

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

DAN RATHER,

Plaintiff,

-against-

CBS CORPORATION,

Defendant.

Index No. 603121/07

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S
MOTION TO COMPEL DOCUMENT PRODUCTION FROM
RICHARD THORNBURGH, LOUIS BOCCARDI, AND K&L GATES LLP**

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PRELIMINARY STATEMENT

Plaintiff Dan Rather makes this motion to compel the production of thousands of documents, withheld under an unsustainable claim of privilege, concerning the work of the “Panel” CBS appointed to investigate the *60 Minutes II* story about President Bush’s National Guard service (the “Broadcast”). The truth about the Panel’s work, and what it chose to include or exclude from its Report, are central facts in this action.

The Relevance Of The Withheld Documents: As the Court may recall, in the midst of the 2004 presidential election, the partisan attacks on the Broadcast related to the authenticity of the “Killian documents.” The basic content of the story -- that political influence saved George W. Bush from active duty in Vietnam and from discipline for failing to complete his Guard duty -- had not been challenged. Mr. Rather believed the story should be defended, further investigated by CBS News, and reported. Defendant CBS overruled Mr. Rather and decided to apologize, publicly announcing that it would appoint the Panel.

CBS induced Mr. Rather to apologize personally on national television, to abandon his own further investigation, and to stay silent about his belief in the truth of the story by falsely and tortiously promising Mr. Rather, among other things, that the Panel would conduct a full and independent investigation. The Panel’s failure to do so evidences that CBS’s true motivations were not to report the news, but to appease the Bush Administration and its partisan allies in Congress, whose anger over the substance of an important news story threatened the business interests of its parent, Viacom, Inc. Mr. Rather contends that CBS dictated the outcome of the Panel’s review -- to criticize the Broadcast, empowering CBS to get rid of Mr. Rather and others.

What the public knows about the Panel is already highly suspicious: appointing Bush family allies Richard Thornburgh and Louis Boccardi to be the “independent” persons to investigate a story about the Bush family’s political influence, not recording or transcribing

Panel interviews, and the one-sided Report itself that, on its face, presumes the story was not true. Discovery to date reveals far more. Only conservative lawyers were considered for the Panel; their names were vetted by Viacom's Washington lobbyists (as well as with unnamed "GOP folks"). Also, the Report strikingly fails to mention that the Panel thought it necessary to email President Bush to ask for answers the central questions about the basic content of the story in writing, but that their request was refused by the White House. (Thornburgh email to the White House, Ex. A.)¹ As discussed below, Panel witnesses complained about being misquoted in the Report, and depositions reveal highly questionable efforts to cover up CBS's true involvement in the Panel's work.

The Privilege Assertions: CBS is now funding the effort of non-parties Thornburgh, Boccardi, and Mr. Thornburgh's law firm K&L Gates LLP ("K&L") to block further discovery through an improper assertion of privilege. These non-parties have refused to produce any of the Panel's interview questions and outlines, any interview notes, any memoranda describing the interviews, any internal K&L/Panel emails or other communications regarding any subject, and any drafts of the Panel Report.² Having not recorded or transcribed the interviews, the withheld notes and memoranda are the *only* record of those interviews -- to the extent they still exist, since K&L instructed its team to *destroy* interview notes, drafts of interview memoranda, and drafts of the Report. Emails between K&L partners regarding their review of draft Panel Report sections, as well as the drafts themselves, may evidence the Panel's true motivations.

Importantly, CBS *asserts no privilege of its own* -- it has waived any privilege it could assert with respect to K&L's work. Instead, K&L asserts a privilege purportedly held by the

¹ Citations to "Ex. ___" are to the documents and deposition testimony attached as exhibits to the accompanying October 23, 2008 Affirmation of Daniel Pancotti.

² K&L likely will take credit for producing thousands of pages of documents and complain of being burdened as a non-party. However, they have been well paid by CBS for their effort to represent themselves and the Panel, and the bulk of their production was merely multiple copies (as many as ten) of the documents CBS provided to the Panel in 2004, documents CBS knows Mr. Rather already obtained from CBS, burying a smattering of external emails.

Panel. But K&L cannot meet its burden of proving any such privilege for two central reasons: (i) the investigation was factual, not legal, and (ii) while CBS retained K&L, the evidence contradicts the existence of any attorney-client relationship between the Panel and K&L.

The work of lawyers is only protected as privileged if it is undertaken in connection with the provision of legal advice: primarily or predominantly of a legal character. None of the parties here -- not CBS, the Panel, or K&L -- treated this work as anything other than a fact investigation to assist CBS in making business decisions until now. At a pre-subpoena March 2008 symposium at Washington & Lee University, K&L's Michael J. Missal, principal author of the Panel's Report, volunteered the following description of K&L's work:

So we took this, this is not like a traditional lawyer who advocates a position. When you're retained as a lawyer, you're supposed to zealously represent your client. That's not what we were doing here. What we were trying to do is find out what the facts were, all the facts.

(Ex. B at 40:3-9.) Under New York law, no privilege attaches to a fact investigation just because it is conducted by lawyers.

And K&L's post-hoc assertion that it had a separate and distinct attorney-client relationship with the Panel is soundly debunked by the documentary record. CBS hired Mr. Thornburgh and K&L together, executing a single engagement letter stating that K&L was "being engaged to act as counsel for CBS . . . *and for no other individual or entity.*" (Ex. C at 1 (emphasis added.)) There is no documentation supporting K&L's retention by the Panel, nor any billing records revealing work K&L did for the Panel; no relationship, no privilege.

Mr. Rather also seeks to compel the production of other documents K&L and the Panel have objected to producing -- those post-dating the Panel's Report, relating to other CBS News stories, or to Panel member bias -- under a specious claim that this Court has restricted discovery in these areas. The Court was clear, at its transcribed, June 16, 2008 conference, that all discovery was moving forward in order to get this case ready for trial.

STATEMENT OF FACTS

CBS Retains K&L To Investigate the Broadcast; K&L Engages Boccardi To Assist In The Investigation

On September 22, 2004, CBS announced that Messrs. Thornburgh and Boccardi would comprise the “Independent Review Panel” and that they would “examine the process by which [the Broadcast] was prepared and broadcast.” (Announcement, Ex. D.) CBS did not report that it was seeking legal advice from Mr. Thornburgh or K&L, or that it expected the Panel’s work to be confidential; from the outset, the Panel’s findings were to be made public. *Id.*

K&L, Mr. Thornburgh’s law firm, confirmed its engagement by CBS in a letter dated September 23, 2004. (Letter, Ex. C, at 1.) This “CBS Engagement Letter” does not mention the creation or existence of any panel or any other organization. CBS has no other agreement with Mr. Thornburgh. The CBS Engagement Letter provides, “[i]t is [K&L’s] understanding *that we are being engaged to act as counsel for CBS Broadcasting Inc., including its CBS News division, and for no other individual or entity.*” (*Id.* at 1 (emphasis added).) The CBS Engagement Letter also sets forth the services to be provided:

We further understand that we are to conduct an investigation into, and to render legal advice pertaining to, the circumstances surrounding the 60 Minutes show pertaining to President Bush’s National Guard duty that broadcast on September 8, 2004. Such work will include investigation of how the story came to be broadcast, including CBS News efforts prior to and after September 8, 2004 to authenticate the documents and other information that formed the basis of the story.

The letter further provides, “[i]t is our Firm’s practice to confirm in writing the identity of any client whom we represent, the nature of our undertaking on behalf of that client and our billing and payment arrangements with respect to our legal services.” (*Id.*)

The CBS Engagement Letter also defines Mr. Boccardi’s role in the investigation as an assistant to K&L: “[W]e are authorized to engage Mr. Louis Boccardi, retired president of the Associated Press, to assist us in this investigation.” (*Id.* at 2.) K&L engaged Mr. Boccardi in a

letter signed by Mr. Missal and dated September 23, 2004 -- the same date as the CBS Engagement Letter. (Letter, Ex. E.) That letter “confirm[s] that Kirkpatrick & Lockhart LLP has engaged you to work with us on our representation of CBS News on certain issues relating to the CBS News 60 Minutes Wednesday report broadcast on September 8, 2004 pertaining to President Bush’s National Guard duty.” (*Id.*)

K&L’s Investigation And The Panel Report

Between September 2004 and January 2005, Messrs. Boccardi and Thornburgh, assisted by several K&L attorneys, conducted the investigation. K&L billed CBS directly for all of its work; no bills were sent to the Panel. Mr. Thornburgh’s time and descriptions of work performed appears in the same K&L bills, interspersed with the time of the other K&L attorneys. (K&L Bills, Ex. F.) The work descriptions provided include gathering documents relating to President Bush’s service in the National Guard, preparing interview outlines for witnesses, conducting interviews, drafting memoranda summarizing interviews, investigating the field of forensic document analysis, and drafting the Panel Report. The overwhelming majority of the work was performed by K&L lawyers other than Mr. Thornburgh. (*Id.*) There are no time entries indicating that any legal work was being performed for the Panel. The bills do not indicate that work was being performed for any party other than the one being billed -- CBS.

On January 5, 2005, K&L delivered the Report to CBS, which thereafter released the Report to the public. (Panel Report, Ex. G.) The Report confirms that the Panel’s mandate was “to examine the process by which the September 8 Segment was prepared and broadcast.” (*Id.* at 2-3.) The Report consists of a factual narrative of the preparation and airing of the Broadcast and the subsequent media controversy; a discussion of the authenticity of the documents used in the Broadcast; a discussion of whether a political agenda drove the airing of the Broadcast; and

recommendations for CBS News with respect to its business and journalistic practices. As K&L described its efforts in the Report:

- “The Panel was asked to make recommendations with respect to 60 Minutes Wednesday to help CBS News avoid a repetition of the failures identified in the reporting, production and vetting of the September 8 Segment, as well as the deficiencies identified in the Aftermath.” (*Id.* at 216.)
- “The Panel asked many members of the CBS News staff about their expectation for this Report. The answer, often in exactly these words, was ‘Tell us the truth, and tell us what happened.’ The Panel has tried to do just that as it retraced the path from a seeming investigative coup on September 8 to the ignominy of the September 20 apology.” (*Id.* at 221.)
- “Done accurately and fairly, investigative reporting serves a critical role in a free society. Done inaccurately, it can cause great harm. The recommendations made by the Panel at the end of this Report will, we hope and expect, strengthen 60 Minutes Wednesday and CBS News’ capacity to fulfill this role.” (*Id.* at 5.)
- “The stated goal of CBS News is to have a reputation for journalism of the highest quality and unimpeachable integrity. To meet this objective, CBS News expects its personnel to adhere to published internal Standards based on two core principles: accuracy and fairness. The Panel finds that both the September 8 Segment itself and the statements and news reports by CBS News that followed the Segment failed to meet either of these core principles.” (*Id.* at 4.)
- “The fact is that basic journalistic steps were not carried out in a manner consistent with accurate and fair reporting, leading to countless misstatements and omissions in the reporting by 60 Minutes Wednesday and CBS News. Those misstatements and omissions lead the Panel to conclude that it is not sufficient simply to exhort those responsible to do better in the future. The Panel believes that certain process changes must be put in place to strengthen controls so that similar problems are less likely to occur in the future.” (*Id.* at 29.)

The Panel Report contains no legal analysis, opinion, or legal recommendations. It does not contain a single citation to any legal authority. Although the Report states that the Panel conducted interviews of 66 witnesses, it does not provide a list of those witnesses. Their identities, to the extent not covered in the text of the Report, remain a secret. The Report does not describe investigative efforts made that the Panel chose not to report, or leads the Panel chose not to follow. The Report does not contain the questions posed to witnesses, nor does it summarize the complete testimony of any of the witnesses interviewed.

K&L Billed, And Collected Fees From, CBS Only

K&L's invoices for the work it performed were sent directly to Linda Mason, CBS's Vice President, Public Affairs. (K&L Bills, Ex. F.) They contain no references to the existence of a Panel; they do not describe any services provided to any entity other than CBS. (*Id.*) Mr. Boccardi sent separate invoices for his time spent on the investigation. (*See*, Email, Ex. H.) Thus, K&L followed the billing procedure described in its CBS Engagement Letter: "[i]t is our Firm's practice to render statements for professional services and related charges on a monthly basis. We understand that our invoices should be sent directly to you. . . . With regard to Mr. Boccardi's invoices, we will cause Mr. Boccardi to send you a copy of each invoice, and CBS News will then pay him directly for his services." (Letter, Ex. C, at 3.)

K&L billed CBS more than \$2.2 million for conducting the investigation and for attention to matters arising after the delivery of the Report. K&L did not send any invoices to, and did not collect any fees from, the Panel or its members. (Missal Dep., Ex. I, at 66:16-19). There is no written agreement in which CBS agreed to pay the legal fees of any other entity. There are no other agreements or other documents that create, or even describe, any relationship among CBS, the Panel, K&L, or Messrs. Thornburgh and Boccardi other than the CBS Engagement Letter and the letter in which K&L retained Boccardi. Nor is there any document indicating that these agreements were rescinded or modified.

The Record Already Includes Evidence Supporting Mr. Rather's Allegations About The Panel

CBS considered only conservative lawyers for the Panel. CBS vetted the names of these conservative lawyers with Viacom's senior in-house Washington lobbyists, Carol Melton and Gail Mackinnon, who "enthusiastically approved" Mr. Thornburgh. (*See* Lists/Notes on proposed panelists, Ex. J.) (*Id.*) A concern about appointing another proposed panelist was that he would not "mollify the right." (*Id.*, notes on Rudman) While CBS's Linda Mason identified

the documents discussing the “qualifications” of these candidates as her notes (they say nothing about skills or experience), she claimed to be unable to recall who the GOP sources were that CBS consulted. (Mason Dep., Ex. K, at 76:15-79:13.)

None of the Panel’s interviews was recorded or transcribed. The answers to the questions were taken down by K&L lawyers. (Missal Dep., Ex. I, at 84:7-85:9.) These K&L lawyers were later instructed to destroy their notes and any drafts of memoranda prepared on those interviews, (*id.* at 86:23-88:2), and drafts of the Report at CBS’s request. (*Id.* at 103:13-104:2.)

On December 7, 2004, after the interviews had been completed and while the Report was being drafted, Richard Thornburgh sent an email to Dan Bartlett, then White House Communications Director, requesting written responses from the President to certain questions about the Broadcast “so that we can tie up a couple of loose ends.” (Thornburgh Email, Ex. A.) The questions specifically addressed the basic content of the Broadcast -- not the authenticity of the documents -- including, “Were you ever ordered to take a physical in May 1972,” “Do you recall being suspended from flight status,” etc. In an email response, Bartlett stated, “we would prefer to keep him out of participating in your report.” (*Id.*) The Panel’s Report concludes that the Broadcast was not fair and accurate, but fails to include any reference to the Panel’s determination that it needed answers from President Bush, but could not get them.

Following the issuance of the Report, several witnesses complained that their statements to the Panel had been mischaracterized in the Report. In one critical example, Roger Charles, a retired military officer, asserted that the Panel had made a “direct distortion” of his testimony by implying that he was concerned about certain documents not conforming to Air Force format criteria, when in fact he had “emphasized at some length” that this did not bear upon the authenticity of the documents. (Charles Email, Ex. L.)

The Panel asserts in its report:

CBS News did not control or influence the scope of the investigation or the methods employed by the Panel. CBS News did not have any input or influence with respect to the findings of the Panel, other than to commit itself at the outset to make the Report public.

(Panel Report, Ex. G at 31). Mr. Missal and CBS witnesses testified that the first draft delivered to CBS was the substantially completed draft provided on December 29, 2004. (Missal Dep., Ex. I, at 16:25-17:13; Heyward Dep., Ex. M, at 60:3-60:6.) Mr. Missal testified that he did not provide CBS with interim reports of the Panel's findings or earlier drafts of its report, and attempted to minimize disclosures regarding particular interviews. (Missal Dep., Ex. I, at 18:22-19:12; 274:15-25.)

Linda Mason, CBS's liaison with the Panel, initially corroborated the Report's statements and Mr. Missal's testimony that CBS News was uninvolved in the Panel's investigation or Report. When confronted with contrary documentary evidence, Ms. Mason recanted, admitting that she received reports on "a lot of interviews," even describing some of them in detail. (Mason Dep., Ex. K, at 205:20-210:13.) While Ms. Mason initially joined Mr. Missal in testifying that no interim reports were given to CBS (*id.* at 164:3-165:3), she later directly contradicted Mr. Missal and herself, testifying that K&L attorneys described aspects of the Report to her over the telephone in November. (*Id.* at 185:24-186:16.) This is corroborated by a contemporaneous memo written by Ms. Mason to herself. (Memo, Ex. N.) And neither Ms. Mason nor Andrew Heyward, CBS News President, could explain Mr. Heyward's email in which he describes specifics of the Panel's Report on December 17, weeks before they claim to have received it for the first time. (Email, Ex. O; Mason Dep., Ex. K, at 184:17-185:23; Heyward Dep., Ex. M, at 617:25-619:25.)

Mr. Missal's Statements At The Washington & Lee Symposium

On March 17, 2008, Mr. Missal appeared as the featured speaker at a Washington & Lee University symposium on the Broadcast and the Panel, in which he delivered a broad and in-

depth speech about the Panel's investigation. He explained how the role that K&L played in the investigation differed from a traditional attorney-client relationship: "So we took this, this is not like a traditional lawyer who advocates a position. When you're retained as a lawyer, you're supposed to zealously represent your client. That's not what we were doing here. What we were trying to do is find out what the facts were, all the facts." (Transcript, Ex. B, 40:3-9.)

During his remarks, Mr. Missal also disclosed facts and conclusions arising from the Panel's investigation that cannot be found in the Panel Report. For example, Mr. Missal discussed the Panel's conclusion that the conservative bloggers who attacked the format of the Killian documents as proof that they were forgeries were proven wrong:

It's ironic that the blogs were actually wrong. When they had their, their, uh, criticism, we actually did find typewriters that did have the superscript, did have proportional spacing and on the fonts, given that these are copies, it's really hard to say, but there were some typewriters that look like it could have a very similar font there. So the initial concerns didn't seem to hold up."

(*Id.* at 70:7-15.) The Panel implies the opposite conclusion in its Report. (Ex. G, at 149-150.) Nor did it include the extent to which Mr. Rather was excluded from producing the Broadcast. "[I]ronically Dan Rather never saw the show before it went on the air. He wasn't involved in putting it together. In fact, we heard from a few people that he came in to see if he could help and they said no, Dan, we're busy, leave us alone, we'll take care of it." (Ex. B, at 53:19-24.)

Rather Requests Documents Relating To The Investigation From K&L and the Panel Members

Plaintiff served subpoenas *duces tecum* on Boccardi and K&L on April 2, 2008 and on Thornburgh on May 7. (Subpoenas, Ex. P.) The subpoenas requested production of, *inter alia*: all documents concerning the Panel's investigation of the Broadcast, including drafts of the Panel Report, documents concerning the scope and purpose of the investigation, documents reviewed by the Panel members and K&L, and communications between and among the Panel members, K&L, and CBS (Request No. 1); documents concerning the retention of the Panel members and

K&L by CBS (Request Nos. 2-3); documents created after the issuance of the Panel Report in which the work of the Panel or K&L was discussed (Request No., 5); documents concerning work performed by the Panel members or K&L concerning any other story broadcast by CBS (Request No. 6); documents concerning the news reporting, journalism, investigative, or fact gathering experience of K&L lawyers who provided work or services for or to the Panel (Request No. 7 (to K&L)); and documents concerning communications between the Panel members or K&L on the one hand and the Bush administration on the other hand (Request No. 7 to Thornburgh and Boccardi)).

CBS Fails To Assert Any Attorney-Client Privilege With K&L; K&L And The Panel Nevertheless Refuse To Produce Responsive Documents On Privilege Grounds

CBS waived any privilege it might have based upon an attorney-client relationship with K&L on March 3, 2008, when it produced communications between CBS and K&L about the investigation to Mr. Rather in this action. Following service of the subpoenas on the Panel and K&L, on May 6, 2008, Mindy Spector, counsel for CBS in this action, contacted Missal and advised him that “CBS was going to waive any privilege it had with the panel.” (Missal Dep., Ex. I, 112:8-22.)

Thereafter, on May 23, 2008, K&L served Responses and Objections to the subpoenas. (Objections, Ex. Q.) Despite CBS’s waiver of privilege, K&L, Thornburgh and Boccardi interposed objections based on attorney-client privilege and attorney work product to nearly every request. Notably, they responded that they had **no** documents reflecting the attorney-client relationship they now claim exists:

REQUEST NO. 4 OF THE SUBPOENAS

All documents concerning the Panel’s retention of, contracting with, or employment of K&L (or Thornburgh’s or Boccardi’s retention of the K&L) to serve as a member of the Panel, to assist the Panel, to serve as “legal counsel” or “counsel” to the Panel, or to serve in any other capacity in connection with an investigation of the Broadcast or its subject matter, including

communications, retention agreements, engagement letters or agreements, confidentiality agreements, or joint defense agreements.

RESPONSE TO REQUEST NO. 4 OF THE SUBPOENAS

Subject to their General Objections, the Subpoena respondents presently are unaware of any documents in their possession that are responsive to this Request.

Mr. Missal corroborated the absence of such documents at his deposition, as well as the non-existence of any documents evidencing CBS's purported agreement to pay legal fees for services K&L would provide to the Panel. (Missal Dep., Ex. I, at 69:16-70:5.)

K&L and the Panel further objected to the subpoenas based on their "understanding" that the Court had made an oral discovery order on April 22, 2008 that permitted them to refuse to produce documents that: "(a) post-date the publication of the Panel's Report, (b) do not concern the Broadcast and/or (c) seek documents relating to any alleged bias of the panel," purportedly based on supposed discovery limitations imposed by this Court. (Objections, Ex. Q, at General Objection 4.) Having not attended the April 22, 2008 conference, K&L based its "understanding" on CBS's interpretation of the Court's comments, rejecting Mr. Rather's position on that early ruling. (Correspondence, Ex. R, at 1.) K&L refused to withdraw its objection, and produce the withheld documents, even when Mr. Rather presented K&L with the transcript of the Court's subsequent, July 16, 2008 ruling. When asked whether there would be limitations on discovery, the Court responded, "No. No. No. Take the discovery on the assumption that the allegations now contained in that motion [to dismiss] are going to be tried." (Transcript, Ex. S; Correspondence, Ex. T.)

On August 12, 2008, K&L produced a privilege log that listed approximately 3,200 documents being withheld; a revised log of 2,200 documents, purportedly eliminating duplicates, was delivered on August 29, 2008. (Revised Log, Ex. U.) Among the categories of documents listed in the privilege log were: interview outlines and drafts of interview outlines, handwritten

notes taken at interviews, memoranda and draft memoranda summarizing interviews, and memoranda comparing different interviews; outlines and draft outlines of the Panel Report and drafts of the Panel Report; emails between K&L attorneys and the Panel members, charts and other documents prepared by K&L attorneys, notes of conversations between CBS employees and K&L attorneys, and memoranda prepared by K&L attorneys regarding meetings with CBS employees. CBS is paying K&L's legal fees for responding to the subpoenas, preparing the privilege log, and even defending depositions in this action, fees that totaled approximately \$300,000-\$400,000 dollars as of August 21, 2008. (Missal Dep., Ex. I, at 7:18-8:24.)

ARGUMENT

I. **K&L CANNOT ASSERT A PRIVILEGE BECAUSE THE DOCUMENTS AND TESTIMONY AT ISSUE DO NOT RELATE TO LEGAL ADVICE**

A. K&L Bears The Burden Of Establishing Attorney-Client Privilege/Work-Product

K&L is unable to prove that the work in question was of a legal nature, regardless of who it now claims to be its client. "In order for the [attorney-client] privilege to apply, the communication from attorney to client must be made for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship. The communication itself must be primarily or predominantly of a legal character." *Spectrum Sys. Int'l Corp. v. Chemical Bank*, 78 N.Y.2d 371, 377-78, 575 N.Y.S.2d 809, 814 (1991) (internal quotation marks and citations omitted). "The proponent of the privilege has the burden of establishing that the information was a communication between client and counsel, that it was intended to be and was kept confidential, and it was made in order to assist in obtaining or providing legal advice or services to the client. *Allied Irish Banks v. Bank of Am., N.A.*, 240 F.R.D. 96, 103-04 (S.D.N.Y. 2007), citing *Charter One Bank, F.S.B. v. Midtown Rochester, L.L.C.*, 191 Misc. 2d 154, 738 N.Y.S.2d 179 (Sup. Ct. Monroe County 2002). "Additionally, the party claiming the privilege

bears the burden of establishing that it has not been waived.” *Id.*, citing *John Blair Commc’ns, Inc. v. Reliance Capital Group*, 182 A.D.2d 578, 579, 582 N.Y.S.2d 720 (1st Dep’t 1992).³

Similarly, “[n]ot every manifestation of a lawyer’s labors enjoys the absolute immunity of work product. The exemption should be limited to those materials which are uniquely the product of a lawyer’s learning and professional skills, such as materials which reflect his legal research, analysis, conclusions, legal theory or strategy.” *Hoffman v. Ro-San Manor*, 73 A.D.2d 207, 211, 425 N.Y.S.2d 619, 622 (1st Dep’t 1980); see also *Brooklyn Union Gas Co. v. American Home Assur. Co.*, 23 A.D.3d 190, 190-91, 803 N.Y.S.2d 532, 534 (1st Dep’t 2005) (finding factual investigation by attorney not privileged because “attorney work product applies only to documents prepared by counsel acting as such, and to materials uniquely the product of a lawyer’s learning and professional skills, such as those reflecting an attorney’s legal research, analysis, conclusions, legal theory or strategy.”). The burden of establishing work-product protection lies with the proponent of the privilege. *Id.*

B. K&L’s Investigation Was Factual, Not Legal

The documents reviewed and generated in K&L’s investigation are not privileged because the work was factual, and not legal in nature. It is well settled that no privilege exists where lawyers are retained to conduct factual investigations or provide business advice. In

³ New York law applies to the determination of privilege here. The Panel investigation was conducted in CBS’s New York offices, for a New York based corporation, under an engagement letter delivered in New York, relating to a story prepared and broadcast from New York. The only other law arguably implicated (the law of Washington, D.C., where K&L’s lawyers resided) is similar to New York law on the principles at issue. See *Jones v. U.S.*, 828 A.2d 169, 175 (D.C. 2003) (“The burden of proving that the attorney-client privilege shields a particular communication from disclosure rests with the party asserting the privilege.”); *Adams v. Franklin* 924 A.2d 993, 998 (D.C. 2007) (“the privilege applies only ... where legal advice of any kind is sought ... from a professional legal adviser in his capacity as such....”); *Crane v. Crane*, 614 A.2d 935, 940 (D.C. 1992) (“To be protected by the attorney-client privilege, communications between a lawyer and a client must concern legal advice; business advice or similar assistance is not privileged.” (concurring opinion)). With no conflict between the forum state’s law and the law of the other potentially implicated jurisdiction, the law of the New York applies. See *SNS Bank, N.V. v. Citibank, N.A.*, 7 A.D.3d 352, 354, 777 N.Y.S.2d 62, 64 (1st Dep’t 2004) (“The first step in any choice-of-law analysis is to determine if there is actually a conflict between the laws of the competing jurisdictions. If there is none, then the law of the forum state where the action is being tried should apply.”)

Spectrum, 78 N.Y.2d at 379, 575 N.Y.S.2d at 815, the New York Court of Appeals set forth the standard for determining when an investigation is privileged:

As [the First Department] correctly observed, an investigative report does not become privileged merely because it was sent to an attorney. Nor is such a report privileged merely because an investigation was conducted by an attorney; a lawyer's communication is not cloaked with privilege when the lawyer is hired for business or personal advice, or to do the work of a nonlawyer. Yet it is also the case that, while information received from third persons may not itself be privileged, a lawyer's communication to a client that includes such information in its legal analysis and advice may stand on different footing. The critical inquiry is whether, viewing the lawyer's communication in its full content and context, it was made in order to render legal advice or services to the client.

(Internal citations omitted).

Although the Court of Appeals in *Spectrum* ultimately found that the report at issue was privileged, the rationale underlying the ruling ineluctably leads to the conclusion that the documents here are not. In *Spectrum*, the defendant accused the plaintiff, one of its vendors, of fraud. Prior to the litigation, the defendant retained a law firm to investigate the possible fraud, including plaintiff's role in it. The court held that the plaintiff was not entitled to a copy of the report because the law firm was hired to provide, and did provide, legal advice:

[I]t is uncontested that the law firm was specially retained as outside counsel for the purpose of conducting an internal investigation into possible fraud on [its client] and rendering legal advice about that problem, including counseling about litigation options. Clearly the requisite professional relationship was established when [the client] retained the law firm to render legal assistance. (*Radiant Burners, Inc. v. American Gas Ass'n.*, 320 F.2d 314 (7th Cir.), cert. denied 375 U.S. 929, 84 S.Ct. 330, 11 L.Ed.2d 262 (1963)).

The report itself, after presenting facts, sets forth the firm's assessment regarding a possible legal claim, its approximate size and weaknesses. As a confidential report from lawyer to client transmitted in the course of professional employment and conveying the lawyer's assessment of the client's legal position, the document has the earmarks of a privileged communication.

78 N.Y.2d at 378, 575 N.Y.S.2d at 814. In finding that the report was primarily legal in nature, the court noted that the "report offers no recommendations for desirable future business

procedures or corruption prevention measures, or employee discipline.... Rather, the narration relates and integrates the facts with the law firm's assessment of the client's legal position, and evidences the lawyer's motivation to convey legal advice." *Id.* at 380, 575 N.Y.S.2d at 815.

Here, K&L cannot prove that the material it seeks to withhold was generated for a legal purpose at all, much less that it was primarily or predominantly legal. The very factors the court relied on in *Spectrum* in finding privilege are completely absent here. The Panel did not issue a report "set[ting] forth the firm's assessment regarding a possible legal claim [and] its approximate size and weaknesses." 78 N.Y.2d at 378, 575 N.Y.S.2d at 814. The Panel Report focused on precisely what *Spectrum* noted would **not** be privileged -- "recommendations for desirable future business procedures." *Id.* at 380, 575 N.Y.S.2d at 815. (See Panel Report, Ex. G, at 217 ("The Panel was asked to make recommendation with respect to *60 Minutes Wednesday* to help CBS News avoid a repetition of the failures identified in the reporting, production and vetting of the September 8 Segment, as well as deficiencies identified in the Aftermath."))

Moreover, K&L lawyers are repeatedly on record stating that their task was factual in nature. As Thornburgh explained in a February 1, 2005 interview about the Panel's work: "We were told to develop a factual record, as fully and complete as we could, to provide a basis for CBS taking whatever action they felt was appropriate." (Interview, Ex. V, at 4.) As recently as March 17, 2008, at the Washington & Lee symposium, Mr. Missal volunteered that the role that K&L performed in the investigation was "not like a traditional lawyer . . . What we were trying to do is find out what the facts were, all the facts." (Transcript, Ex. B, at 40:3-9.) Mr. Missal testified at his deposition that this statement was a true and accurate description of his work. (Missal Dep., Ex. I, at 42:11-14.)

Even when given the opportunity, Mr. Missal was unable to identify any legal services rendered by K&L:

Q. What legal interests of the panel were you representing when you organized the investigation for the panel?

A. To -- to try to achieve the objectives of the internal investigation, which are to make sure that it's thorough, accurate, fair, objective, credible, and timely. I believe those would be the six overall objectives of what the panel was trying to achieve in its work.

Q. Is it your testimony that those are legal objectives?

A. Yes. Legal issues will arise with respect to all of those objectives.

Q. What legal issues?

A. For instance, who -- who should be interviewed? How do you know the work has been thorough? How do you know what questions to ask?

Q. Why are those legal issues?

A. I believe they're commonly considered legal issues by virtually every law -- major law firm in this country.

Q. I don't want to know why major law firms in this country consider them legal issues. I want you to tell me why you considered them legal issues.

A. Because I believe that these issues come up in legal matters frequently.

(Missal Dep., Ex. I, at 80:8-81:10.) Mr. Missal fails to identify *any* legal purpose for the interview outlines, notes, memoranda, communications, and drafts being withheld, much less that this work was predominately legal in nature. Obviously, this work was performed to assist the Panel's fact investigation.

In the case of *Allied Irish Banks*, 240 F.R.D. 96 (S.D.N.Y. 2007), involving strikingly similar facts, the court rejected the arguments K&L advances here, finding documents relating to an internal investigation conducted by the Wachtell Lipton law firm ("Wachtell") not privileged. The plaintiff bank retained Wachtell and a consulting firm to "jointly investigate" whether one of its traders had defrauded it out of hundreds of millions of dollars. *Id.* at 100. Like K&L's task,

the investigation in *Allied Irish Banks* was to “ascertain the facts regarding the [fraud], to describe the policies and controls in place and how they operated, and to make recommendations on any improvements which may appear necessary or desirable to the policies and controls.” *Id.* (internal quotations omitted). Just like K&L, Wachtell and the consulting firm interviewed dozens of current and former employees and reviewed thousands of pages of documents. *Id.* at 101. After conducting the investigation, the consulting firm and law firm drafted a report, which, much like the Panel Report, was made public and concluded that ““there was a major breakdown in controls”” and made ““a series of recommendations, including...a review of [plaintiff’s] risk management architecture, and improvements in the control environment.”” *Id.* As result of this report, plaintiff “fired six individuals and accepted the resignation of two others.” *Id.* at 102.

The defendants in *Allied Irish Bank* moved to compel production of the same type of documents sought here -- “documents underlying the creation of [the] report[,] documents that were created during the course of preparing the [report] or reviewed in the course of preparing the [report, including] notes of witness interviews and drafts of the Report.” *Id.* Plaintiff argued that the documents “reflect confidential communications with counsel for the purpose of obtaining legal advice about regulatory and other legal matters, including potential litigation.”

Id. at 104. The Court, in granting the motion to compel, rejected this argument:

The only document attributable in any form to Wachtell personnel that was also presented to [plaintiff] is the [r]eport itself, which does not reflect the provision of legal advice. Indeed, [plaintiff] does not even argue that it does. Thus, there is ample evidence to show that at least two categories of documents-the drafts of the [r]eport and the memoranda of Wachtell’s investigation interviews-were not prepared “primarily” or “predominantly” for the purpose of providing legal advice. Rather, they were prepared for the purpose of generating the Report, which indisputably did not provide legal advice.

See also Gulf Islands Leasing, Inc. v. Bombardier Capital, Inc., 215 F.R.D. 466, 472 (S.D.N.Y. 2003) (finding communications with lawyer that primarily dealt with amount of money owed and not “legal strategies” were not privileged); *Overseas Private Inv. Corp. v. Mandelbaum*, 1998 WL 647208, at *2-3 (D.D.C. Aug. 19, 1998) (“[c]onclud[ing] that none of the documents are covered by the attorney client privilege” because client “[did] not disclose any information that is confidential and [did] not explicitly or implicitly seek legal advice from an attorney”); *see also Montgomery v. Leftwich, Moore & Douglas*, 161 F.R.D. 224, 227 (D.D.C. 1995) (“These documents are business related and do not contain personal legal advice [and t]herefore they do not fall under the protection of the attorney-client privilege and are discoverable.”).

Similarly here, the purpose of generating the Panel’s Report was indisputably not to provide legal advice. However, even if K&L could find a way to demonstrate that its work had a mixed purpose -- of serving both legal and business needs -- the same result would obtain. *See Westhampton Adult Home, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 105 A.D.2d 627, 628, 481 N.Y.S.2d 358, 360 (1st Dep’t 1984) (Finding no work product protection for report generated by attorney as part of client’s business because “[i]t is the rule that multi-motived reports do not warrant the immunity if litigation is but one of the motives.”); *Bombard v. Amica Mut. Ins. Co.*, 11 A.D.3d 647, 648, 783 N.Y.S.2d 85, 86 (2d Dep’t 2004) (finding reports prepared by attorney in regular course of business are “not privileged and are discoverable, even when those reports are ‘mixed/multi-purpose’ reports, motivated in part by the potential for litigation” (internal citations omitted)). In *Stenovich v. Wachtell, Lipton, Rosen & Katz*, for example, the Court found that documents prepared by Wachtell regarding regulatory issues were not privileged because the documents “were designed to serve more than one purpose and therefore do not constitute material prepared *principally or exclusively* to assist in anticipated or ongoing litigation.” 195 Misc. 2d 99, 116, 756 N.Y.S.2d 367, 383-84 (Sup. Ct.

New York County 2003). The Court elaborated that “[u]nder New York law, although the prospect of litigation may have been cogent at the time, such ““multi-motived reports do not warrant the immunity if litigation is but one of the motives.”” *Id.* at 116, 756 N.Y.S.2d at 384, citing *Chemical Bank v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 70 A.D.2d 837, 838, 418 N.Y.S.2d 23, 25 (1st Dep’t 1979).

C. K&L Did Not Treat As Confidential The Matters It Now Seeks To Protect

The existence of any privilege is also belied by Mr. Missal’s voluntary appearance at Washington & Lee University. Lawyers engaged in the protection of client confidences do not book appearances for the purpose of revealing the results of a privileged investigation to the public. Nor did Mr. Missal limit his remarks to what was contained in the Panel Report. (*See* discussion above at page 10-11.)⁴

Under New York law, the attorney-client privilege protects only “evidence of a *confidential* communication made between the attorney or his or her employee and the client...” CPLR 4503(a) (emphasis added). The scope of the privilege depends on “whether the client had a reasonable expectation of confidentiality under the circumstances.” *People v. Osorio*, 75 N.Y.2d 80, 84, 550 N.Y.S.2d 612, 615, 549 N.E.2d 1183, 1186 (1989); *Coiro v. Fed Cap Custodial Service, Inc.*, 2004 WL 2282853, at *2 (Sup. Ct. N.Y. County Aug. 11, 2004). Mr. Missal’s comfort with appearing at a symposium and disclosing the Panel’s undisclosed secrets is hardly consistent with an expectation that such matters were intended to remain confidential, further undercutting K&L’s claim that a privilege ever existed.

⁴ Indeed, the Panel’s failure to include in its Report one of its conclusions -- that the bloggers were wrong about their basis for challenging the Killian documents as forgeries -- evidences its bias in favor of criticizing CBS News’s reporting.

In summary, none of the documents on K&L's voluminous privilege log can be protected under the attorney-client privileged or work product doctrine because none of those documents was generated in connection with the provision of legal advice.⁵

II. THERE WAS NO ATTORNEY-CLIENT RELATIONSHIP BETWEEN K&L AND THE PANEL

Even if K&L could demonstrate that its work was legal in nature, and it cannot, the documents at issue cannot be withheld because the only party that could claim such a privilege is CBS. CBS asserts no privilege, and even K&L admits it is not asserting a CBS privilege. To prevail, K&L would also need to prove that it had a separate attorney-client relationship with the Panel for such work to be protected.

Post-hoc claims are immaterial to the Court's analysis. "To determine whether an attorney-client relationship exists, a court must consider the parties' actions." *Pellegrino v. Oppenheimer & Co.*, 49 A.D.3d 94, 99, 851 N.Y.S.2d 19, 23 (1st Dep't 2008); *see also Wei Cheng Chang v. Pi*, 288 A.D.2d 378, 380, 733 N.Y.S.2d 471, 473 (2d Dep't 2001) ("a court must look to the actions of the parties to ascertain the existence of [an attorney-client] relationship."). Courts consider the parties' intent in determining whether an attorney-client relationship was entered into. *People v. Deutsch*, 164 Misc. 2d 182, 184, 624 N.Y.S.2d 533, 535 (Sup. Ct. New York County 1994). The contemporaneous record contradicts any current K&L effort to demonstrate that an attorney-client relationship was established between the Panel and K&L.

A. There Is No Engagement Letter Between K&L And The Panel

New York law requires a written engagement letter. *See In re Blau*, 50 A.D.3d 240, 242, 853 N.Y.S.2d 18, 20 (1st Dep't 2008) ("22 NYCRR 1215.1...requires an attorney . . . [in] a

⁵ While Mr. Missal testified at his deposition that K&L provided legal advice to the Panel regarding the Panel's potential liability to third parties (Missal Dep., Ex. I, at 100:15-20), Mr. Rather does not seek, and K&L's privilege log does not identify, any such documents. In any event, even for those documents to be protected, a relationship would need to have been documented between K&L and the Panel and, as discussed below, it was not.

matter in which fees are expected to reach \$3,000 to send the client a written letter of engagement ... or, alternatively, to enter into a signed written retainer agreement addressing such matters.”). It is also K&L’s “practice to confirm in writing the identity of any client whom we represent, the nature of our undertaking on behalf of that client and our billing and payment arrangements with respect to our legal services.” (Letter, Ex. C, at 1).⁶

While K&L followed the law, and its own practice, in obtaining a written agreement with CBS, no letter or other writing exists that establishes or confirms an attorney-client relationship between K&L and the Panel. (See Objections, Ex. Q, at Response No. 4; Missal Dep., Ex. I, at 62:3-11.) The absence of any such writing confirms that no such relationship existed. See, e.g., *Wei Cheng Chang*, 288 A.D.2d at 380-381, 733 N.Y.S.2d at 473 (finding no attorney-client relationship where “the record is devoid of any written or oral agreement that the defendant attorneys would perform a specific task for the plaintiffs”).

Messrs. Thornburgh and Missal have emphasized repeatedly, in their own writings, the importance of having a written engagement letter to establish the existence of attorney-client relationship. For example, in a July 2006 paper on “internal investigations” trumpeted on K&L’s website, Messrs. Thornburgh and Missal discussed ways to maximize the attorney-client privilege: “At a minimum, the engagement letter should make clear that a purpose of the investigation is to give legal advice.” *Key Issues in Internal Investigations*, Dick Thornburgh and Michael J. Missal, July 26, 2006 (Article, Ex. W at 6.) And in another Missal article:

At the outset of an internal investigation, the identity of the client on whose behalf the investigation is being conducted and the scope of the investigation

⁶ The undocumented attorney-client relationship necessary to K&L’s claim of privilege also imperils K&L, and its Washington D.C. attorneys, under their home forum’s ethical rules. See D.C. Rules of Professional Conduct, Rule 1.5 (b) (Ex. X). See also, *In re Wright*, 702 A.2d 1251, 1254 (D.C. App. 1997) (imposing 30 day suspension because attorney “never communicated the basis for his fee in writing[, which] constitute[d] a violation of Rule 1.5(b).”); *In re Drew*, 693 A.2d 1127, 1128 (D.C. 1997) (ordering 60 day suspension where, in part, “[attorney] failed to provide [client] with a written disclosure of the basis or rate of his fee, as required by Rule 1.5(b) of the D.C. Rules of Professional Conduct.”).

should be made clear....After an initial determination about the scope of the investigation is made, an engagement letter should be prepared by the outside investigative team that specifies the identity of the client and delineates the likely scope of the investigation.

(Article, Ex. Y, at 299-300.) K&L's position strains credulity; it asks this Court to find that the authors of multiple articles on how to protect a privilege in an internal investigation failed to follow their own basic instructions, their home forum's ethical rules, and New York law.

B. K&L Did Not Bill The Panel And The Panel Did Not Pay For Legal Services.

All bills for K&L's work were directed to CBS, not the Panel, and CBS, not the Panel, paid all such bills. (K&L Timesheets, Ex. F.) None of the bills delineates any work done on behalf of the Panel, as opposed to the work done on behalf of K&L's client CBS. (*Id.*)

That a party was not billed, and did not pay for, legal services is further proof that no attorney-client relationship exists. *Wei Cheng Chang*, 288 A.D.2d at 380-381, 733 N.Y.S.2d at 473 (no attorney-client relationship where "there was no agreement to pay a fee to the defendant attorneys, and no fee was ever paid or demanded"); *Elghanayan v. Iannucci*, 145 A.D.2d 345, 347, 535 N.Y.S.2d 611, 612 (1st Dept. 1988) (no attorney-client relationship where supposed client "was never billed for any advice he may have received; nor did he pay a fee therefor").

C. K&L's Representation Of CBS In The Investigation Was Exclusive

The existence of an attorney-client relationship between K&L and the Panel would have violated the CBS Engagement Letter. That agreement made clear that K&L was representing CBS and *only* CBS:

It is our understanding that CBS News is a division of CBS Broadcasting Inc. and that we are being engaged to act as counsel for CBS Broadcasting Inc., including its CBS News division, and for no other individual or entity.

(Letter, Ex. C, at 1.)

K&L has produced no documents evidencing any modification or removal of this provision, or of any other portion of the CBS Engagement Letter. Nor is there any evidence that

K&L took any steps to secure a waiver from CBS of the potential conflict of interest that could arise by virtue of a joint representation of CBS and the Panel. All told, the documentary evidence firmly establishes that K&L did not render legal services to the Panel in connection with its investigation of the Broadcast, and that no such services were intended.

III. K&L'S LIMITS ON THE SCOPE OF DISCOVERY MISINTERPRET THIS COURT'S RULING

K&L also seeks to avoid producing certain categories of documents on the specious grounds that this Court excluded them from the scope of discovery. Specifically, K&L asserts that discovery in this case has been limited to exclude documents that: “(a) post-date the publication of the Panel’s Report, (b) do not concern the Broadcast and/or (c) seek documents relating to any alleged bias of the panel.” (Objections, Ex. Q, at General Objection 4).

While the Court did make an oral ruling, back in April, that certain aspects of discovery in this case would be staged -- discovery relating to Panel bias or the Abu Ghraib story -- those temporary restrictions ended with the Court’s ruling at the transcribed, July 16, 2008 conference. When plaintiff’s counsel advised the Court that “defendants have tried to limit the scope of discovery,” the Court responded, “No. No. No. Take the discovery on the assumption that the allegations now contained in that motion [to dismiss] are going to be tried.” (So-Ordered Transcript, Ex. S, at 36.) Even if based on the Court’s now-obviated oral ruling, K&L clearly overreached in its objections, relying on CBS’s self-serving interpretation.⁷ In any event, the Court’s subsequent ruling, and interest in getting this case to trial expeditiously, eliminated any such discovery restrictions.

⁷ K&L’s knee-jerk efforts to avoid production of documents potentially damaging to CBS’s position in this action belies its claim, and the claim of CBS, that K&L is independent and has “no horse in this race.” Their refusal to produce such documents stands in stark contrast to their willingness to prepare a multi-thousand entry privilege log, on CBS’s nickel, without first engaging in a meet and confer with Mr. Rather’s counsel as to the contours of any purported privilege. Only after the Court recently expressed its view that it was unlikely to credit K&L’s assertion of privilege, and invited K&L to reconsider, that K&L sought to meet and confer on the scope of its asserted privilege. Since no documents are privileged, further conferring would be of no use.

Nor can there be any argument that the requested documents do not bear on Mr. Rather's claims. There is no basis for a date restriction. With respect to panel bias, Mr. Rather alleges that "[f]ollowing the Broadcast, CBS announced that it was retaining an independent panel to conduct a thorough investigation into the Broadcast and its production, when in fact its intention was to conduct a biased investigation with controlled timing and predetermined conclusions in order to prevent further information from Bush's TexANG service from being uncovered." (Am. Compl., Ex. Z , at ¶ 7; *see also id.* at ¶¶ 67-73). With respect to Abu Ghraib, Mr. Rather alleges that CBS management's attempt to bury that story is key evidence of CBS's motive to curry favor with the Bush administration in order to further its business interests. (*Id.* at ¶¶ 40-43). That K&L even came into possession of these documents as parts of its investigation removes any doubt that they properly fall within the scope of discovery in this action.

CONCLUSION

For the foregoing reasons, Mr. Rather respectfully requests that the Court grant his Motion To Compel.

Dated: October 23, 2008

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