ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-372

TITLE FEDERAL TRADE COMMISSION, ET AL., Petitioners
v.
GROLIER INCORPORATED

PLACE Washington, D. C.

DATE March 29, 1983

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IN THE SUPREME COURT OF THE UNITED STATES

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FEDERAL TRADE COMMISSION, ET AL., :

Petitioners :

v. : No. 82-372

GROLIER INCORPORATED :

- -x

Washington, D.C.

Tuesday, March 29, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:10 o'clock a.m.

APPEARANCES:

KENNETH S. GELLER, ESQ., Office of the Solicitor General, Washington, D.C.;

on behalf of the Petitioners.

DANIEL S. MASON, ESQ., San Francisco, California;

on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Federal Trade Commission against Grolier Incorporated.

Mr. Geller, you may proceed whenever you are ready.

ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.,
ON BEHALF OF THE PETITIONERS

MR. GELLER: Thank you. Mr. Chief Justice, and may it please the Court:

This is a Freedom of Information Act case in which the Respondent, Grolier Incorporated, seeks access to work product prepared by Federal Trade Commission attorneys for a civil action that ended several years ago. The Commission denied the FOIA request on the ground that the documents were protected by the attorney work product privilege and were therefore exempt from disclosure under Exemption 5 of the FOIA.

Exemption 5 protects against mandatory disclosure of memorandums or letters that would not be available by law to a party in litigation with the agency, and it's quite clear from the legislative history of the FOIA and from this Court's decisions that Exemption 5 incorporates the work product privilege and is intended to protect the work product of Government

attorneys against mandatory public disclosure.

The Court of Appeals nonetheless ordered the documents disclosed. The D.C. Circuit held that attorney work product from terminated litigation remains privileged only when litigation related to the terminated action exists or potentially exists.

We have sought review of this holding because it's contrary to every other appellate ruling on the temporal scope of the work product privilege and because it would have a particularly devastating effect on the conduct and working papers of Government attorneys.

Now, the facts of this case can be briefly stated. In 1972 the Government brought a civil action against the Americana Corporation, which is a wholly owned subsidiary of Grolier, charging Americana with violating a 1949 cease and desist order prohibiting false advertising and misrepresentations in the door to door sale of encyclopedias. The suit was dismissed in 1976 when the FTC refused to comply with a discovery order requiring it to turn over certain documents relating to a covert investigation of Americana's sales techniques.

In 1978 Grolier brought this FOIA suit seeking access to records relating to the Americana investigation. In response, the FTC turned over

literally 7,000 pages of documents, but it withheld a very few documents on the ground of attorney work product.

The district court conducted an in camera examination of the disputed documents and agreed with the FTC that they constituted attorney work product. The district court found that the documents encompassed opinions by FTC attorneys regarding the evidentiary needs of the Americana action and discussed specific methods of obtaining evidence for use in that litigation.

The district court therefore found that the documents fell squarely within the work product privilege and were therefore exempt from disclosure under Exemption 5 of the FOIA.

QUESTION: Mr. Geller, are these documents among those that were refused to be disclosed pursuant to the 1976 order?

MR. GELLER: I believe they are.

QUESTION: So they're the same documents in both cases?

MR. GELLER: I believe some of them are the same documents.

As I noted a moment ago --

QUESTION: And the Government took no appeal

or sought review in any way?

MR. GELLER: That's correct, of the dismissal of the Americana action.

QUESTION: Yes.

MR. GELLER: Yes.

The Court of Appeals --

QUESTION: And Mr. Geller, in the earlier action, as I understand it, the district court had actually ordered that the documents be disclosed under Rule 26; is that right?

MR. GELLER: Yes. The district court found that Americana had made a sufficient showing of need for the documents and of hardship to overcome the qualified privilege that attached to the documents, and the judge ordered the disclosure of the documents. But they were not disclosed and instead the suit was dismissed.

QUESTION: Why can't we say that if a district court has ordered disclosure then that's within the category of documents referred to by Sears that are routinely disclosed?

MR. GELLER: Well, I think what the Court -- what the exemption means and what the Court said in Sears is that Exemption 5 protects against documents, disclosure of documents that would not be routinely disclosed in the sense that are not subject to any

privilege.

But work product documents, even the documents involved in this case, are not routinely disclosed. They were only disclosed in the Americana action because that particular plaintiff was able to make a sufficient showing of need. But if --

QUESTION: But I suppose they are routinely disclosed if the court orders them to be disclosed.

MR. GELLER: Well, that can't be what the exemption means or what this Court meant when it used the phrase "normally privileged," or else it would wipe out all qualified privileges, because every qualified privilege by definition can be overcome by a sufficient showing of need. But that's not the category of documents that would be routinely disclosed.

I think what the legislative history clearly shows is that Exemption 5 was meant to protect documents that are subject to absolute or qualified privileges, and clearly it meant to encompass documents subject to the work product privilege.

Now, the D.C. Circuit reversed and, even though it agreed that these documents were unquestionably subject to the work product privilege, the court noted that the Americana action, the action as to which these documents had been prepared, had ended.

And the court announced that in its view the work product privilege should not extend beyond the termination of the litigation for which the documents were prepared, except where litigation related to that first litigation exists or potentially exists.

The court, however, quickly rejected the notion that an FOIA suit such as Grolier's here could be considered a related action, and then it announced that it didn't appear that there were any other related actions in existence or on the horizon. Therefore, the court remanded the case to the district court to reassess the work product claim in light of the test it announced in regard to related litigation and in light of the fact that the court suggested that there was no so-called related litigation in existence.

We believe that the Court of Appeals decision is plainly wrong for two independent reasons: First, the court's interpretation of the duration of the work product privilege is fundamentally inconsistent with the underlying purposes of the privilege, and it creates a test that's frankly unworkable.

And second, even if the Court of Appeals were correct in its ruling as to the temporal scope of the work product privilege and the fact that it's not perpetual in civil discovery, that wouldn't mean that

those same qualifications exist under the FOIA because, as I mentioned a moment ago in responding to the question of Justice O'Connor, documents may be obtained under the FOIA only if they would be routinely discoverable in civil litigation, in other words not subject to any privilege. And even under the D.C. Circuit's newfangled work product test, attorney work product from terminated litigation would not be routinely disclosed in subsequent litigation, but would only be disclosed when certain additional criteria are met.

QUESTION: Mr. Geller, your argument suggests that there's a lot more analytical coherence to that exemption than I've ever thought there was. Do you really think that the language "routinely disclosed" and so forth lends itself to rather precise application based on analogies to ordinary civil lawsuits?

MR. GELLER: The Court has suggested in cases like EPA against Mink that just by virtue of the nature of FOIA litigation, for example, the plaintiff needn't make any showing of need. The civil discovery privileges have to be applied by way of rough analogies. But with the work product privilege it's left no doubt in cases such as Sears and Roebuck and Federal Open Market Committee that Exemption 5 was

plainly intended to incorporate the work product privilege.

The legislative history of the Act shows that it was intended to apply under the FOIA just as it does in civil litigation, and it's quite clear that work product is always subject to a privilege. It may only be a qualified privilege, especially when we're dealing with non-opinion work product. But there really is no uncertainty, I think, as to this aspect of Exemption 5 that it's not routinely discoverable.

QUESTION: Isn't there a problem, though, in carrying over the statutory language when you have a totally abstract defendant, the Government, and there isn't any live lawsuit, in which you can ordinarily draw the conclusions you have to draw and decide whether to allow discovery of something or not? It's just kind of a half a lawsuit.

MR. GELLER: I think that's one of the severe problems with applying the D.C. Circuit's related litigation test in the context of a FOIA case, which I hope to get to in a little while. But it's clear from Sears and Roebuck that the work product privilege applies in the FOIA context and that a plaintiff's need for it is to be assessed under the least compelling circumstances.

In other words, it's analogized to a plaintiff who in civil discovery could show nothing more than mere relevance. And it's quite clear that in civil discovery a plaintiff who can show nothing more than mere relevance is not entitled to work product, because it's subject to a qualified privilege and he has to show more than mere relevance, he has to show need and hardship.

QUESTION: Mr. Geller, does Exemption 5 also encompass material that's part of the deliberative process within a Government agency?

MR. GELLER: Yes, it does.

QUESTION: And could the Government have claimed a privilege under that aspect of the rule in this case?

MR. GELLER: Well, as to certain documents the Government did, as to the work product documents in this case. Many of them are memoranda, for example, either to the files or memoranda that are not being written to a final decisionmaker but are merely being written in order to assess various aspects of a particular litigation, and therefore those documents may not fall within the deliberative process privilege, although they would seem clearly to fall within the work product privilege, as both the district court and the Court of Appeals in this case held.

So while in some categories of cases there may be an overlap between the two privileges, in this case I don't think there is an overlap and in a great many cases there wouldn't be an overlap. All the Government would have available to it would be the work product privilege.

QUESTION: And Exemption 7 would not have covered the Government's request here, I take it?

MR. GELLER: Well, Exemption 7 has a number of facets to it. Not only do you have to show that there's a pending enforcement action, but you also have to show that it falls into one of the other categories of documents that are protected from mandatory disclosure, and no Exemption 7 claim was made here.

But it's quite clear this was work product and Congress intended work product to be incorporated within Exemption 5. That is one of the very few things that is absolutely clear from the legislative history of the FOIA and from this Court's decisions interpreting that exemption.

Now, I'd like to begin by discussing the first of the flaws in the Court of Appeals opinion. I think it's fair to say that the principal purpose of the work product privilege is to create a zone of privacy within which a lawyer can prepare his case without having to

worry that the memos he writes will later be freely disclosed to his adversaries in a way that could harm him or his clients.

This Court in the seminal case of Hickman against Taylor explained the harms that would occur to the adversary system if work product materials were not subject to at least a qualified privilege in civil discovery. Attorneys would be reluctant to put their thoughts down in writing and inefficiency and unfairness would inevitably develop in the giving of legal advice and in the preparation of cases for trial.

QUESTION: Mr. Geller, may I ask you a kind of a -- maybe it's not very helpful, but in the attorney-client privilege area, the privilege belongs to the client. In the work product area, is it clear who owns the privilege, whether the client or the lawyer?

MR. GELLER: I would think it would be the lawyer. It's to protect the legal system.

QUESTION: You think it's the lawyer rather than -- here it's the client that's really relying on it in this case.

MR. GELLER: Well, here the lawyer and the client -- it's hard to distinguish in Government litigation. The privilege is intended to protect the lawyer, the process by which the lawyer puts his case

together.

QUESTION: I understand.

MR. GELLER: Many of the documents that are put together would be quite harmful to the client if disclosed and the lawyer might have a fiduciary obligation not to disclose those documents in a way that would harm the client. But I would imagine in a case involving a waiver question, which this case doesn't raise, you would look perhaps as to whether the lawyer has made --

QUESTION: But you would think in this case, for example, if the lawyer who ran this investigation, whoever it may be, had left the Government service and decided he was willing to waive the privilege, you'd probably assume he could do so?

MR. GELLER: Well, the papers that were being prepared were not his personal papers. They're the papers of the Government. I'm not sure he could take them with him and freely disclose them. In Government litigation it's somewhat different than perhaps in private practice.

But this case certainly doesn't raise any question of waiver of the privilege. If for example the Government had disclosed these documents in the Americana litigation in response to the discovery order,

perhaps there would be a question of waiver in a subsequent FOIA case.

QUESTION: Mr. Geller, I don't mean to be technical, but whose property is the work papers, the Government's or the lawyer's? Isn't it the Government's property?

MR. GELLER: I think it would be the property of the Government, yes.

QUESTION: That's what I thought.

MR. GELLER: Yes.

QUESTION: But you wouldn't carry that -- you don't intimate any analogy as between a private lawyer and his client?

MR. GELLER: In terms of ownership?

QUESTION: The ownership.

MR. GELLER: No.

QUESTION: The private lawyer owns --

MR. GELLER: Yes.

QUESTION: -- and absolutely controls the work product.

MR. GELLER: That's my understanding. That's my understanding.

QUESTION: But when the Government has a lawyer, the Government and the lawyer are more or less merged into one, are they not?

MR. GELLER: I think that's one of the problems with answering Justice Stevens' question in the context of Government litigation. But I'm not sure that the answer to that question is material to the outcome of a case such as this under the Freedom of Information Act. I mean, the Freedom of Information Act only applies to Government documents. Quite clearly these are Government documents.

QUESTION: For example, when a Government lawyer leaves the Government, the Department of Justice or whatever, he may not take his papers --

MR. GELLER: No, he may not take --

QUESTION: -- with him --

MR. GELLER: Right.

QUESTION: -- unless he has special permission.

MR. GELLER: That's correct, and in that sense he would not be free to waive. If that's the sense of Justice Stevens' question, he would not be free to waive the work product that adheres in any papers that belong to the Government. But there's really no question of waiver of any sort in this case.

Now, the concerns that I was mentioning earlier about why there is a work product privilege in the first place are perhaps most compelling during the

period when a case is being litigated, but it seems to us it's equally clear that many of the harms that the work product privilege is designed to avoid would be almost as likely to occur if the privilege were to end with the termination of the litigation for which the documents were prepared, because attorneys would still be reluctant to commit certain thoughts to writing if they realized that they'd have to share those thoughts with an opponent at any time, not just while the case is alive.

And if attorneys did prepare memoranda that might reflect unfavorably on them or their clients or their legal theories, they perhaps would have a tremendous incentive to destroy those documents at the time the case ended if the work product privilege ended at the same time. This took would lead to inefficiencies in the giving of legal advice or in the preparation of cases for trial.

The principal reason that's generally given for construing privileges narrowly is that it inhibits the search for truth. But it's hard to see how the search for truth would be enhanced by a rule that led people to destroy documents rather than take a chance that they might have to be turned over at some later time.

So essentially for these reasons, there's unanimity or general agreement among the lower courts that the work product privilege really can't cease at the time the litigation ceases, but has to to some extent retain its privilege status thereafter. Even the D.C. Circuit agreed with that in this case, because they held that the privilege survives in certain instances where there's related litigation or potential for related litigation.

But it seems to us that that test is not responsive to the concerns that underlie the work product privilege and it's not at all workable in practice. First of all, I think it's plainly wrong to conclude that the harms associated with allowing discovery of work product are limited to discovery in so-called related actions. The harm can be equally as great when discovery is made in a so-called unrelated action.

But even if we were to accept the Court of Appeals' premise that there are differences about so-called related and unrelated actions, the principal flaw in the D.C. Circuit's test is that it's impossible to apply the test. There would be no certainty. There has to be a substantial degree of certainty, predictability as to the scope of the protection, if the

work product privilege is going to achieve the results that justify its existence in the very first place.

The Court observed in Hickman against Taylor that if attorneys know that their work product is subject to discovery they'll behave in a way that would necessarily be harmful to the adversary system. And many of the harmful consequences the privilege is designed to avoid are therefore the result of what a lawyer can reasonably anticipate at the time he's putting the materials together. Certainty as to the scope of the privilege is therefore essential.

This Court said in a closely related context in the Upjohn case just a couple of terms ago that a privilege that's uncertain in scope or that leads to widely varying results in seemingly similar cases is really no better than no privilege at all.

QUESTION: But there really is no certainty, is there, under Rule 26 of the Federal Rules of Civil Procedure? There are provisions whereby someone can gain access to documents.

MR. GELLER: Well, if a particular showing of need is made. That only says, Justice O'Connor, that it's a qualified privilege, that the balance is not as strongly tipped in one direction. But that qualified privilege even applies during the time that the

litigation is alive, and all we're saying is that it should retain its qualifiedly privileged status later. There's always going to be some uncertainty when you're dealing with qualified privileges, and we agree to that.

But the D.C. Circuit has extended, expanded the level of uncertainty to the situation where it would be totally unworkable. A lawyer wouldn't know at the time he's putting papers together whether some later judge might find that some litigation he has no notion is even going to arise is a related litigation, and he has no reason to know whether there's a potential for related litigation years later when someone's seeking access.

QUESTION: If you're right in your analysis of what the routine discovery language of Exemption 5 means, that is that all the person, the hypothetical plaintiff or defendant making a showing under Rule 26, has shown is relevancy --

MR. GELLER: Yes.

QUESTION: -- then I presume that work product would be almost automatically denied?

MR. GELLER: I think that is what Congress intended. That -- first of all, what I said about what Exemption 5 means is I think exactly what the Court said

in Sears, in NLRB against Sears and Roebuck, in which they said, the Court said, that a requester under the FOIA is to be judged, is to be put in the place of a person in civil litigation with the least compelling need for the information. In other words, someone who cannot make any showing of need, who cannot overcome any qualified privileges.

And I'd say it would be quite bizarre if that wasn't what Congress intended, because if that wasn't what Congress intended Congress would have been repealing the work product privilege and every other qualified privilege in Government litigation, because it would mean that any person in litigation with the Government who couldn't make the showing of need necessary to overcome the privilege in civil litigation would just file an FOIA request and he would get it.

It's quite clear from the legislative history that that's not what Congress had in mind.

I should add that this whole notion of work product privilege as restricted to so-called related cases is based on a rather myopic and I think naive view of litigation, especially Government litigation, because especially with Government litigation it's hardly the case that the Government's interests end when a particular case ends.

Each case is generally part of a much larger litigative scheme. In this case, for example, this unfair method of competition case against Americana was just part of the FTC's continuing efforts to police the marketplace to eliminate deceptive practices, and much of the work product is not related to one particular case but may lay out the Government's litigative strategies in a whole range of cases.

It would be quite useful to potential adversaries of the Government or regulatees to wait until some case terminates and then get the work product for that case. In fact, Grolier in this very case is not particularly shy about why it wants this work product. In its complaint which is reprinted at page 12 of the joint appendix, Grolier says that it wants the information in this case which is subject to the work product privilege because Grolier is a Respondent in an above-mentioned adjudicative proceding that was then before the FTC, and plaintiff, that is Grolier, believes that such records may have some bearing on certain issues raised in that proceeding.

And in a letter that Grolier sent contemporaneously to the FTC in connection with its FOIA request for these work product documents, it says: "We seek access to the records in question because we

believe such records may have some bearing on certain issues raised in another pending FTC proceeding against Grolier raising similar sorts of unfair method of competition issues."

So I think it would be devastating and it could not have been within the contemplation of Congress that this sort of work product material would have to be given over even if the case, one case, may technically have ended.

Finally, the related litigation test is flawed because it's wholly unresponsive to the concerns underlying the privilege, because it ignores the fact that subsequent unrelated litigation often precedes the institution of related litigation. And if the FOIA request were made at the time when there was no litigation pending, then the materials would have to be given over and then people could use that to bring a related suit.

That's precisely what the work product privilege is designed to prevent, is the use of one lawyer's opinions, thought processes, legal research, for the purpose of helping his adversary bring a lawsuit.

QUESTION: Mr. Geller, what do you say about their argument that there should be an exception for

documents that show unethical conduct by the lawyer?

MR. GELLER: Well, a number of responses to that. One is that that is an issue that's raised for the first time in this case. There's no proof that there was any unethical conduct in this case. They never made that argument below. The district court in the Americana litigation found no unethical conduct. The district court in this case --

QUESTION: Well, it is -- or maybe I just get this out of the briefs. But isn't there some basis for believing that the documents indicate that the Government put an informer in their training program and that sort of thing? Or is that just speculation?

QUESTION: There's nothing unethical about that, is there?

MR. GELLER: There's nothing unethical or illegal about that. The word "informer" is a somewhat loaded phrase.

The appendix contains a discussion of what this so-called covert investigation was at pages 42 and 43. But even if I were to pursue it for a moment with you, Justice Stevens, that perhaps some of this work product would be subject in civil litigation to being overcome by proof that it was put together perhaps, you know, equivalent to a fraud or exception to the

attorney-client privilege, it still wouldn't mean in our view that it was routinely discoverable in civil litigation, because it would still be presumptively privileged.

QUESTION: Your "routinely discoverable" argument as I understand it means, if there is any burden on the proponent of discovery in the civil litigation context to overcome any slight objection, then it's not routinely.

MR. GELLER: Yes, if he has to show something more than relevance in the civil litigation context.

But this is an argument that was not made below. It is not the basis for any of the underlying decisions in this case. There's no evidence in the record as to any unethical conduct.

QUESTION: No, but it would be an argument that would sustain the judgment below.

MR. GELLER: Well, I'm not so sure it would, unless you reject our second argument, which is that even if in civil discovery a sufficient enough showing could be overcome -- could be made to overcome the privilege, we still would take the position that that does not satisfy the Congressional test of being routinely discoverable, because, as even the D.C. Circuit agreed, this was work product at the time it was

prepared.

QUESTION: Are the documents in issue before us? I know the Court of Appeals --

MR. GELLER: Well, the documents themselves are obviously not before you. But there is an index, a so-called borne index, in the appendix, which is on pages 36 and 37 of the joint appendix. There is a description of what these documents are.

We were talking about documents 3, 5, 6 and 7. Those are the four documents that are at issue in this case.

QUESTION: But they were examined by the district judge and by the Court of Appeals?

MR. GELLER: Yes, and nobody made any suggestions that they were the product of any sort of unethical conduct. This is something that Grolier has --

QUESTION: But they are not in the papers that are here?

MR. GELLER: I am not aware of whether the record has them, but they're certainly not freely available, and there is a borne index in the record that describes what they are.

Now, I've announced many of the problems that would inhere in the D.C. Circuit's test. But that --

I've just been discovering that test -- discussing that test in the context of civil discovery. It is possible to figure out how the test would work in civil discovery, I suppose, because there really have to be two lawsuits. There's lawsuit one, which is the suit in which the documents were prepared; then there's lawsuit two, which is the suit in which the documents are being sought.

And I suppose some judge could make some judgment as to whether suit one relates to suit two in some as yet undefined way. And of course in civil litigation the person seeking the documents in suit two would have to make some showing of relevance, and that would help the judge make a determination as to whether suit one was related to suit two.

But I have no idea how this test the D.C. Circuit announced would work in the context of an FOIA request, because there is no second suit in an FOIA, in the FOIA context. The D.C. Circuit and Grolier are adamant in saying that an FOIA suit can never be a related suit.

So if I understand what the D.C. Circuit is saying in the FOIA context, it is when an FOIA request comes in for documents in a previous suit the agency and ultimately the courts must ask themselves whether there

is some third suit in existence or potentially in existence, and whether the third suit is related in some as yet undescribed way to the subject matter of the first suit.

This is I think unworkable in practice. We find it hard to believe that that's what Congress meant when they made clear that Exemption 5 incorporates the work product privilege, and we would ask this Court to reject that view of the work product privilege in the context of a FOIA request.

If there are no further questions, I'd like to reserve the balance of my time.

CHIEF JUSTICE BURGER: Very well.

Mr. Mason.

ORAL ARGUMENT OF DANIEL S. MASON, ESQ.

ON BEHALF OF RESPONDENT

MR. MASON: Thank you. Mr. Chief Justice and may it please the Court:

Preliminarily, in response to Justice O'Connor's question, it is true that the Government did not raise the deliberative process exemption. On the petition for rehearing the Court of Appeals sua sponte noted that fact, Your Honor.

Now, the Government does not like the facts of this case, and accordingly they don't talk about them.

They didn't talk about them in the certiorari petition and they don't talk about them in the brief.

In response to Justice Stevens' question, Your Honor, this case is unique in the annals of FOIA litigation in this Court and in every other case that we know of in that the documents that are the subject of this appeal were ordered produced in litigation by Federal District Judge Fisher. No other case has had these circumstances. Not certain documents the Government called; these very documents. That is undisputed in this record.

The Government neither appealed that decision nor did they appeal the dismissal with prejudice when the Government did not return those documents.

QUESTION: What showing did they make to get the documents from the judge?

MR. MASON: What showing did the Americana Corporation make, Your Honor? The document -- the showing that was made was as follows. After the lawsuit was filed by the Department of Justice against Americana in February 1972, after an answer was filed, after counsel appeared, after discovery commenced, counsel for the FTC told an FTC investigator to go to the company and take a job surreptitiously and try to obtain "supplemental evidence."

Mr. Howerton, the lawyer who gave this instruction, did not tell counsel for Americana that they were doing this. Counsel for Americana discovered this fact and brought this to the attention of the magistrate then conducting discovery proceedings, and the magistrate in an oral opinion ordered the documents produced, the documents being, Your Honor, the documents generated as a result of and pursuant to the so-called investigation. This is --

QUESTION: What was the master's order in response to, a motion to produce documents?

MR. MASON: Yes, Your Honor, a Rule 37 motion filed by the defendant in the Americana litigation. The magistrate ordered those documents produced and --

QUESTION: And of course you just can't get any document you want by making a motion.

MR. MASON: That's correct, Your Honor.

QUESTION: What was the -- what's the standard in Rule 37?

MR. MASON: Well, the standard under Rule 37 -- the Government --

QUESTION: What's the standard under Rule 37 to get documents?

MR. MASON: Well, the standard under Rule 37 would be whether they're relevant, whether it fits all

the other tests. The Government --

QUESTION: What are the other tests? That's what I want to know.

MR. MASON: Well, the main test in civil litigation, Your Honor, under Rule 37 is whether the documents are relevant or may lead to relevant evidence or information in the litigation.

The Government objected and responded by asserting privilege before Judge Fisher and before the magistrate. Judge Fisher in a memorandum opinion which we have in our brief said, I am going to reject the Government's claim of privilege. And all Judge Fisher said is to recite the facts: After the lawsuit was filed, while discovery was under way, counsel for the FTC directed that this particular individual go to Americana and try to obtain supplemental information.

I concede that there was no finding by Judge Fisher of any unethical practices or so forth. But the facts are very clear as to what happened. The Government does not challenge those facts in this case and they did not below and did not take an appeal.

QUESTION: Mr. Mason, you seem to make a great deal of these facts, as if they suggested some impropriety on the Government's part. As I understand it, the Government simply sent one employee, a

Government employee, to infiltrate, if you want to, a client whom they were having adversary proceedings against. But there was no infiltration of the legal representation of that client.

MR. MASON: Your Honor, so the Court is clear, we are not contending that this case should be affirmed because we've shown some ethical violation. All we are --

QUESTION: What ethical violations do you think you have shown?

MR. MASON: Well, Your Honor, I don't know that we've shown any. We think there are facts in the record that raise questions.

QUESTION: Why were you talking about the ethical factors so much when you now tell us that you don't know whether you've shown any?

MR. MASON: Your Honor, there was no finding by the district court of any ethical practice, and I would not tell this Court that it should make a ruling based on any ethical violation that was found below.

QUESTION: Well then why talk about it?

MR. MASON: Because, Your Honor --

QUESTION: To cast some sort of a cloud over the argument here?

MR. MASON: No, Your Honor. The only

reason --

QUESTION: That's the impression you're giving me.

MR. MASON: The only --

QUESTION: Your brief gave me the same impression.

MR. MASON: Your Honor, the only reason we have raised that point is to indicate that this case is slightly different than the type of documents that were generated by Mr. Fortenbas in Hickman versus Taylor. That's the only point we're making on those particular documents. We are not saying that because there was some "unethical violation" that the Government loses that privilege.

We mainly point that out as the facts of this case. The facts of this case are very clear that in point of fact this contact was made. But that is not necessary and we do not urge that the Court has to reach that.

The point we are making is that, based upon the record before Judge Fisher, the judge did order those documents produced. That is clear. We believe under Exemption 5 the result is very clear. Exemption 5 does not apply. The reason Exemption 5 does not apply is because the exemption talks about documents not

available in litigation.

The Government of course has a great deal of difficulty with that argument, and so Mr. Geller and the briefs present a syllogism, and there is some practicality or simplicity to it, but upon examination it falls apart. Here is what the Government says:

Point number one: Documents are available under FOIA only if "routinely available" in civil litigation.

Point number two: To get work product documents in civil litigation under Rule 26 you always have to show some need.

The Government therefore concludes that you may never in a FOIA case ever get work product because to get work product you would necessarily have had to make a showing of need in the private litigation.

That, Your Honor, is simply inconsistent with what this Court has said. Justice Powell, for instance, in his concurring opinion in NLRB against Robbins, which this Court cited with approval in Merrill, makes it very clear that the work product standards under the Civil Rules of Procedure are not as broad as work product under FOIA. Indeed, there are circumstances where this Court has directed work product to be produced in FOIA cases.

For instance, some courts have read the Sears opinion to say work product of a factual nature which winds up in a final opinion is produceable. At least four circuits have held -- Deering Milliken and the Robbins case, and the Fifth Circuit reversed on other grounds -- have said purely factual work product is available.

The Government's argument necessarily would have to have this Court accept the proposition that work product is never available in FOIA. That is not what this Court has ever said and it would have this Court overrule four different Circuits which have said that.

The only point, to respond again to the Chief Justice's comments with respect to what our contentions are with respect to the so-called practices that Mr. Howerton took, are with respect to the Hickman versus Taylor argument that we hear much about. If I might have a brief bit of license with legal history, let us suppose that Mr. Fortenbas, the attorney involved in Hickman, instead of going out after he was hired by the tugboat owners and the underwriters, and instead of interviewing third party witnesses before the litigation had commenced, had advised his clients as follows: Wait until petitioner in Hickman files a lawsuit. After the petitioner in Hickman files a lawsuit then you, my

clients, hire some agents to go talk to the petitioner surreptitiously and try to get some "evidence".

The only point -- that's this case. That is the facts of this case. The only point I am making and that we make in our briefs on that issue -- and again, I don't suggest the Court need reach it, but I think it's important to understand the type of documents we're talking about.

The point that we are making, that if those had been the facts of Hickman versus Taylor I respectfully suggest that the rule announced by the Court in that opinion would have been substantially different.

QUESTION: I'm not sure where you say that, Mr. Mason. It was my impression that Hickman against Taylor laid down the work product rule that work product was not ordinarily or routinely discoverable unless in cases of real dire necessity where the other party simply couldn't get the information in any other way.

Now, if it's relevant information, which I assume you think yours is, I don't see why this is the kind of information that couldn't be gotten in some other way.

MR. MASON: Your Honor, Your Honor is talking about the Howerton documents, how we could have gotten

those in some other way?

QUESTION: Yes.

MR. MASON: Your Honor, we asked for those documents --

QUESTION: Why were they relevant, anyway?

MR. MASON: Your Honor, the reason they were relevant is because the Federal Trade Commission had filed an action against Americana Corporation alleging all types of violations of a cease and desist order. By Mr. Howerton's own concession he had to get "supplemental evidence" to buttress that claim, and he did it in a manner which was inconsistent --

QUESTION: Well, have you ever tried a lawsuit in which you didn't have to go out and get supplemental evidence, sometimes during -- while witnesses were testifying? You never know how your case is going to hold up.

MR. MASON: Your Honor, Justice Rehnquist, the only point we are making -- and it is not a big point in our appeal, but I want to be responsive to Your Honor's questions -- the only point we are making is that the documents that were generated here were generated as a result of an effort by counsel for plaintiff, counsel for the Government, in litigation against defendant, which instructed his client to go, after a lawsuit had

been started, after counsel had been retained by the defendant, and try to go and get some supplemental information or so-called evidence without telling the lawyer for the other side.

We believe that that --

QUESTION: Why on earth would you tell the lawyer for the other side? He'd probably prevent it from having any use.

MR. MASON: Your Honor, because Disciplinary Rule 7.104 says that after a lawsuit is filed and the other side hires a lawyer you, the lawyer for one party, can't approach the other defendant on the subject of the representation or the litigation without advising the lawyer who represents the other party.

QUESTION: Mr. Mason, didn't you a few minutes ago tell the Chief Justice you were not raising any ethical points?

MR. MASON: Your Honor --

QUESTION: Didn't you?

MR. MASON: Yes, Your Honor. That's correct.

QUESTION: So now you're raising them.

MR. MASON: Because Justice Rehnquist asked me the question, Your Honor, and I wanted to be responsive. But that is absolutely correct.

Now, Your Honors, I have suggested and we have

suggested in our brief a very narrow grounds upon which the judgment could be affirmed below, and that is merely to say these documents were available in litigation to a party, they were ordered produced, therefore Exemption 5 doesn't apply, and the Court on those narrow grounds could affirm that judgment.

QUESTION: Mr. Mason, do you think then we should adopt a principle that -- supposing it's not Judge Fisher in New Jersey but Judge Schmaltz in Wisconsin, and he files a perfectly bizarre order directing the Government to disclose information which they would much rather dismiss their lawsuit than conform to. And say all members of any court which would look at Judge Schmaltz' order, except Judge Schmaltz, would think it's just off the wall.

Do you think nonetheless that in an FOIA proceeding one is bound by a discovery order?

MR. MASON: I would assume, Your Honor, the Government does not appeal Judge Schmaltz's outrageous order --

QUESTION: Well, you can't really appeal a discovery order. You can get a mandamus on it.

MR. MASON: Your Honor, a lot of times the Government will take a dismissal with prejudice, as they did in Leggett & Platt, and appeal that up to the

Circuit Court. The Government did neither.

To answer Your Honor's question, yes, because that's what Exemption 5 says, documents available in litigation. They'd have to show that they were not available.

Moreover, the Government's argument that it has to be routinely available, which they take from Senate Report 813 and this Court's statement in Sears, was concerned about the hypothetical plaintiff. Let's not forget, it is conceivable that one could conjure up a hypothetical plaintiff in civil litigation who might be able to show need for a certain document. That is what the Court was concerned about.

Mr. Geller's statement that it is improper to order these documents produced on the theory of routinely available misconstrues the legislative history that this Court has talked about and that clearly is set forth in Senate Rule 813.

I'd like Your Honors -- and if Your Honors want to reach the judgment of the Court of Appeals, I'd like to address that issue also. First of all, counsel is simply incorrect when he states that the Court of Appeals conflicts with other circuits. I assume he is talking about Duplan in the Fourth Circuit, Leggett & Platt in the Sixth Circuit, and Murphy in the Eighth

Circuit.

Those cases indeed hold in the civil litigation context, in the civil litigation context under Rule 26, that work product will not terminate after the litigation is over. Those are Rule 26 cases, not inconsistent with FIOA.

But more important, in each of those circuit court opinions, Your Honor, the courts have said, we might not hold this but for the fact that work product is qualified. Therefore, even under the holdings in those circuit court opinions the plaintiffs, if they were able to make a showing, could still get those documents.

And indeed, Your Honor, in Leggett & Platt the Sixth Circuit remanded and said, although we fashion this rule, if the plaintiff can show in the district court that he really needs this he'll get these documents anyway. The point being that when the Government says the D.C. Circuit's rule conflicts, it's simply not correct.

Moreover, at least two Justices of this Court have hinted that the work product rule should terminate at trial. I refer to Justice White's concurring opinion in United States versus Nobles, concurred in by Justice Rehnquist. And Justice White noted in that concurrence,

number one --

QUESTION: Still just a concurrence.

MR. MASON: It is a concurrence, Your Honor, but I think the language is very persuasive. Justice White says in the concurring opinion: Point number one, Hickman versus Taylor didn't say there was a privilege for work product. Indeed, if the Court carefully examines Hickman versus Taylor, the Court says the documents are not available because they're not discoverable under Rule 26.

Justice White went further and said, there was some reason the Supreme Court in Hickman versus Taylor said, it's not a privilege, it's simply not discoverable, because the Court wanted to leave open the possibility, as I read Justice White's opinion, that maybe this material, this so-called work product, would be available post-discovery.

Justice White also points out in that concurring opinion the reasons for having the work product privilege in discovery, i.e., that a lawyer, be it a Government lawyer or anybody else, would not want to amass the information for fear his adversary will get it, is evaporated at trial. A fortiori, if it is evaporated at trial, clearly it's evaporated when the litigation is dismissed.

And the D.C. Circuit went farther than that. It said if there's any related litigation you're not going to get it, and if there's any potentially related litigation.

QUESTION: Mr. Mason.

MR. MASON: Yes, Your Honor.

QUESTION: May I ask you a point on that question. The action that was terminated was the penalty action, is that correct?

MR. MASON: Yes, sir.

QUESTION: And that was an action to penalize Grolier-Americana for violating a 1948 order, was that not it?

MR. MASON: Yes, sir.

QUESTION: Is the 1948 order still on the books?

MR. MASON: Your Honor, I believe the FTC -- and we're representing Americana. I believe it is still on the books, there is still a consent decree.

QUESTION: Well, isn't there a possibility that that order might be violated in the future?

MR. MASON: Your Honor, I would not want to suggest that my client would do that, but yes, there could be a possibility, but that is a pending case. There is a consent degree. That case is not

terminated. That is a pending case. And although the issue of what is related and what is not related is not before this Court, I might readily agree if Your Honor is suggesting that we couldn't -- that that would be a bar to getting documents.

But I would say that, Your Honor, the D.C. Circuit's opinion carefully made it very helpful for the Government because of the fact that if there's a consent degree pending, it just hasn't been terminated and perhaps under Justice White's rule in Nobles the documents could be had. But certainly under the D.C. Circuit they couldn't, and I think, Your Honor, that should give ample protection to the Government.

Now one other point that I think is --

QUESTION: Well, let me just make sure. I'm not totally sure I understand you. If an identical proceeding to the one that was filed in '72 or '76 were filed again and the Government wanted to use the same investigative technique and the same appraisal of evidence that may be disclosed in these documents, why wouldn't these documents then be related to that potential litigation?

I don't quite understand your answer.

MR. MASON: Your Honor, because under the D.C. Circuit's rules the litigation must be terminated and,

step two, there must be no related litigation. Under Your Honor's hypothetical, in fact as the case is, if there is a consent degree which is still on file in a federal district court, the litigation is not "terminated." It's still there. And that really -- I hope that answers Your Honor's question.

But under the facts of that situation --

QUESTION: It would seem -- the answer, it seems to me, is that the documents should not be disclosable because there is potential litigation on the horizon. Maybe I don't understand your answer.

MR. MASON: Yes, Your Honor, but also sine quo non, the reason for having the rule, i.e. terminated litigation, hasn't happened. If there is a consent degree pending in a federal district court and under the D.C. Circuit's rule somebody wants documents relating to that, I would say they don't get them because the litigation isn't over.

QUESTION: Why isn't that this case? That's what I'm really asking.

MR. MASON: Because the documents we're asking for in this case were generated in the enforcement proceeding --

QUESTION: Right.

MR. MASON: -- which was dismissed with

prejudice. We are not, Justice Stevens, asking for documents in the consent --

QUESTION: No, I understand.

MR. MASON: -- but in the underlying litigation.

QUESTION: But you also acknowledge the possibility of another enforcement proceeding of the 1948 order, as I understand you.

MR. MASON: Yes, Your Honor, that's true. I would say with respect to that, if that would be the rule that the Court would want to fashion -- and as I say that --

QUESTION: You'd be happy with that rule, but you'd lose this case.

MR. MASON: Your Honor, we are not asking -- I don't think that's correct, because we are not -- we don't say that there is a relation here between the consent decree and discovery --

QUESTION: No, and the Government hasn't made this argument. But I was just trying to think it through. Well, you go ahead with your argument. I'm sorry.

MR. MASON: All right. Thank you, Your Honor.

I suspect that under your argument each side

could make arguments and that would be, I suggest, decided on a case by case basis in the district court.

I'd like to point out a few other comments with respect to what counsel has said. The D.C. Circuit standard does not go as far as other situations and other arguments the Government has made. In United States versus IBM, in Chief Judge Ellestein's court, the Government urged the rule that you should get documents, work product documents, upon termination of litigation. And there are several district court opinions, albeit only district court opinions, that would go farther than the D.C. Circuit's rule in FOIA.

I would like to make one other point. Most of the argument in the Government's brief, at least half of it, is directed to the situation of civil discovery. This, Your Honor, is a FOIA case. There is no issue here with respect to discovery of work product in civil litigation under Rule 26.

Indeed, in Merrill the court said, we are not going to decide this in the discovery Rule 26 context. Therefore, the Court should examine these parameters not under Rule 26 but under FOIA legislative history that says, as the D.C. Circuit said, disclosure at a zenith. We interpret exemptions very narrowly under FOIA. The Government has a greater burden under FOIA.

The argument that there may be some harm in civil discovery is simply not before this Court, and nothing the D.C. Circuit said would indicate that this particular ruling could apply in the work product rule or under Rule 26.

Finally, I'd like to turn to the so-called parade of horribles that the Government is suggesting will happen if the D.C. Circuit's rule is upheld. First of all, they say if this rule is the case and is upheld the Government will not amass or prepare its case. Probably the best answer I could give to that is what Justice White said concurring in Nobles.

If the purpose of the work product rule, as Justice White said, is to protect the adversary process, when the litigation is over and your adversary cannot get those documents and use them against you, the raison d'etre, if you will, of Hickman evaporates. Now, I submit that that is clearly the situation in this particular litigation. When the lawsuit is over, clearly when it's dismissed with prejudice, not even having to get to the issue of related litigation, the so-called advantage that Hickman versus Taylor was concerned about simply, simply will not happen, because the other lawyer can't use those work product materials against the Government.

The Government has other parades of horribles. The Government says Government attorneys will not write mistakes or memorialize their wrongdoing or errors in the files. Well, there's nothing in the record to indicate that that would happen. This is an argument they make on appeal. But I think it's clear, Your Honor, that lawyers simply do not sit around writing memorandums to the files indicating that they've made all kinds of mistakes. That simply is a red herring.

The Government also says that now we might have to destroy our files, heaven forbid, if this rule stays. Well, in point of fact, as the Government points out, Government lawyers are very transient, and I think this Court should accept the clear proposition that Government lawyers are not going to destroy their files because of this so-called work product privilege.

As I believe Justice O'Connor said, the work product privilege today is qualified. Under the rationale of the Government, all those fears would happen right now, because it may well be that Mr. Geller's work product in this case conceivably could be ordered produced by a federal district judge if some other conceivable party would make a showing of need.

Many of the arguments the Government makes, in

other words, clearly are not going to have any application, because the fears, the so-called concerns, are already there.

With respect to so-called pending investigations, Exemption No. 7 is there. There's also Exemption No. 5. The Government didn't use that exemption in this case. I don't know why. Maybe they forgot about it, maybe they made a mistake. But clearly a concern that Government lawyers would have could be covered under Exemption 7 or Exemption 5.

Let's talk about the related test in my few remaining minutes. The Government says, well, we can't fashion a related litigation test, it's impossible, no court will ever do it. Well, Your Honors, it happens all the time.

Section 5 of the APA has the issue about related litigation, whether if you sit as a factfinder on it, whether you can do that if you were working on the investigation. The FTC has interpreted that many times.

Section 28 U.S.C. 1407, just for another example, the venue statute, says if there are common questions of law and fact maybe they should be multidistricted in one case. United Mine Workers versus Gibbs says, common issues of fact, whether it arises out

of the same concern, whether it arises out of the same circumstance.

I am not suggesting that this Court should adopt one of those so-called related litigation tests. All I am suggesting is that it is a workable rule, courts have done it all the time. The Government simply errs when it says we can't do that, we can't fashion that test.

The best thing to do, Your Honors, I submit, is to have this done on a case by case basis. After all, under the Sherman Act rule of reason the Court annunciates the rule of reason law and rule. It doesn't say, here is every circumstance that is reasonable conduct or not reasonable conduct. That's for determination on a case by case basis.

Finally, with respect to potential litigation. First of all, the D.C. Circuit had that test to help the Government. Mr. Geller got that test to help him, because without it it would just be related litigation. Now he doesn't like it and he attacks that and apparently he thinks that's why the judgment should be reversed.

Again, related litigation and potentially related litigation; you have the same test in great part. I would suggest the following, potential related

litigation. The Government could say, we have a grand jury investigation going on. The Government could say, we have subpoenas under the Hart-Scott-Rodino Antitrust Improvements Act. The Government can say, we have an investigation under the FTC.

These are examples. There are others. The only thing I am saying is that the potential related litigation test is workable, it's been done in other contexts. This Court need not concern itself right now with formulating a specific test because the Court of Appeals said, remand this thing back to the district court and the district court will determine.

Lastly if I may, this question about why we want these documents and doesn't this relate to the FTC-Grolier proceeding in the Ninth Circuit. In point of fact, as we submitted to the Clerk last week, the administrative law judge which had that proceeding said, these cases are not related. I'm now referring to the Ninth Circuit proceeding and the Americana proceeding. And the Government, the FTC, the petitioner in this case, said those cases are not related.

Again, the Court doesn't have to reach that decision. It's not before the Court. I only point that out here because Mr. Geller thinks it's important and he wants to make the argument.

Also, we don't say and we never have that because of the so-called other case out there we have a need for it. We have never argued in this Court that we should get these documents because of need or because of anything else, because respondent recognizes under Sears that that does not make us any greater or give us any lesser right to obtain these documents.

Thank you very much, Your Honors.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Geller?

REBUTTAL ARGUMENT OF KENNETH S. GELLER, ESQ.

ON BEHALF OF PETITIONERS

MR. GELLER: Just one or two things, Mr. Chief Justice.

I want to make sure there are no misunderstandings in light of respondent's argument. We do take the position that under Exemption 5 documents that are subject to a qualified privilege, that is that are subject to the work product privilege, cannot be mandatorily disclosed under the Freedom of Information Act.

In other words, the word "routinely" has a meaning there. The fact that one judge in one particular case may have found that a plaintiff has shown the need doesn't need that that document would be

routinely disclosed. And in this very case, in response to Justice White's question, Judge Fisher in the Americana litigation made a finding defendant had substantial need for the documents. No suggestion that these sorts of documents would be routinely disclosed.

Unless qualified privileges are covered by Exemption 5, as they clearly appear to be by the legislative history, then Congress would have effectively repealed qualified privileges such as the work product privilege or the confidential commercial information privilege at issue in Merrill when it passed the Freedom of Information Act. We can't believe Congress intended to do that.

Now, secondly, Respondent has suggested many times that this is a very narrow decision, it only applies in the Freedom of Information Act context. And it's true that the D.C. Circuit sprinkled in a few places in its opinion the suggestion that this is a FOIA case.

But of course, there's no analytical support for that sort of a distinction. Exemption 5 is clearly tied right to civil discovery. The legislative history and this Court's opinions in Sears and Roebuck -- and I would refer the Court to footnote 16 in Sears and Roebuck -- shows that the exemption is intended to

mirror civil discovery, and therefore the Court has to consider not only the FOIA context but whether this is a workable rule.

QUESTION: Mr. Geller, you don't really contend it mirrors civil discovery. You're contending it's somewhat narrower, because of the "routinely" requirement. If this was discoverable --

MR. GELLER: Well, it mirrors civil discovery in terms of the extent of the privilege. But once you determine that there is a privilege there --

QUESTION: Right.

MR. GELLER: -- then you never --

QUESTION: But your view is that really in specific cases it's narrower, FOIA is narrower, whereas the Court of Appeals took the view it was broader.

MR. GELLER: Well, it's quite -- it's narrower in the sense that no showing of need has to be made under FOIA. If it's privileged at all, you don't look --

QUESTION: Right.

MR. GELLER: -- to see whether there's some plaintiff somewhere who could overcome the privilege, because that would read the privilege out of the statutes in terms of Government litigation.

Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:10 a.m., the case in the above-entitled matter was submitted.)

* * *

CERTIFICATION

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FTC, et al., petitioners v. Grolier Inc., No. 82-372

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