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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FCC 94M-331
41820

In re Applications of)	MM DOCKET NO. 93-94 ✓
SCRIPPS HOWARD BROADCASTING COMPANY)	File No. BRCT-910603KX
For Renewal of License of Station WMAR-TV)	
Baltimore, Maryland)	
and)	
FOUR JACKS BROADCASTING, INC.)	File No. BPCT-910903KE
For a Construction Permit for a New)	
Television Facility on Channel 2)	
at Baltimore, Maryland)	

MEMORANDUM OPINION AND ORDER

Issued: May 11, 1994 ; Released: May 13, 1994

1. This is a ruling on a reconsideration of a bench ruling made at a Prehearing Conference that was conducted on May 10, 1994. There the Presiding Judge had ruled that seven of twelve documents that Scripps Howard had identified as privileged communications under the "Attorney-Client and Work Product" doctrines were to be submitted for an in camera inspection. For reasons stated below, that ruling is reconsidered in the interest of case efficiencies.¹

2. Documents were ordered to be produced by Scripps Howard under a ruling of the Presiding Judge that was issued on April 22, 1994 (FCC 94M-300). Specific instructions were given to the parties on procedures for requesting in camera inspection of documents that are claimed to be privileged. Id. at Para.7. One instruction stated:

Four Jacks will assure to the extent possible that there will not be any request for the examination of documents that are clearly within the attorney-client privilege (e.g.correspondence from counsel to client containing legal advice).

Id. at 3 n.2. Four Jacks requested, inter alia, the in camera inspection of twelve documents that were identified by Scripps Howard as written

¹ The rulings on the inspection of Scripps Howard documents has been expedited to accommodate the parties' trial preparations. The Presiding Judge called a Prehearing Conference for May 10, 1994, on short notice. In the course of bench rulings made on May 10, there was a reconsideration of one document that had initially been determined as not qualifying for an examination. [Notes of Sean Lane, dated February 3, 1994 regarding Janet Covington's notes.] At the request of Four Jacks, that decision was reconsidered in order to maintain consistency in documents that are being selected for in camera inspection. Therefore, the parties are being treated equally.

communications between client and counsel under the heading "Attorney Client and Work Product. The Presiding Judge had initially excluded five of the documents for review and therefore the reconsideration here applies to only seven of the documents.²

3. Five of the seven documents are identified as written communications between Mr. Kleiner (client) and Mr. Howard (counsel) regarding ascertainment. Two of the seven documents are written communications between Ms. Barr (client) and Mr. Roberts (counsel) regarding documents related to ascertainment. One of those communications [facsimile to Mr. Howard from Mr. Kleiner dated August 18, 1992] is identified as "seeking legal advice." Therefore, under the above instruction, Four Jacks was only alerted to the communication of August 18, 1993 as attorney-client.

4. In connection with this reconsideration, the Presiding Judge has considered the Review Board ruling in William F. Peel, 6 F.C.C. Rcd 5388 (Review Bd 1991). There the Review Board cites the Commission in defining the purpose for the attorney-client privilege, i.e., "to protect confidential communications by a client to his or her lawyer for the purpose of obtaining legal advice." Id. at 5389. (Emphasis added). The critical condition for consideration of the privilege is that the communication be "for the purpose of obtaining legal advice."³ As indicated above, except for the communication of August 18, 1992, it cannot be determined from the pleading that the other six documents seek or contain legal advice. The documents might be strictly limited to gathering facts which would raise a probable work product privilege. However, it is recognized that there is implicit legal advice flowing between attorney and client throughout trial preparation. See Jaroslawicz v. Engelhard Corp., 115 F.R.D. 515, 518 (D.N.J. 1987) (information prepared by client pursuant to attorney's instructions in connection with rendering legal advice protected by attorney-client privilege). See also Raveesh K. Kumra, 5 F.C.C. Rcd 5607 (Review Bd 1990) (chronologies and index prepared by client at request of counsel in anticipation of litigation protected under attorney-client privilege).

5. The Review Board has admonished applicants that "blunderbus invocation of that [attorney-client] privilege is not favored by the law." Western Cities Broadcasting, Inc., 6 F.C.C. Rcd 3599 (Review Bd 1991), cited in Peel, supra at n.2. The Review Board has also instructed that "parties

² There were a total of 67 documents that were identified by Scripps Howard as relevant documents that were privileged. Four Jacks had requested a review of almost all of the documents. Before this reconsideration, the Presiding Judge had agreed to review 42 of those documents. Under this ruling, there will be a total of 35 of 67 documents reviewed for the availability of a privilege.

³ The Review Board relied on the Commission's definition of the attorney-client privilege in WWOR-TV, Inc., 5 F.C.C. Rcd 6261, 6262 (Comm'n 1990). Once the purpose for the communication is determined as being to obtain legal advice, there are four elements to apply: (1) the existence of an attorney-client relationship; (2) a communication from the client to his or her attorney; (3) the communication is legally related; and (4) there is an expectation of confidentiality. All four elements apply here.

will craft their privilege claims carefully with particular specificity before the presiding officer." Id. The documents under reconsideration here were not described "with particular specificity." However, the free flow of information between attorney and client in connection with legal advice is the acknowledged purpose behind the attorney-client privilege and it is sufficiently clear from the descriptions provided that these seven documents fall within that protection.

Ruling

Accordingly, IT IS ORDERED that the seven documents referred to above SHALL NOT BE SUBMITTED to the Presiding Judge for in camera inspection.⁴

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel
Administrative Law Judge

⁴ Copies of this ruling were made available to counsel on date of issuance.