IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
EXIDE TECHNOLOGIES, et al.,[1]	)	Case No. 02-11125 (KJC)
	)	(Jointly Administered)
Debtors.	)	

MEMORANDUM OF LAW RELATING TO DEBTORS' SCOPE OF ATTORNEY-CLIENT PRIVILEGE AND ATTORNEY WORK PRODUCT DOCTRINE

As requested by the Court on September 26, 2003, the Official Committee of Unsecured Creditors (the "Committee") of Exide Technologies ("Exide") and its affiliated debtors and debtors-in-possession (collectively, the "Debtors") and Smith Management LLC ("Smith Management"), by and through their counsel, respectfully submit this memorandum of law relating to the scope of the attorney-client privilege or work product doctrine properly available to the Debtors to immunize documents and information from discovery. As no privilege log has yet been produced and no specific documents are at issue, this memorandum is strictly intended to be a general overview. As set forth below, we have identified the categories of documents and communications that the Committee and Smith Management believe are not immune from discovery pursuant to the attorney-client or work product privilege.

BACKGROUND

On April 15, 2002, each of the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code (the "Petition Date"). Before the Petition Date in October of 2001,

[1] The Debtors in these proceedings are: Exide Technologies (f/k/a Exide Corporation); Exide Delaware, L.L.C.; Exide Illinois, Inc.; RBD Liquidation, L.L.C.; Dixie Metals Company and Refined Metals Corporation.

the Debtors employed and retained the services of The Blackstone Group L.P. ("Blackstone") as financial advisors to the Debtors and JA&A Services LLC ("Alix") as restructuring consultants to the Debtors. The retention agreements for Blackstone and Alix indicate that they were retained to provide business advice and perform business services. For example, the Blackstone engagement letter states that it will assist "in the evaluation of [Exide's] businesses and prospects" and "in the development of financial data and presentations to [Exide's] Board of Directors." Similarly, the Alix engagement letter states that it will assist in the restructuring process and "in developing and implementing cash management strategies, tactics and processes" for Exide.

The Debtors also employed and retained the services of Kirkland & Ellis ("K&E") as their attorneys to perform legal services during the restructuring.

The Committee and Smith Management assert that the following categories of documents are not protected under the attorney-client privilege or attorney work product doctrine and, if responsive to the parties' discovery requests, must be produced:

(a) all internal communications of (i) the Debtors (ii) Alix and (iii) Blackstone;

(b) all external communications between (i) Blackstone and the Debtors, (ii) Alix and the Debtors, (iii) Alix and Blackstone or (iv) all three;

(c) all communications between (i) Alix and K&E, (ii) Blackstone and K&E, (iii) Alix, Blackstone and K&E, or (iv) between the Debtors and K&E, if copied to Alix or Blackstone;

(d) all communications between K&E and the Debtors or anyone deemed to be an agent of the Debtors, if not intended to assist counsel in rendering legal advice;

(e) all communications among Alix, Blackstone, and/or the Debtors and any third party including the Pre-Petition Lenders, their attorney(s) or their advisor(s);

(f) all communications between K&E and any third party including the Pre-Petition Lenders, their attorney(s) or their advisor(s); and

(g) all documents considered by or provided to the Debtors' expert witnesses relating to the areas of any expected expert testimony they may seek to offer (except for those documents properly considered to be opinion work product), and all drafts and workpapers.

The Committee and Smith Management are entitled to the disclosure of all responsive documents within the above-mentioned categories, as the attorney-client privilege and attorney work product protection are not applicable to such documents.

ATTORNEY-CLIENT PRIVILEGE

(A) Alix and Blackstone Are Not Agents of K&E.

The attorney-client privilege protects communications between attorneys and clients so long as the communications are related to the giving or receiving of legal advice. *See, e.g., Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1428 (3d Cir. 1991). Generally, voluntary disclosure of a privileged communication to a third party destroys the privilege, but under certain circumstances the client may allow disclosure to an "agent" for purposes of assisting the attorney in rendering legal advice to the client. *See, e.g., In re Grand Jury Matter*, 147 F.R.D. 82 (E.D. Pa. 1992); *see also Westinghouse* 951 F.2d at 1424. For the privilege to be maintained, the agent "must have been essential to and in furtherance of the communication and absent disclosure of the communication to [the agent], the purpose of the attorney-client privilege would not have been fulfilled because the client could not have or would not have obtained legal assistance." *Giovan v. St. Thomas Diving Club,* Civ. No. 1996-123 (GWB), 1997 U.S. Dist LEXIS 8816, *7 (D. V.I. June 13, 1997).

Nonetheless, a consultant hired for the purpose of providing advice relating to the consultant's area of expertise is not considered an agent of the attorney and not protected by the attorney-client privilege. *See, e.g., Swarthmore Radiation Oncology, Inc. v. Lapes,* Civ. No. 92-3055 (RSG), 1994 U.S. Dist. LEXIS 1970 (E.D. Pa. Feb. 18, 1994). For example, in *Swarthmore,* the court found that even though the business advice of the health care consultant enhanced the ability of the lawyer to provide legal services, the "symbiotic relationship [did] not preserve the attorney-client privilege." *Swarthmore*, 1994 U.S. Dist. LEXIS 1970, *12; *see also In re G-I Holdings Inc.*, Civ. No. 02-03082 (WGB), 2003 U.S. Dist. LEXIS 13901, *19 (D. N.J. July 17, 2003)(concluding that third parties must act as "go betweens" to assist the communications between a client and attorney).

The Committee and Smith Management are entitled to the production of all communications among employees of Alix and/or Blackstone, whether internal or exchanged with the Debtors or K&E because the attorney-client privilege generally does not apply to third parties, and Alix and Blackstone do not qualify as agents of K&E. As their engagement agreements reflect, both Alix and Blackstone were retained by Debtors to provide advice directly to the Debtors relating to their respective areas of expertise: the reorganization process and financial matters. There has been nothing to suggest any additional agreement to perform work for the specific assistance of K&E, or that either Alix or Blackstone has in fact performed work outside the scope of the reorganization process and financial matters that they were retained by Debtors to provide. There is nothing to suggest, in particular, that either Blackstone or Alix was contemplated to serve merely as "go-betweens" or interpreters for the facilitation of communication between K&E and Debtors, or that such facilitation or interpretation would have

been at all necessary. Accordingly, the Debtors should disclose all responsive communications in categories (a), (b) and (c) above.

(B) Communications Among All Parties That Do Not Assist K&E In Providing Legal Advice to Debtors Should be Disclosed.

Even if Alix and/or Blackstone could be deemed to be agents of K&E for privilege purposes (which they are not), the Debtors should disclose, if responsive, communications among all parties that do not assist K&E in providing legal advice to the Debtors. Communications between the attorney or attorney's agent and client not intended to assist the attorney in rendering legal advice are denied attorney-client privilege protection. *See, e.g., In re Grand Jury Matter*, 147 F.R.D. 82 (E.D. Pa. 1992). "What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer." *U.S. v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961).

In *In re Grand Jury Matter*, the court found that communications or documents prepared for the purpose of providing environmental services by the expert consultant to the company are not protected *even when some of the documents are between the expert consultant and the lawyers*. *See* 147 F.R.D. at 85 (emphasis added). The company hired a law firm which in turn retained an environmental consulting firm to help the firm render legal advice to the company. *See* 147 F.R.D. at 84. The *Grand Jury* court protected only those documents made for purposes of providing legal advice to the client: "when a client's ultimate goal is not legal advice, but is rather accounting, medical or environmental advice, the privilege is inapplicable." 47 F.R.D. at 85; *see also In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1037-38 (2d Cir. 1984)(finding that communications between a client and attorney for business purposes, as opposed to legal purposes, are not protected).

The Committee and Smith Management are therefore entitled to receive all responsive documents in categories (a) through (d) not intended to assist the Debtors' attorneys in providing *legal advice* to their client. As always, the burden of proving confidentiality of the communication rests on the party asserting the privilege. *See, e.g., In re Bevill, Bresler & Schulman Asset Mgmt. Corp.,* 805 F.2d 120, 126 (3d Cir. 1986); s*ee also In re Grand Jury Matter*, 147 F.R.D. 82 (E.D. Pa. 1992). If the Debtors cannot prove that the communications among the relevant parties were made for the sole purpose of assisting the lawyers in providing legal advice, disclosure must be made.[2]

WORK PRODUCT DOCTRINE

(A) Documents Prepared By Any Party For Purposes Other Than Assisting The Attorneys In Providing Legal Advice Should be Disclosed.

The work product doctrine applies to "documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative." Fed. R. Civ. P. 26(b)(3). Materials prepared by an attorney's agent or consultant are covered by the work product doctrine as long as such materials were intended to assist the lawyers in providing legal advice to the client. *See, e.g., In re Grand Jury Matter*, 147 F.R.D. 82 (E.D. Pa. 1992); *see also United States v. Nobles*, 422 U.S. 225, 238-39 (1975)(noting that attorneys may rely on the assistance of agents in compiling material in preparation for trial).

In *In re Grand Jury Matter*, the court concluded that the work product doctrine protects documents prepared by the company's expert consultants for purposes of relaying legal advice,

[2] There can be no real dispute that documents and communications in categories (e) and (f) are not protected by any privilege, or that any potential privilege would be deemed waived, and must be produced if responsive.

but not for purposes of relaying consultant advice. *See* 147 F.R.D. at 87. The court denied attorney work product protection, finding no documents created by the consultant that "could be deemed legal theories or opinions of the law firm." *See id.* at 87; *see also Loctite Corp. v. Fel-Pro, Inc.*, 667 F.2d 577, 582 (7th Cir. 1981)(noting that documents are work product "only where the document is primarily concerned with legal assistance").

The Committee and Smith Management are therefore entitled to receive all responsive documents in categories (a) through (f) not intended to assist the Debtors' attorneys in providing *legal advice* to their client.

(B) Documents Not Prepared "In Anticipation of Litigation" Should Be Disclosed.

(1) Prior to the Petition Date.

All documents prepared by the Debtors, Blackstone or Alix or communicated by K&E to Blackstone or Alix prior to the Petition Date, if responsive, should be disclosed by the Debtors, even if they meet the above test, if they were not considered to be prepared "in anticipation of litigation" as required for attorney work product protection. The fact that litigation is imminent at the time the documents were produced does not automatically make all documents generated by a party work product. *See IBJ Whitehall Bank & Trust Co. v. Cory & Associates, Inc.*, Civ. No. 97 C 5827 (SIS), 1999 U.S. Dist. LEXIS 12440, *13 (N.D. Ill. Aug. 10, 1999). The Debtors in our case retained the services of Alix and Blackstone well before the Petition Date. At such time, bankruptcy litigation may have been likely, but such odds do not qualify as being "in anticipation of litigation." The Debtors should not be able to claim work product protection for documents prepared prior to the Petition Date.

(2) Subsequent to the Petition Date.

Action taken after the Petition Date does not automatically qualify every document prepared thereafter as work product. Only those documents prepared after the Petition Date that are specific to assisting in giving legal advice are protected by work product. *See, e.g., In re Air Crash Disaster at Sioux City,* 133 F.R.D. 515, 520 (N.D. Ill. 1990)(noting that evidence of work product includes "whether the subject matter of the document concerns preparation or strategy, or the appraisal of the strengths and weaknesses of [the] case, . . . and not simply underlying evidence").

In asserting work product protection, should they choose to do so, the Debtors have the burden of demonstrating that the documents at issue were prepared "in anticipation of litigation." *See, e.g., In re Gabapentin Patent Litig.,* 214 F.R.D. 178, 183 (D. N.J. 2003). Providing a privilege log with sufficient information is necessary to permit judgment as to whether materials are protected from disclosure. A privilege log usually identifies individual documents and includes information regarding "individuals who were parties to the communications" as well as enough substantive details to determine privilege. *See, e.g., In re Unisys Corp. Retiree Med. Benefits ERISA Litig.,* MDL 969 (CJC), 1994 U.S. Dist. LEXIS 1344, *5 (E.D. Pa. Jan. 5, 1994); *see also Nike v. Brandmania.com, Inc.,* Civ. No. 00-5148 (PHJ), 2002 U.S. Dist. LEXIS 20355, *29 (E.D. Pa. Oct. 3, 2002) ("Any claim of attorney-client privilege or attorney work-product protection must be accompanied by a detailed privilege log identifying individual documents."). The Debtors should not be able to claim work product protection

without at the very least providing adequate information detailing the individual documents they are withholding and proving that such documents are protected.[3]

(C) Under Rule 26, Expert Witnesses Are Required to Disclose Documents.

Finally, with respect to category (g) above, Rule 26 of the Federal Rules of Evidence provides for demanding disclosure requirements for expert witnesses. Rule 26(a)(2)(B) of the Federal Rules of Evidence requires that expert witnesses disclose any documents and other communications considered by the expert in forming the expert's opinion. However, the work product doctrine may slightly limit the expert witness discovery requirements. *See., e.g., Bogosian v. Gulf Oil Corp.,* 738 F.2d 587, 595 (3d Cir. 1984)(finding that disclosure relating to expert witnesses does not include core work product).

The Third Circuit requires the disclosure of documents relating to expert testimony with the exception of core work product. All communications considered by the Debtors' experts in forming their opinions, except for documents "containing an attorney's 'mental impressions, opinions or conclusions,'" are subject to disclosure. *Krisa v. Equitable Life Assurance Soc'y,* 196 F.R.D. 254, 258 (M.D. Pa. 2000), quoting *Upjohn Co. v. U.S.,* 449 U.S. 383 (1981).

Accordingly, the Debtors must disclose all communications with their expert witnesses (whether such communications involved the Debtors, K&E, Alix and/or Blackstone or any other party) relating to the subject matter of any anticipated expert testimony, as well as drafts and other information used in developing the experts' opinions. If some of the materials requested

[3] If the court determines that a privilege log is necessary, the Committee requests the opportunity to contest whether the documents listed by the Debtors are in fact protected by the attorney-client privilege or work product doctrine.

contain both facts and opinion work product of the Debtors' attorneys, the Debtors should redact the legal theories and produce the facts. The parties are entitled to full disclosure of facts presented to the experts and considered in formulating the experts' opinions. *See, e.g., Bogosian v. Gulf Oil Corp.,* 738 F.2d 587 (3d Cir. 1984); *see also Smith v. Transducer Tech., Inc.,* 197 F.R.D. 260 (D. V.I. 2000)(quoting same).

CONCLUSION

There has been no evidence to support that K&E or the Debtors used other parties to assist in providing legal advice as required by both the attorney-client privilege and the work product doctrine. The Debtors have the burden of proving that all documents and other communications are protected. The Debtors are required to provide a privilege log detailing the individual documents they claim are immune from discovery. A privilege log would reveal, for example, whether communications exist among employees of Alix and/or Blackstone either internally or with the Debtors or K&E. Information identifying party names in connection with correspondence and other communications would provide guidance regarding whether privilege can be properly asserted. A factual summary describing the substantive nature of the individual documents or other communications currently withheld is also necessary to determine whether such information provided legal assistance to the Debtors, was prepared "in anticipation of litigation," and contain opinion work product. The Debtors cannot withhold all communications without sound evidence that such information is protected. A reasonably detailed privilege log will likely reveal that not all communications among the numerous parties involved in the financial and business decisions of the reorganization process are protected under the attorney-client privilege and the work product doctrine.

PEPPER HAMILTON LLP

/s/ Adam Hiller
David B. Stratton (Bar No. 960)
Adam Hiller (DE No. 4105)
1201 Market Street, Suite 1600
Wilmington, Delaware 19801
Telephone (302) 777-6500
Facsimile (302) 656-8865

-and-

/s/ David Zensky
David Zensky, Esquire
Akin Gump Strauss Hauer & Feld LLP
590 Madison Avenue
New York, New York 10022
(212) 872-1000

Attorneys for the Official Committee of Unsecured Creditors

DUANE MORRIS LLP

/s/ Richard W. Riley
Richard W. Riley (DE No. 4052)
William K. Harrington (DE No. 4051)
1100 North Market Street, Suite 1200
Wilmington, Delaware 19801-1246
Telephone (302) 657-4900
Facsimile (302) 657-4901

-and-

/s/ Andrew I. Silfen
Andrew I. Silfen, Esquire
Arent Fox Kintner Plotkin & Kahn, PLLC
1675 Broadway, 25th Floor
New York, NY 10019
(212) 484-3900

Attorneys for Smith Management LLC