

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF THE CURRENCY

IN THE MATTER OF:)

PETER G. WEINSTOCK, ESQ.,)

AND)

JEANNE BRECKINRIDGE, ESQ.,)

FORMER COUNSEL TO THE CASEY)

NATIONAL BANK, CASEY, ILLINOIS.)

OCC-AA-EC-99-01

**DECISION AND ORDER ON MOTION
FOR INTERLOCUTORY REVIEW
OF JUNE 15, 1999 ORDER ON MOTION TO COMPEL**

On July 7, 1999, Enforcement Counsel for the Office of the Comptroller of the Currency ("Enforcement Counsel") filed a motion for interlocutory review in this disciplinary action under 12 C.F.R. Part 19, Subpart K. In that motion, Enforcement Counsel requested review of the June 15, 1999 order of Administrative Law Judge Arthur L. Shipe ("ALJ"), denying Enforcement Counsel's Motion to Compel Production of Documents. For the following reasons, the Comptroller of the Currency ("Comptroller"¹) denies the motion for interlocutory review.

Procedural Background

The OCC brought this disciplinary action alleging that Respondents made false statements, or caused false statements to be made, in connection with a request to rescind a

¹ Comptroller John D. Hawke, Jr., has recused himself from this proceeding and has delegated the matter to Chief Counsel Julie L. Williams for decision pursuant to 12 U.S.C. § 4a. Throughout this decision, unless the context indicates otherwise, references to the Comptroller refer to the Chief Counsel as the Comptroller's designate to decide this matter.

prohibition imposed on a former bank officer ("Request"). As part of the proceeding, Enforcement Counsel sought production of documents from Respondents on April 22, 1999. When Respondents objected to certain document requests, Enforcement Counsel filed a motion to compel production on June 4, 1999.

In the motion to compel, Enforcement Counsel sought documents that were responsive to document requests 2-4 and 7-10.² See OCC's Motion to Compel Production of Documents by

² The documents sought were:

2. Any statements or affidavits or other documents taken from any persons concerning any allegations contained in the Notice.
3. All documents that relate or refer to correspondence or communications between Respondents and/or Jenkins & Gilchrist and any potential witness to this Proceeding, including, but not limited to, Luke Holsapple, Terry Howard, Larry Strohm, Tim Clark and/or Larry Jones, respectively, and/or their counsel, including without limitation any deposition transcripts, affidavits, statements or any documents or communications related thereto.
4. All documents provided to, and the identity of, any expert, including such experts who might testify in this Proceeding.

* * *

7. The identity of any persons who Respondents intend to present as witnesses in this Proceeding.
8. All documents relating or referring to any allegation, claim or finding made in any matter unrelated to this Proceeding that Respondents, individually or collectively, misstated or misrepresented a material fact or legal conclusion, or failed to state a material fact or legal conclusion that was necessary to make the statements made by Respondents not misleading.
9. All documents relating or referring to any allegation, claim or finding that Respondents, individually or collectively, negligently, recklessly or incompetently represented a client or a client's interest.
10. All documents relating or referring to any notices or claims made by Jenkins & Gilchrist to the firm's malpractice carrier that pertain to the acts or omissions of Respondents, individually or collectively.

Office of the Comptroller of the Currency's First Request to Respondents to Produce Documents, at 5-6.

Respondents, at 2. In essence, the documents sought fell into two broad categories:

(1) documents containing or referring to statements or communications to or from various potential witnesses (Nos. 2-4, 7); and (2) documents relating to claims that Respondents had engaged in misconduct other than the misconduct alleged in the notice initiating this proceeding (“Other Acts Evidence”) (Nos. 8-10).

On June 11, 1999, Respondents filed an opposition claiming, among other things, that the items sought in document requests 2-4 were subject to the privilege accorded attorney work-product, and that the Other Acts Evidence sought in document requests No. 8-10 was not relevant. Respondents argued that document request No. 7 was, in effect, an interrogatory that was not permitted under the OCC’s Rules of Practice.

On June 15, 1999, the ALJ ruled that the “preparation and filing of the Request to rescind the Order of Prohibition against Stanton W. Grotenhuis constituted ‘litigation’ within the meaning of the work product doctrines.” Order on Motion to Compel dated June 15, 1999 (“June 15th Order”). Therefore, the ALJ ordered Respondents to produce “only substantially verbatim statements of persons concerning the allegations of the Notice” in response to document production requests numbers 2 and 3. The ALJ ruled that Respondents need not produce documents reflecting work product or mental processes of counsel in connection with preparing the Request to the OCC. In addition, the ALJ ruled that the materials sought in document requests 4, 7, 8, 9 and 10 need not be produced unless they fell within the documents required to be produced for requests 2 and 3.

Enforcement Counsel subsequently filed the current motion seeking interlocutory review of the ALJ’s order.

Discussion

The OCC rules of procedure intentionally limit interlocutory review to rulings that have a substantial impact on the proceeding. Indeed, the rules contemplate that interlocutory review will be granted rarely and specify the limited circumstances under which the Comptroller, in his discretion, will grant review. Thus, the Comptroller may grant interlocutory review if:

- (1) The ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion;
- (2) Immediate review of the ruling may materially advance the ultimate termination of the proceeding;
- (3) Subsequent modification of the ruling at the conclusion of the proceeding would be an inadequate remedy; or
- (4) Subsequent modification of the ruling would cause unusual delay or expense.

12 C.F.R. § 19.28(b).

In the motion for interlocutory review, Enforcement Counsel argue that the ALJ erred when he concluded that: (1) the Request to rescind the prohibition order entered against Mr. Grotenhuis constitutes litigation so that documents prepared in relation to submitting that Request are protected by the attorney work-product doctrine; and (2) the “Other Acts Evidence” sought by Enforcement Counsel was not sufficiently relevant to the proceedings to warrant its discovery.

Enforcement Counsel contend that interlocutory review is appropriate here because the ALJ’s rulings “substantially prejudice the OCC.” OCC Enforcement Counsel’s Motion for Interlocutory Review at 2. According to Enforcement Counsel, the ALJ’s ruling that documents prepared in connection with the Request to rescind the Grotenhuis prohibition order are entitled to protection under the attorney work-product doctrine “potentially precludes the OCC from asking questions about what Respondents did or did not do to verify the accuracy of the statements made in the Request and from introducing drafts of the Request, notes and other

documents because these inquiries and documents reflect the mental impressions of Respondents.” Id. Enforcement Counsel also assert that the ruling barring discovery of Other Acts Evidence prevents them from preparing to refute defenses Respondents may raise. Id.

Based on the current record, Enforcement Counsel have not shown that the ALJ’s rulings have a sufficient effect on the proceeding to warrant interlocutory review by the Comptroller based on the potential, but as yet unrealized, problems that they cite. First, the OCC's Rules of Practice and Procedure provide the ALJ in administrative proceedings with “all powers necessary to conduct a proceeding in a fair and impartial manner and to avoid unnecessary delay.” 12 C.F.R. § 19.5(a). For this reason, the Comptroller is generally reluctant to exercise interlocutory review of an ALJ order, particularly orders involving discovery disputes that may be resolved or eliminated through subsequent rulings by the ALJ as the case progresses.

Second, nothing in the ALJ’s order precludes Enforcement Counsel from asking a witness what he or she knows about the allegations in the Notice. Nor does the order prohibit asking a witness about what Respondents did or did not do to verify the accuracy of the statements made in the Request.³ Moreover, like the attorney-client privilege, the protections of the attorney work-product doctrine can be waived. *United States v. Nobles*, 422 U.S. 225, 239 (1975). Thus, if Respondents seek to make use of documents or testify about matters that fall within the attorney work-product doctrine during this proceeding, the ALJ may appropriately determine that Respondents have waived its protections and allow Enforcement Counsel

³ Although the order states that “[d]ocuments reflecting work product or mental processes of counsel need not be produced,” the ALJ ordered Respondents to produce any “substantially verbatim statements of persons concerning the allegations of the Notice.” June 15th Order (emphasis added).

additional discovery. *See id.* at 240 & n.14 (counsel cannot use the work-product doctrine to support a unilateral use of work-product materials).

At this stage of the proceedings, it does not appear that Respondents have raised any defenses based on mistake or accident. However, should they produce witnesses or offer testimony that raise these defenses, the ALJ may appropriately determine that Enforcement Counsel have been prejudiced by the June 15th Order denying discovery aimed at rebutting these defenses, and allow additional discovery for that purpose.

Although the Comptroller does not reach the merits of Enforcement Counsel's claims in denying this motion for interlocutory review, these issues can be preserved for review by the Comptroller on the merits at the conclusion of the proceedings before the ALJ. At that point, should the Comptroller determine that the ALJ's rulings are erroneous, the Comptroller will have a more complete record for evaluating the prejudice caused to Enforcement Counsel. Then, if warranted, the Comptroller may order that "the action, or any aspect thereof be remanded to the administrative law judge for further proceedings." 12 C.F.R. § 19.40(c)(2). While a remand may occasion some additional cost or delay in the proceeding, the burden should be minimal given the limited nature of the additional evidence that would be sought.

For these reasons, the Comptroller concludes that the motion for interlocutory review does not satisfy the criteria in 12 C.F. R. § 19.28(b).

Conclusion and Order

For the foregoing reasons, the Comptroller denies Enforcement Counsel's motion for interlocutory review of the Order on Motion to Compel entered by the ALJ on June 15, 1999.

So ordered this 16th day of August, 1999.

JULIE L. WILLIAMS
Chief Counsel