Ruger & Co., 864 F.2d 379, 381-82 (5th Cir. 1989) . . . . [Laporta, 340 N.J. Super. at 263-64.]

The two cases cited by the Laporta court, John Doe and Shields, both apply the majority rule correctly. In re John Doe, 662 F.2d at 1081 ("[W]hen an attorney freely and voluntarily discloses the contents of otherwise protected work product to someone with interests adverse to his or those of the client, knowingly increasing the possibility that an opponent will obtain and use the material, he may be deemed to have waived work product protection."); Shields, 864 F.2d at 382 ("The work product privilege is very different from the attorney-client privilege. . . . Therefore, the mere voluntary disclosure to a third person is insufficient in itself to waive the work product privilege." (citations omitted)).

Thus, in Laporta, the Appellate Division did not consider whether the disclosure of work product was subject to a different waiver analysis than that applied to communicative privileges like the attorney-client privilege. *See also* Adler v. Shelton, 343 N.J. Super. 511, 519 (2001) (not differentiating between waiver of attorney-client

privilege and waiver of work-product protection); Hannan v. St. Joseph's Hosp. & Med. Ctr., 318 N.J. Super. 22, 29-31 (1999) (same).

The Laporta decision begat the Appellate Division's opinion in this case. Here, the Appellate Division began its analysis by correctly noting that work product is not subject to disclosure under OPRA and the common-law right of access. O'Boyle, 426 N.J. Super. at 9-10. The court then addressed whether disclosure of those documents between Sufrin and Argentieri waived the protection of the work-product doctrine, applying the common-interest rule. Id. at 10-12. After concluding that the disclosures fulfilled the requirements of the common-interest rule, the Appellate Division held that the documents were not subject to disclosure. Id. at 12

The Court should now take the opportunity to adopt the majority approach to waiver of work-product protection. As explained above, the majority approach is consistent with the rationale behind work-product protection and focuses on whether disclosure gives rise to an increased likelihood that an adversary will obtain the work product. The Appellate Division's approach confuses the rationales underlying the work-product doctrine and the communicative privileges like the attorney-client privilege, improperly grounding its analysis on

whether the disclosure is inconsistent with the attorney-client relationship.

Further, New Jersey Rule of Evidence 530 does not compel the analysis adopted by the Appellate Division. In the sentence immediately following the section quoted in Laporta, Rule 530 states, "A disclosure which is itself privileged or otherwise protected by the common law . . . shall not constitute a waiver under this section." N.J.R.E. 530. In the context of the work-product doctrine, disclosures to third persons who do not materially increase the likelihood of an adversary obtaining the work product should be "protected by the common law," and thus not constitute a waiver.

Applying the better-reasoned majority approach here renders resort to the common-interest rule unnecessary. See BASF Aktiengesellschaft v. Reilly Indus., Inc., 224 F.R.D. 438, 443 n.4 (S.D. Ind. 2004)

("Because the Court finds that Reilly's letter to Procter did not substantially increase the opportunities for BASF to obtain the disclosed information and, therefore, work product protection was not waived, the Court need not determine whether the common interest doctrine applies.") Instead, the key issue is whether by exchanging work product Argentieri and Sufrin materially increased the likelihood that O'Boyle would obtain those documents. For the reasons Defendants-Respondents and the

Appellate Division identified, the disclosures to Longport's counsel did nothing to increase the likelihood that O'Boyle would obtain the work product, and thus the result reached by the Appellate Division should be affirmed, albeit for different reasons.

II. The Appellate Division has adopted an appropriate analysis of the common-interest rule.

If this Court adopts the minority approach to work-product waiver, i.e. that it mirrors attorney-client-privilege waiver, then the Appellate Division should also be affirmed. Under the minority rule, work-product waiver would be analyzed under the common-interest rule. Below, the Appellate Division correctly held that the common-interest rule extends work-product protection to the documents at issue here.

As noted above, the common-interest rule creates an exception to the waiver of attorney-client privilege. Teleglobe USA, Inc. v. BCE Inc. (In re Teleglobe Commc'ns Corp.), 493 F.3d 345, 364 (3d Cir. 2007)

. The rule protects communications disclosed to a third party where the third party shares a common interest with the client. Ibid. At first, the common-interest rule "allowed the attorneys of criminal co-defendants to share confidential information about defense strategies without waiving the privilege as against third parties." Ibid. The rule then expanded to

protect "all communications shared within a proper 'community of interest,' whether the context be criminal or civil." Ibid.

There are a variety of approaches to scope of the common-interest rule. The Restatement (Third) of the Law Governing Lawyers takes a broad approach, protecting otherwise privileged communications that are disclosed to third parties that have a "common interest, which may be either legal, factual, or strategic in character. The interests of the separately represented clients need not be entirely congruent." Restatement (Third) of Law Governing Lawyers § 76 cmt. e (2000). By contrast, some courts interpret the rule more narrowly, requiring the sharing parties to have an identical legal interest. Teleglobe, 493 F.3d at 365. These courts conclude that "the nature of the interest [must] be identical, not similar, and be legal, not solely commercial." Ibid. (quotation omitted). Some courts limit the rule to litigation-related communications, others extend it to transactional contexts. Teleglobe, 493 F.3d at 364.

The New Jersey courts have adopted a middle ground. They have held that under the common interest rule, individuals may share information without waiving the attorney-client privilege if: "(1) the disclosure is made due to actual or anticipated litigation; (2) for the purpose of furthering a common interest; and (3) the disclosure is made in a manner not inconsistent with

maintaining confidentiality against adverse parties." Laporta, 340 N.J. Super. at 262 (quoting Holland v. Island Creek Corp., 885 F. Supp. 4, 6 (D.D.C. 1995)
). The New Jersey courts interpret the common-interest rule "in a commonsensical way, fashioning a 'common interest' doctrine which protects communications made to a non-party who shares the client's interests." Id. at 261 (quoting In re State Comm'n, 226 N.J. Super. at 466). "Importantly, it is not necessary for every party's interest to be identical for the common interest privilege to apply. Rather, the parties must simply have a 'common purpose.'" Id. at 262 (citing United States v. McPartlin, 595 F.2d 1321, 1336 (7th Cir. 1979)
).

The Appellate Division's approach to the common-interest rule appropriately balances the parties' needs to share information with similarly situated parties against the public's need for disclosure and candor in the judicial system. New Jersey rightly rejected the more restrictive approach. As one scholar has explained:

> The identical interest requirement stifles the free flow of communication that the attorney-client privilege is intended to promote while inconsistent application of the requirement further stifles communication. A definition of "common interest" with broader application will encourage more parties to utilize the doctrine to enhance legal advice. Moreover,

> when courts consider whether parties share a common legal interest, the determination should focus on the nature of the communication and the general purpose for which it is shared, rather than on the relationship of the parties. Specifically, under a uniform common interest doctrine, courts should deem an interest "common" where two or more parties share a sufficiently similar interest and attempt to promote that interest by sharing a privileged communication. [Katharine Traylor Schaffzin, An Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It, 15 B.U. Pub. Int. L.J. 49, 73 (2005) .]

Accord Paul R. Rice, Attorney-Client Privilege in the United States § 4:36, p. 223 (2d ed. 1999). The common-sense approach adopted by the Appellate Division meets these recommendations and advances the purposes of the attorney-client privilege.

O'Boyle incorrectly argues that Sufrin and Argentieri had to be acting in furtherance of a formal joint-defense agreement for the common-interest rule to apply. No formal agreement is needed for a party to take advantage of the common-interest rule. United States v. Gonzalez, 669 F.3d 974, 979 (9th Cir. 2012)

("[I]t is clear that no written agreement is required, and that a JDA may be implied from conduct and situation, such as attorneys exchanging confidential communications from clients who are or potentially may be codefendants or have common interests in litigation."); Lugosch v. Congel, 219 F.R.D. 220,

237 (N.D.N.Y. 2003)

(a formal written agreement is not necessary). Such an agreement "militates against a finding of waiver" but is not required. BASF Aktiengesellschaft, 224 F.R.D. at 443 (citations and quotations omitted)(considering confidentiality agreement in work-product context). See generally Schaffzin, supra, at 82-83 (no written agreement should be required).

In sum, if this Court adopts the minority approach to work-product waiver, then the common-interest rule determines whether work-product protection was waived here. The Appellate Division adopted an appropriate standard for the common-interest rule. Applying that standard, the documents here are protected for the reasons the Appellate Division and Defendants-Respondents stated. Accordingly, the Appellate Division should be affirmed.

CONCLUSION

For the foregoing reasons, DRI respectfully submits that this Court should join the majority of courts in recognizing a distinction between waiver of the work-product protection and the attorney-client privilege. While similar in some respects, the work-product protection and the attorney-client privilege serve different purposes and provide different protections. Each doctrine must be considered separately and according to its own rules that are designed to achieve its goals. Thus, the

Appellate Division reached the correct result below for the wrong reason. This Court should affirm the Appellate Division's decision because the facts of this case do not result in the waiver of work-product protection under the majority approach.

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