

TORKILDSON, KATZ, FONSECA,
MOORE & HETHERINGTON,
Attorneys at Law, A Law Corporation

JEFFREY S. HARRIS 2718-0
TAMARA M. GERRARD 6153-0
DANIEL G. MUELLER 6516-0
700 Bishop Street, 15th Floor
Honolulu, HI 96813-4187
Telephone: (808) 523-6000
Facsimile: (808) 523-6001

Attorneys for Non-Party Deponent BRENT WHITE and
his employer AMERICAN CIVIL LIBERTIES UNION
OF HAWAII

HAWAII LABOR RELATIONS BOARD

STATE OF HAWAII

In the Matter of

United Public Workers, AFSCME, Local
646, AFL-CIO,

Complainant,

and

Sharon L. Agnew, Director, Office of Youth
Services, Department of Human Services,
State of Hawaii; Melvin Ando, Former
Administrator, Hawaii Youth Correctional
Facility, Department of Human Services,
State of Hawaii; Phillip Tuminello, Acting
Administrator, Hawaii Youth Correctional
Facility, Department of Human Services,
State of Hawaii; Mark J. Bennett, Attorney
General, Office of the Attorney General,
State of Hawaii; and Linda Lingle,
Governor, State of Hawaii (2003-029),

Respondents.

Case No. CE-10-541

BRENT WHITE AND AMERICAN CIVIL
LIBERTIES UNION OF HAWAII'S
MEMORANDUM REGARDING THEIR WORK
PRODUCT OBJECTION; CERTIFICATE OF
SERVICE

**BRENT WHITE AND AMERICAN CIVIL LIBERTIES UNION OF HAWAII'S
MEMORANDUM REGARDING THEIR WORK PRODUCT OBJECTION**

I. INTRODUCTION

In response to UPW's Motion for Pre-Hearing Discovery, the HLRB issued a subpoena on September 26, 2003 requiring Brent White to appear "for the taking of [his] deposition" and requesting that he bring a broad list of documents. The ACLU timely filed a motion to revoke the subpoena on October 1, 2003. Brent White filed a joinder in that motion. The HLRB granted that motion in part, denied it in part, and reserved ruling on certain assertions of the attorney-work product doctrine pending receipt of supplemental briefs from the movant and the UPW. Both at the hearing on the motion to revoke on October 7, 2003 and when Mr. White appeared to testify on October 8, 2003 counsel representing Mr. White and the ACLU emphasized that Mr. White would not testify as to matters believed to be privileged or otherwise entitled to protection absent an order from Circuit Court enforcing the subpoena. The ACLU voluntarily produced certain documents requested via the subpoena subject to the same provision.

At the hearing on October 7, 2003, the ACLU provided the HLRB with a privilege log listing the documents that are being withheld under a claim of privilege. Only one of those documents is being withheld solely on the ground that they are entitled to protection under the attorney work product doctrine. That document is bated stamped A000015, dated August 27, 2003 is authored by Mark Soler, an attorney with the Youth Law Center, addressed to Brent White, an attorney with ACLU and is described as "Communications with counsel re Hawaii Youth Correctional Facility."

II. DISCUSSION

A. The Attorney Work Product Doctrine Encompasses Materials Prepared By Non-Parties In Anticipation of Litigation.

Contrary to the UPW's assertion, courts have in some instances applied the attorney-work product doctrine to materials prepared by non-parties to the litigation in which the materials are sought. See e.g., AT & T Corp. v. Microsoft Corp., 2003 WL 21212614 at 6 (N.D. Cal. April 18, 2003)(holding that materials prepared by non-party in infringement action based on technology developed by that non-party were entitled to protection under the attorney work product doctrine); State v. Cartwright, 20 P.3d 223, 173 Or.App.59 (Or. App. 2001)(holding that under Oregon law, audiotape recordings of victim witnesses obtained by company in anticipation of sexual harassment lawsuit were entitled to protection under the attorney work product doctrine and thus need not be produced to defendant in criminal proceeding); Stanley Works v. Haeger Potteries, Inc., 35 F.R.D. 551, 554 (N.D. Ill. 1964)(attorney work product doctrine encompassed materials prepared by non-party who was partner with a party in a joint licensing program for exploitation of the patent at issue in the litigation). As one court has noted, "[w]here a non-party 'is in substance equally concerned with the outcome' of litigation and documents are created with an 'eye toward litigation,' then the attorney-work product privilege applies." AT & T, 2003 WL 21212614 at *6. Although, unlike the entities asserting the privilege in Stanley and AT & T, the ACLU has absolutely no relationship to the Respondent in the instant HLRB proceeding, the ACLU is concerned with the outcome of the HLRB proceeding to the extent that it affects conditions at the facility, and prepared materials in anticipation of litigation against the State. The ACLU is fully committed to pursuing that litigation. Thus, under Stanley and AT & T, the attorney work product doctrine should serve to protect the materials prepared by the ACLU in anticipation of the litigation it plans to pursue against the State.

Relying on Sameshima v. Yamashiro, 642 P.2d 544, 3 Haw. App. 130 (Hawaii App. 1982), UPW argues that Hawaii courts have adopted the rule that the attorney work product doctrine is not applicable to non-parties. Sameshima does not stand for that proposition and UPW's reliance on Sameshima is misplaced. There, the **client waived any privilege** that otherwise would have applied by filing a lawsuit based on statements made to the client by the attorney and by then testifying as to conversations with the attorney. 642 P.2d at 548, 3 Haw. App. at 135. Moreover, the information withheld went to the heart of the litigation and, in fact, formed the basis for the allegations of the suit. In contrast, in the instant case, the client (the wards) has **not** waived any privilege and the information sought is of no relevance to the prohibited practice proceeding filed by the UPW.

In addition to incorrectly relying on Sameshima, the UPW has mischaracterized the holdings of many other decisions on which it relies in support of the proposition that the work product doctrine applies only to materials prepared by parties. For example, in Gomez v. City of Nashua, 126 F.R.D. 432, 434 n.1 (D. N.H. 1989), the court expressly “decline[d] to consider the issue” of whether the work product doctrine could apply to materials prepared by non-parties. In Chaney v. Slack, 99 F.R.D. 531, 533 (S.D. Ga. 1983), the materials in question – personnel files and employment records – were not entitled to protection because they were not prepared in anticipation of litigation but were instead prepared in the regular course of business. In Loustalet v. Refco, Inc., 154 F.R.D. 243, 248 (C.D. Cal. 1993), the “client” had voluntarily disclosed the information to an adversary and thus had waived any privilege that otherwise might have applied.

B. The Materials Are Entitled To Protection Under H.R.C.P. Rule 26(c)

Even if the court should determine that the work product doctrine is inapplicable because neither the ACLU nor the wards are parties to the HLRB proceeding, the documents nevertheless

are entitled to protection under Rule 26(c) of the Hawaii Rules of Civil Procedure as adopted by Haw. Adin. Rules §12-42-8(g)(6)(A). See, e.g., In Re California Public Utilities Comm’n Southern California Edison Co. v. Westinghouse Electric Corp., 892 F.2d 778, 781 (9th Cir. 1989)(“In Re. CPUC”); In Re Polypropylene Carpet Antitrust Lit., 181 F.R.D. 680, 691-92 (N.D. Ga. 1998). The Ninth Circuit expressly noted in In Re. CPUC that the purpose of the attorney work product doctrine is “to safeguard the attorney-client relationship by enabling attorneys to record their thoughts and advice candidly and completely.” 892 F.2d at 781. In order to protect this relationship, the Ninth Circuit emphasized that non-parties are free to “seek a protective order under Rule 26(c)” if disclosure of the materials would cause hardship. Id.

Similarly, in Polypropylene Carpet, the district court held:

Although the documents do not fall under the literal protection afforded by Rule 23(b)(3), the third party who generated the documents is not powerless to seek protection from disclosure of sensitive and confidential information. Rule 26(c) provides that a court “may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . that the disclosure or discovery may not be had.”

Id. at 691-92. In its decision, the court quoted the following excerpt from Wright, Miller & Marcus:

Courts need not be constrained by a literal reading of Rule 26(b)(3) and can continue to arrive at sensible decisions on this narrow point. To the extent that Rule 26(b)(3), literally read, seems to give insufficient protection to material prepared in connection with some other litigation, the court can vindicate the purposes of the work-product rule by the issuance of a protective order under Rule 26(c).

Wright Miller & Marcus, Federal Practice & Procedure: Civil §2024, at 356. Accordingly, the court in Polypropylene Carpet determined that because the documents would constitute attorney work product as defined by Rule 26(b)(3) if the Division were a party to the litigation, the

“confidentiality of these documents is appropriate for protection pursuant to Rule 26(c).” Id. at 692.

Rule 26(c) of the Hawaii Rules of Civil Procedure authorizes issuance of a protective order “which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . .” Here, justice requires that the materials sought by the UPW not be released. Release of the information sought by the UPW would jeopardize the ACLU’s litigation strategy **and would also create great risk of bodily harm and or death to the wards at the HYCF.** Certainly, there can be no more appropriate situation than the present to refuse to require release of information prepared in anticipation of litigation. The information sought by the UPW is of no possible relevance to the instant Prohibited Practice Proceeding.

DATED: Honolulu, Hawaii, October 16, 2003.

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CERTIFICATE OF SERVICE

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The undersigned hereby certifies that on this date a true and accurate copy of the foregoing document was duly served upon the following individual(s) by hand delivery, addressed as follows:

HERBERT R. TAKAHASHI, ESQ.
Takahashi, Masui, Vasconcellos & Covert
345 Queen Street, Room 506
Honolulu, HI 96813

Attorneys for Complainant

DANIEL MORRIS, ESQ.
Deputy Attorney General
235 So. Beretania Street, 15th Floor
Honolulu, Hawaii 96813

Attorney for Respondents

DATED: Honolulu, Hawaii, October 16 2003.

TORKILDSON, KATZ, FONSECA,
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Attorneys at Law, A Law Corporation

JEFFREY S. HARRIS
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