

FCC Received May 20, 1994 @ 2:15 p.m.
Diana A. Budetaw

ORIGINAL

JUL 1 1994
FEDERAL COMMUNICATIONS COMMISSION
SECRETARY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

TRANSCRIPT OF PROCEEDINGS

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

IN THE MATTER OF:

MM DOCKET NO. 93-94

SCRIPPS HOWARD BROADCASTING COMPANY
and
FOUR JACKS BROADCASTING, INC.

Baltimore, Maryland

DATE OF CONFERENCE: May 10, 1994

VOLUME: 15

PLACE OF CONFERENCE: Washington, D.C.

PAGES: 1426-1464

FREE STATE REPORTING, INC.
Court Reporting Depositions
D.C. Area (301) 261-1902
Balt. & Annap. (410) 974-0947

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

RECEIVED

JUL 1 '94

FEDERAL COMMUNICATIONS
COMMISSION
OFFICE OF THE
SECRETARY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

In the matter of:)
)
SCRIPPS HOWARD BROADCASTING COMPANY)
and)
FOUR JACKS BROADCASTING, INC.)
)
Baltimore, Maryland)

MM DOCKET NO. 93-94

The above-entitled matter came on for conference pursuant to notice before Judge Richard L. Sippel, Administrative Law Judge, at 2000 L Street, N.W., Washington, D.C., in Courtroom No. 4, on Tuesday, May 10, 1994 at 10:00 a.m.

APPEARANCES:

On behalf of Scripps Howard Broadcasting Company:

KENNETH C. HOWARD, JR., Esquire
STEPHANIE S. ABRUTYN, Esquire
Baker and Hostetler
Washington Square, Suite 1100
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5304

On behalf of Four Jacks Broadcasting:

MARTIN R. LEADER, Esquire
GREGORY L. MASTERS, Esquire
Fisher, Wayland, Cooper, Leader and Zaragoza
2001 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20006-1851

I N D E X

1		
2		<u>PAGE</u>
3	Opening Statement by Judge Sippel	1428
4	Statement by Mr. Howard	1430
5	Statement by Mr. Leader	1442
6	Statement by Mr. Masters	1454
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25	Hearing Began: 10:00 a.m.	Hearing Ended: 10:55 a.m.

P R O C E E D I N G S

1
2 JUDGE SIPPEL: We're on the record. I'm assuming
3 that everybody's given their -- identified themselves for the
4 reporter. We don't have to go -- have appearances on the
5 record. Mr. Zauner I've spoken to. He is involved in
6 deposition work in another case and he will not be here today.
7 But he knows what's going on and since this basically involves
8 discovery between the two applicant parties, I don't think
9 it's necessary for him to be here.

10 I can get right to it and tell you what I have
11 decided and does any -- are there any preliminary statements
12 or matters that anyone wishes to raise before I do that? Mr.
13 Leader?

14 MR. LEADER: (Shakes head no.)

15 JUDGE SIPPEL: No? Mr. Howard?

16 MR. HOWARD: No, Your Honor.

17 JUDGE SIPPEL: All right. I have looked at all the
18 pleadings and I have looked at the list of the documents and I
19 have concluded that there's going to have to be production for
20 in camera review and I'll tell you precisely which ones.

21 Let me start by saying that this is -- this
22 conference was called by myself in response to a motion for a
23 protective order that was filed by Scripps Howard. But let me
24 get, for the record, exactly what the flow of that -- of how
25 these issues have been arisen to require this conference.

1 First is my Memorandum Opinion and Order, 94M-300,
2 which was released on April 25, 1994. Then there was a
3 scheduling of documents that was filed by Scripps Howard on
4 April 29th. There were objections to Scripps Howard's
5 privilege claims filed by Four Jacks on May 5. There was a
6 motion for a protective order, or in the alternative to
7 strike, that was filed by Scripps Howard on May 6th.

8 Then there was an opposition to that motion for a
9 protective order filed by Four Jacks on May 9th. And then
10 recently, this morning, I received a letter dated May -- a
11 copy of a letter dated May 9th to Mr. Leader from Mr. Howard
12 having to do with the Attachment D drafts.

13 So having said that, for purposes of focusing the
14 record on what's going on here this morning, let me go right
15 to my ruling with respect to what has to be produced to me for
16 in camera inspection. Let me say that what I am primarily
17 going to focus on is work product material for determination
18 as to whether or not there's a substantial need of the
19 materials in the preparation of Four Jacks' case and the
20 inability without an undue hardship to obtain the substantial
21 equivalent by other means.

22 Now, let me state further, with respect to that
23 analysis of the work product need -- substantial need, there
24 are these other alternative means for discovering this
25 information, that is the information which is relevant to the

1 issue. Starting with the testimony of Ms. Barr back in 1993
2 in Phase One, the deposition of Ms. Barr back in 1993, the
3 Barr deposition to be taken -- am I correct in that, it's not
4 taken yet?

5 MR. MASTERS: That's correct.

6 JUDGE SIPPEL: Mr. Kilborne will be deposed. Do I
7 have that name correct?

8 MR. HOWARD: Yes, sir.

9 JUDGE SIPPEL: Ms. Covington will be deposed, the
10 drafts of Attachment D that were turned over recently, and the
11 miscellaneous affidavits that have been filed in this case.
12 So I say that Four Jacks is not totally in the dark on the --
13 on evidence and facts in the issue.

14 MR. HOWARD: May I interject one other thing, one
15 other means for them obtaining relevant evidence on this
16 point, Your Honor?

17 JUDGE SIPPEL: Mr. Howard?

18 MR. HOWARD: None of these ascertainment contacts
19 occurred in a vacuum. They were all contacts with community
20 leaders in Baltimore. Four Jacks is based in Baltimore. All
21 those people were identified and their organizations and if
22 there was any effort to contact any of those people, it's
23 unknown to us.

24 JUDGE SIPPEL: Well, let me --

25 MR. LEADER: Let me -- can I --

1 JUDGE SIPPEL: Go ahead, Mr. Leader.

2 MR. LEADER: The burden isn't on us to demonstrate
3 that they've conducted their ascertainment problem. That's
4 it.

5 MR. HOWARD: May I respond to that?

6 JUDGE SIPPEL: You may.

7 MR. HOWARD: That's irrelevant to the issue that's
8 here. With respect to the comparative elements of this case,
9 yes, we had the responsibility to identify these persons and
10 we did so in the exhibit. Now the question that is raised is
11 whether there is some uncertainty as to -- the only argument,
12 that at least is apparent to me as to why there might be any
13 concern about this ascertainment exhibit, is whether that
14 exhibit is reliable.

15 And there's testimony in the record to the effect
16 that it is reliable and if they choose to make arguments it's
17 not reliable, one of the avenues that is available to them is
18 to pursue those contacts in Baltimore. It is available to
19 them and there's no question about that, Your Honor.

20 JUDGE SIPPEL: Well, Mr. Leader, I mean, you told me
21 what you're saying about this. Obviously what I am -- well,
22 let me not say obviously. What I am focusing on is the added
23 issue which has to do with misrepresentation/lack of candor.
24 What we're looking for is information that might be more than
25 just relevant to that issue, but information which would

1 clarify some of the -- some of the cloudiness about the
2 circumstances as to how this information was put together,
3 this ascertainment information.

4 I was making this point throughout the whole trial
5 in Phase One. There was no prescribed way in which
6 ascertainment was done in a formalistic way. It was all done
7 in very informal ways with informal meetings, some of which
8 may have been catch-up information as opposed to information
9 that you're getting in the ordinary course of events.

10 And then there were the circumstances with respect
11 to documents that weren't produced, documents that later
12 showed up that were there, or some place anyway, and you know,
13 the litany goes on and on and on. All of these have created
14 circumstances which make it difficult for me to analyze the
15 record to come up with conclusions that are based on
16 substantial evidence that'll eliminate any of these doubts.

17 And the Court of Appeals has said when you've got
18 series doubts with a case, this is when issues are added and
19 you go after it and you look at it and that's exactly what
20 we're -- what I'm doing here anyway. And I need information
21 in order to do that. Mr. Leader, Four Jacks, they need
22 evidence for purposes of meeting their burdens. Although the
23 burden actually on the issue is with respect to Scripps
24 Howard, the fact remains is that, you know, how these issues
25 are tried. Mr. Leader needs the information that's relevant

1 and available to him to prepare his case.

2 So that's where we are today. The fact that I'm
3 going to look at this information in camera does -- has
4 absolutely no bearing in terms of what I'm going to ultimately
5 do with the documents. They may go back to you, Mr. Howard,
6 in toto. Some may go back to you and some may be required to
7 be turned over.

8 One thing that I am going to need, I'm going to need
9 you and your staff to take a look at these documents and
10 bracket out or highlight out for me those items in the
11 documents which you claim are -- have -- are mental
12 impressions of attorneys' thoughts and concepts. That would
13 be protected even if it's -- even if it's producible work
14 product. In other words, that which could be redacted as your
15 mental impressions. That will help me.

16 I'm going to take the documents as they are based on
17 the way that you gave them to me. I think that the analysis
18 that you gave me up front with respect to -- with respect to
19 how you did this -- and this is not necessarily really meant
20 as a criticism, but you did -- you gave me a scheduling of
21 documents where you laid out the law in a general way up front
22 and then you just gave me a list of the documents with
23 descriptions that are sufficient for me, certainly for
24 purposes of asking to see the documents in camera.

25 But they're not descriptions which are sufficient

1 for me on the face of a pleading to say yes or no as to
2 whether or not all the elements of work product apply. I am
3 mainly focused on the work product. However, that commentary
4 does carry over to a lesser degree into some of the claimed
5 attorney/client privilege documents.

6 I -- it's -- since I'm going to be looking at a
7 universe of documents, I have concluded, after looking this
8 over for several days now, that it makes sense for me to look
9 at some of those documents as well. Now, I'm not going to ask
10 for everything, but I'm going to ask for a good deal. And
11 then the other question is when do you want to get them to me?

12 You can get them to me -- let me go through my list,
13 I guess, and then we can decide that. But you can get them to
14 me in batches, that is you can give me work product one day
15 and then a day or so later, you can give me the remainder of
16 the documents. We'll see how it goes. That's a logistical
17 observation. Let me just give you -- let me give you -- let's
18 get down to the chase here now and tell you what you're going
19 to have to turn over.

20 With respect to -- this is now -- I'm going down
21 your list. Notes of attorneys, work product on Page Four of
22 your pleading, Scheduling of Documents, dated April 29th. I
23 don't -- I'll tell you what I don't want to see. I don't want
24 to see Item Number Five, the notes of the hearing dated
25 November 8, 1993.

1 I don't want to see Item Eleven. I don't want to
2 see Item 13, 14, 15. I don't want to see Item 18 and I don't
3 want to see Item 28. I'll repeat those again. You have a
4 total of 29 documents listed. What I don't want to see is
5 Five, 11, 13, 14, 15 and 18 and 28.

6 Moving into attorney/client and work product
7 category, I do not want to see the first one. I do not want
8 to see Number Seven. I do not want to see Number Eight and
9 Number Nine. With respect to memos and correspondence, I
10 don't want to see Eight and Nine in that category. And with
11 respect to attorney/client and work product, I don't want to
12 see Two, I don't want to see Nine, Ten, 11, or 12. And with
13 respect to drafts, I don't want to see any of the drafts --
14 none of the drafts. Did you get those numbers?

15 MR. HOWARD: Yes, Your Honor.

16 JUDGE SIPPPEL: Now, when can I get the information?
17 I want you to do this in a way which is orderly and I want you
18 to be sure that you go through those documents and highlight
19 for me -- indicate what you feel are impressions of attorneys
20 that should be protected in the event -- that should be
21 redacted in the event that I were to order the document to be
22 turned over in discovery.

23 MR. HOWARD: Can I -- can we -- without looking at
24 the documents, Your Honor, to assess how voluminous they are,
25 I can't say right now. Certainly by the end of the week. But

1 | if it's going to be shorter than that, it might -- I'd like to
2 | report back to you later this afternoon. And I'd also like to
3 | present one last argument on the scope of the attorney/client
4 | privilege and your finding that we failed to adequately assert
5 | the privilege if I believe that's what it's going to have to
6 | be based on.

7 | JUDGE SIPPEL: I didn't -- I'm not saying that you
8 | really failed to adequately claim the privilege. I understand
9 | that there's been -- I mean, there's been broad claims of this
10 | privilege as we've been going down this road. But the case
11 | law that -- the Commission's case law, and particularly the
12 | Review Board's case law, says that you've got to really be
13 | very -- you have to do this in a very carefully analytically
14 | -- analytical way with respect to the documents so that as to
15 | each document, I can tell exactly what the nature of the
16 | disclosure is in the item and what part of the rule does it
17 | apply to.

18 | And I've given those cases, in terms of my
19 | instructions, back in '93 and the cases have even been cited,
20 | I believe, in your briefs with respect to where the Review
21 | Board has gone into this. I mean, there was one case where a
22 | party gave a judge ten documents to look for in camera and the
23 | judges turned them over to the other side and said, "Hey. You
24 | haven't given me anything here. You've given me documents,
25 | but you haven't given me any analysis." And the Review Board

1 upheld him on that.

2 And I'm not saying that this is anything near that
3 kind of a situation. What I'm saying is, is that I cannot --
4 in conscious, I cannot make a ruling with respect to each of
5 these documents that you have listed in your notes without
6 looking at the documents and going back and looking at the
7 standards -- the Commission's standards because I don't have
8 enough there to -- well, what's in your papers don't give me
9 enough to make that determination.

10 MR. HOWARD: I only know, sir, that as we read the
11 cases to meet that test, it was our understanding that if it
12 met the case, the standard of being a communication between
13 the attorney and the client, that that -- in anticipation of
14 litigation and in preparation for trial, then that met the
15 attorney/client privilege and that once that standard was met,
16 that was all that needed to be addressed and that that was
17 sufficient for making a showing.

18 JUDGE SIPPEL: Well, I don't. I made that -- I
19 tried to state that upfront. My main concern is with respect
20 to work product.

21 MR. HOWARD: There's much attorney -- all of this --
22 all of this material that's listed here as attorney/client
23 privilege is attorney/client. It's not -- it's listed as
24 attorney/client and work product because it is both.

25 JUDGE SIPPEL: Well, it doesn't come all together

1 through that clearly with respect to each one. For example,
2 attorney/client and work product -- I'm just doing this as an
3 illustration now. I'm not going to argue each of these points
4 with you. I understand what you're saying. I don't say --
5 I'm not -- this is -- these issues are very, very difficult.
6 They are very, very difficult and I want to be able to make a
7 ruling and be absolutely clear in my mind that I've made the
8 right ruling and I feel that this is really the only way that
9 I can do it.

10 But you've got an Item Five under attorney/client
11 and work product, for example, notes dated November 2, 1993 in
12 preparation for and used at a meeting with Emily Barr
13 regarding Attachment Eight. Well, that doesn't tell me
14 anything about what might've been communicated by Emily Barr.

15 MR. HOWARD: We would submit, Your Honor, that you
16 don't need to know what was communicated since it was a
17 meeting that was conducted in preparation for this proceeding
18 because that's attorney/client privilege.

19 JUDGE SIPPEL: Not necessarily. Not necessarily.

20 MR. HOWARD: If we had revealed more about what
21 occurred during that meeting, that would've been a waiver of
22 the privilege with respect to the substance of that
23 communication. We were in a Catch-22 position.

24 JUDGE SIPPEL: I've said -- I've said this right up
25 front, that this is a very difficult process. It's a

1 difficult process for the attorneys, for the parties, and for
2 the judge. But once you get down this road and get into it,
3 it's awfully difficult for me to just write this off and say
4 that, well, you've met -- you fall within the technical
5 framework of how the rule is stated and therefore, you get --
6 there's no sense in my going any further with it. I just
7 can't do it.

8 MR. HOWARD: May I argue one last thing or have you
9 heard enough on this subject?

10 JUDGE SIPPEL: Well, I -- go ahead.

11 MR. HOWARD: In this case in particular, where there
12 hasn't been a showing of the need for this material, that I
13 understand at all as to how this is going to advance their
14 case, that it seems to me that that would reduce the burden on
15 the person asserting the privilege dramatically and what is it
16 that they are looking for in these documents that is going to
17 assist them.

18 We only have general -- in terms of our responding
19 to the request and saying this should not be produced because
20 it's privileged, dealing with the subject that you have
21 described as being the subject of your inquiry, we only have
22 their general assertions of, "It would be relevant for us to
23 get this information," or "It would be useful for us to have
24 this information." That's all there is and that doesn't come
25 close to meeting the standard for overcoming these privileges

1 and thus, a blanket, if you will, response is really the
2 appropriate one to a blanket claim.

3 JUDGE SIPPEL: Just bear this in mind, Mr. Howard.
4 They're not getting the documents yet. They haven't come
5 close to getting the documents. It's just a question of me
6 getting the documents and I'm not looking for this. I mean,
7 this is not a job that I really relish. This aspect of it, I
8 should -- I want to be careful when I say that. But it's -- I
9 have tried to think this through both ways and I just can't
10 come up with a different conclusion. Since I am looking -- I
11 tried to carve out the ones that I clearly don't want to see.
12 Mr. Leader?

13 MR. LEADER: Could I just ask a question on notes of
14 attorneys, Item Eleven? Was that an item which you sought
15 review -- sought to review?

16 JUDGE SIPPEL: This is work product, notes of
17 attorneys. I eliminated the notes of -- dated February 3
18 regarding Janet Covington's notes.

19 MR. HOWARD: Could I just make a statement or --

20 JUDGE SIPPEL: I don't know why --

21 MR. HOWARD: I mean, I think perhaps you should
22 reconsider and look at it because the notes of -- regarding
23 Janet Covington's notes dated February 3rd is approximately a
24 week before the Janet Covington notes were discovered.

25 JUDGE SIPPEL: I agree with that. I am going to --

1 I don't know why I had made that notation. But I am going to
2 require Number Eleven to be produced as well. This is not
3 going to -- well, I'll tell you, as to both parties. This is
4 not going to take me very long once I get the documents. It
5 really isn't and I am not going to -- I am not going to turn
6 over any documents that meet the privilege. That's it.

7 MR. HOWARD: You don't expect --

8 JUDGE SIPPEL: And the showing of substantial need,
9 I -- you know, you've got a point, Mr. Howard. You have the
10 difficulty of not being able to disclose enough to convince me
11 on your papers that I shouldn't look at these documents. Mr.
12 Leader's at a disadvantage because he has the difficulty to
13 show whether or not there is cause -- a sufficient need or
14 substantial need for the information when he doesn't have any
15 idea what the information is. So I'm the one that's left.
16 I'm it and that's the way it's going to be. Go ahead.

17 MR. HOWARD: Just relying on -- we took -- in
18 preparing our responses, Your Honor, we relied on your order
19 which directed that Four Jacks shall assure that there will
20 not be any request for the examination of documents that are
21 clearly within the attorney/client claim, for example,
22 correspondence from counsel to client containing legal advice.
23 And that's exactly what many of these documents -- attorney/
24 client and work product privilege are listed on Item -- on
25 Page Eight.

1 Number Four, memorandum to our client from Ken
2 Howard and Dave Roberts regarding Attachment E, memorandum to
3 our client from Ken Howard and Dave Roberts dated August 6th
4 regarding ascertainment documentation, Attachment E. That's
5 absolutely unquestionably within the scope of that order and
6 there's -- what you said, that they should not even ask for,
7 and now they're succeeding in having those documents be
8 reviewed in camera.

9 JUDGE SIPPEL: Well, I wasn't --

10 MR. HOWARD: It just -- it pays off for Four Jacks,
11 over and over again, to disregard the instructions that
12 they've received and benefit from it.

13 JUDGE SIPPEL: All right, all right. Do you want --
14 go ahead, Mr. Leader.

15 MR. LEADER: I'm not going to -- you know, I'm not
16 going to dignify that by commenting, other than how do we know
17 what's in the notes? How do we know that it's legal advice?
18 Not that I'm imputing or impugning Mr. Howard. Maybe Mr.
19 Roberts or someone said well, destroy the notes. That's not
20 legal advice. Or bury the notes. That's got nothing to do
21 with legal advice and that's something that clearly bears on
22 the issues in this case.

23 JUDGE SIPPEL: Well, that's -- now, let me respond
24 to that. I mean, that's your comment, but let me just respond
25 to that kind of a reaction. I am not looking for that kind of

1 information. That is not why I'm going this, all right? I'm
2 doing this because -- I said it before and I'm going to say it
3 again. I don't see how I can do justice to the issue in this
4 discovery without doing this, without going through this.
5 It's not because I'm inclined to look for reasons to give
6 people information or give them documents that is privileged.
7 There's no question about that.

8 But if you read these Commission cases, the
9 Commission's -- particularly these Review Board decisions with
10 how discovery is viewed with -- at the Commission. It's --
11 the parties are cautioned not to keep -- I don't want to just
12 say relevant information, but information which is critical to
13 a case. Don't hide behind attorney/client privilege with
14 respect to that.

15 Now, that's my general -- that's my general
16 statement as to what the Review Board -- that's not my
17 interpretation of what the law is and I'm not going to -- I'm
18 going to apply the law the way the law is. I'm going to apply
19 the traditional, standard test for work product and
20 attorney/client, all right?

21 But I -- in terms of saying I'm going to look at it
22 for this document and not for that document, Mr. Leader, did
23 he follow my instruction? Well, maybe he did, maybe he
24 didn't, maybe -- but my point is, is that this -- these
25 documents are not that extensive.

1 I'm not -- what I was trying to avoid was asking for
2 a lot of -- copies of letters that were going back and forth
3 between clients with respect to the case in general. The
4 numbers of documents here is not that extensive as I count the
5 numbers on them. They're just not that extensive. Now,
6 unless these are 14-page letters or memoranda or something,
7 then --

8 MR. HOWARD: Some of them are. Some of them are
9 lengthy, yes. Your Honor, could I ask for limited
10 reconsideration of three -- as I mentioned, three specific
11 items as being within the blank scope of privilege and not to
12 be --

13 JUDGE SIPPEL: Yes, I will. But I want to say this.
14 You know, it certainly is not fair to me to give me a list of
15 documents and if you're going to have documents of that extent
16 -- to that extent, that is in terms of the number of pages,
17 that you're not disclosing, I don't know what I'm dealing with
18 here. These could be one or two-page memos as far as I'm
19 concerned. You haven't given me any indication, even in your
20 protective order, that what we're dealing with is voluminous,
21 complex cases -- memos that go from this, that, to the other.

22 It's easy for me to look at and make that decision.
23 If it's a -- burdensomeness is another standard which I can
24 apply in my in camera review. That goes again -- that is part
25 and parcel of the substantial need test. So the fact that you

1 | give me a 17-page document does not mean that I have to read
2 | every one -- every page. I can tell pretty quickly what's in
3 | there and I know it's a -- you know, it's a burden for you to
4 | give them to me. I recognize that.

5 | MR. HOWARD: Just the three that I -- that plainly,
6 | without -- Mr. Leader argues that some of the materials in the
7 | correspondence from attorney to the client may not be
8 | protected because they are --

9 | MR. LEADER: I didn't say that.

10 | MR. HOWARD: -- because they may not have involved
11 | legal advice. Well, there was no showing, although we --

12 | MR. LEADER: Well, you made the blanket -- you made
13 | the blanket assertion, Mr. Howard, that everything contained
14 | in there was legal advice and all I was saying is it may be,
15 | it may not be, but let the judge look at it and determine
16 | that.

17 | JUDGE SIPPTEL: Let Mr. Howard complete his
18 | statement.

19 | MR. HOWARD: With respect to a Commission case
20 | decision that cites the elements of attorney/client privilege,
21 | it is plain that without going further, if it is a
22 | communication from the client to the attorney with an
23 | expectation of confidentiality, that that is covered by the
24 | privilege and that there need not be further disclosure as to
25 | the scope of the -- as to what the communication involved and

1 | that is that the elements of attorney/client privilege are
2 | one, the existence of an attorney/client relationship, two,
3 | communication from the client to his or her attorney, three,
4 | the communication is legally related, and four, there's an
5 | expectation of confidentiality.

6 | And three of the documents that are on the list of
7 | documents that he produced plainly fall within the scope of
8 | that exception. It's Number Six, Seven, and Eight under
9 | attorney/client and work product on Page Eight.

10 | JUDGE SIPPEL: Oh, that's on Page Eight? What do
11 | you say to that, Mr. Leader?

12 | MR. LEADER: I say they're all between lawyers, not
13 | between attorney and the client.

14 | JUDGE SIPPEL: No, this is -- he's talking about on
15 | Page Eight, Six, Seven and Eight.

16 | MR. LEADER: Oh, Page Eight?

17 | JUDGE SIPPEL: Yes.

18 | MR. LEADER: Page Eight of his --

19 | JUDGE SIPPEL: Page Eight of their list of the
20 | scheduling --

21 | MR. LEADER: Well, I say that you've already --

22 | JUDGE SIPPEL: -- of documents.

23 | MR. LEADER: I say that you've already ruled, that
24 | you're not turning the documents over to us, and that I think
25 | that administrative due process necessitates that you look at

1 | these and make your own independent determination.

2 | JUDGE SIPPEL: Well, as I said -- well, my initial
3 | statement, when I went on the record, was that I had -- my
4 | main focus was on work product and as I went into this, I saw
5 | that there were -- that maybe it would make sense for me to
6 | take a look at a bigger universe of documents. I'm going to
7 | do -- I did reconsider for you, Mr. Leader, Number Eleven --

8 | MR. LEADER: Well, but, you did reconsider for me,
9 | but that was because they're claiming privilege on a document
10 | that talks about notes that they said didn't exist and they
11 | couldn't find and then they were found a week later. Well,
12 | how could you have notes about something a week before? I
13 | think mine was a legitimate thing. In fact, I think this is a
14 | question of law and I don't think there's a sufficient
15 | information in these description on Page Eight for you to say
16 | that he meets the legal test contained in -- that he just
17 | read.

18 | JUDGE SIPPEL: I'm going to further reconsider Page
19 | Eight, the category of documents under attorney/client and
20 | work product and I'll let you know tomorrow what I want to do
21 | with those.

22 | MR. HOWARD: I'll give you the case that I was
23 | citing that from, Your Honor.

24 | JUDGE SIPPEL: I probably have it. Yes, go -- is it
25 | one of the Commission cases?

1 MR. HOWARD: It's Robert F. Peel, Jr.

2 JUDGE SIPPEL: Yes, I know that. The appeal case?

3 MR. HOWARD: 69 Rad Regs -- a Commission case as
4 indicated here. 69 Radio Regs 2d, 1547 and 1548.

5 JUDGE SIPPEL: All right. I wanted to make -- I
6 think I did make that clear, that there's -- obviously there's
7 a lot of discretion in this. I want to take a look at what I
8 want to take a look at in the context of this and once I get
9 into the process, I'm not going to necessarily restrict myself
10 to what I'm going to look at. I certainly am going to
11 restrict myself in terms of why it ought to be turned over.

12 But I will take a look at that case and take another
13 look at those descriptions. Now, you're going to let me know
14 -- you're going to let me know, by the end of the day, how
15 long this is going to take you? Or maybe you and Mr. Leader
16 can talk about this and just give me a time frame.

17 MR. LEADER: I don't intend to rush him. I think he
18 ought to have a chance to go through them.

19 MR. HOWARD: Just to make sure, with respect to the
20 attorney/client privilege documents, Your Honor, those would
21 be privileged in toto. Is it just the work product that
22 you're asking that -- may I suggest that it would only be the
23 work product, that there would be some responsibility to
24 highlight the legal impressions that would be --

25 JUDGE SIPPEL: Exactly.

1 MR. LEADER: Mental impressions.

2 JUDGE SIPPEL: Mental impressions. Exactly,
3 exactly. If the attorney/client privilege applies, and it
4 will be looked at -- the document would be looked at very
5 carefully to be sure that that's -- and I will do that. I
6 mean, I will independently -- as long as you tell me which or
7 whether you're going on one or the other or both, that is work
8 product, attorney/client privilege, or both. I'll look at the
9 documents. There's not that many here, so I can do this.

10 MR. HOWARD: Another question, Your Honor, is
11 there's many of these documents have material in them that are
12 not relevant to the scope of the document production request
13 whatsoever. Would you like us to redact that material or to
14 leave it in place?

15 JUDGE SIPPEL: No, that won't be necessary, unless
16 there's something in there that you don't want me to see under
17 any circumstances. Does this have to do with -- this has to
18 do with the case, doesn't it? It has to do with --

19 MR. HOWARD: Yes, sir. Yes, sir. It's just a
20 matter of -- there's --

21 JUDGE SIPPEL: You might have -- let me say -- give
22 you this. You might have -- an example, you might have a
23 memorandum that covers five subjects, one of the subjects
24 being what you've disclosed here and the other not having
25 anything to do with that particular subject. Is that what