UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	
	)	
v.	)	***Criminal No. 97-55-P-H***
	)	
CATHERINE DUFFY PETIT, et al.,	)	
	)	
Defendants	)	

RECOMMENDED DECISION ON CERTAIN MOTIONS TO DISMISS

The defendants, Catherine Duffy Petit, Paul B. Richard, David J. Hall, Steven A. Hall and Roland L. Morin, are charged with bankruptcy fraud, mail fraud, money laundering, securities fraud and conspiracy, in violation of 15 U.S.C. § 77(q) and 18 U.S.C. §§ 2, 152, 371, 1341, 1956 and 1957. Defendant Petit has moved to suppress taped conversations between herself and Thomas E. Blackburn, as well as all documents provided by Blackburn to the government (Docket No. 93); all information supplied to the government by Richard E. Poulos and all evidence generated as a result of that information (Docket No. 95); and statements made by and documents provided to the government by Robert Paradis (Docket No. 97). Defendants Richard, Morin and David Hall join in Docket Numbers 93 and 97, and Richard and David Hall also join in Docket Number 95. An evidentiary hearing was held on June 15 and 16, 1998, limited by my ruling concerning standing of some of the defendants seeking to join in the motions, as set forth below. I recommend that the following findings of fact be adopted and that the motions to suppress be denied.

I. Standing

The motion concerning Blackburn (Docket No. 93) is based on assertion of the attorney-client privilege, the work-product doctrine and the Sixth Amendment. All of these grounds presuppose the existence of an attorney-client relationship between the defendant seeking suppression and Attorney Blackburn, because no other attorney is mentioned in the motion. Neither Morin nor David Hall has provided the court with any evidence to support a claim that Blackburn ever served as an attorney for either of them, and they therefore lack standing to bring or join in this motion. *See Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978) (Fourth Amendment rights are personal and may not be vicariously asserted). Steven Hall has submitted an affidavit ("Hall Aff.") (Docket No.141) that establishes limited standing on his part concerning this motion, as reflected in my procedural order dated June 4, 1998 (Docket No. 150), but I see no indication in the record that he has joined in this motion.

The motion concerning Poulos (Docket No. 95) is also based on assertion of the attorney-client privilege, the work-product doctrine and the Sixth Amendment and accordingly also requires the existence of an attorney-client relationship between the defendant seeking suppression and Attorney Poulos. Neither David Hall nor Richard has provided the court with any evidence to support a claim that Poulos ever acted as his attorney and consequently both lack standing to bring or join in this motion.

The motion concerning Paradis (Docket No. 97) is based on assertions that he was acting as an agent of the government when he removed two boxes from the offices of Coastal Associates across the hall from offices at 23 Water Street, Saco, Maine occupied by Petit, that he lacked authority to enter the premises when he removed the boxes, and that as "a member of the support

staff for Petit's legal affairs," *id*. at 3, his statements to the government violated the attorney-client privilege. David Hall has not provided the court with any evidence to support a claim that Paradis' possible statements about him are covered by the attorney-client privilege or that he had a reasonable expectation of privacy in the Coastal Associates offices. Accordingly, he lacks standing to bring or join in this motion. Steven Hall's affidavit suggests that he claims standing concerning the boxes taken by Paradis from the Coastal Associates Office, Hall Aff. ¶¶ 3-6, but there is no indication in the record that he has joined in this motion.

Accordingly, the following recommended findings of fact and conclusions of law address Docket Nos. 93 and 97 as to Petit and Richard only and Docket No. 95 as to Petit only.

II. Proposed Findings of Fact

A. Poulos (Docket No. 95)

Richard E. Poulos, Esq. began to work as an attorney for Petit on February 8, 1982 to "get her financial affairs reorganized." Transcript of Hearing — Day One ("Tr. I") (Docket No. 181) at 8, 10. A foreclosure was filed against some of her property by Pepperell Trust in September 1982. *Id.* at 9. Petit told Poulos that Key Bank would finance her purchase of the pier in Old Orchard Beach, Maine and provide her with working capital. *Id*. at 10-11. In April 1983 Poulos initiated Chapter 11 bankruptcy proceedings in an attempt to recover for Petit the amusement park in Old Orchard Beach that had been repossessed by Pepperell Trust. *Id*. at 12. He took a mortgage on a house in Old Orchard Beach for his fees. *Id*. at 13. An agreement in November 1983 with Pepperell Trust grew out of the bankruptcy and foreclosure proceedings. *Id*. at 15-16.

Poulos represented Petit from 1982 through 1985. *Id.* at 21. He also served as co-counsel

in her litigation against the law firm of Bernstein Shur Sawyer & Nelson ("Bernstein Shur") and Key Bank from 1988 to some point in 1994. *Id*. His role in that litigation was as a consultant based on past cases he had handled against Key Bank and Bernstein Shur. *Id*. at 22. Lead counsel on that case was William Looney, Esq. of the firm of Looney & Grossman. *Id*.

Poulos did very little negotiating with respect to the claims against Bernstein Shur and was not involved in the closing on the settlement with Bernstein Shur. *Id*. at 44-45. He provided documentation of his out-of-pocket costs to attorney Looney, who did the settlement accounting. *Id*. at 45-46. He received a contingency fee of slightly less than $500,000 from the settlement. *Id*. at 46. He was aware that an escrow account had been set up to hold some of the settlement proceeds.[1] *Id.*

After the case against Key Bank was dismissed on res judicata grounds, Poulos promised to help attorney Richard Grahn of Looney & Grossman with the appeal, but he did not do any further work on that case. *Id.* at 18, 25; Government Exh. 202. Poulos attended a meeting in Jupiter, Florida in June 1992 held to bring attorney Robert Axelrod, Petit's new counsel, up to speed on the case when Axelrod replaced Looney & Grossman. Tr. I at 23.

Poulos testified that he terminated his relationship with Petit in 1994 after reviewing the filings in an involuntary bankruptcy case that had been filed against her in 1993, which listed as an asset a possible legal malpractice claim that he read as a claim against him. *Id.* at 24-26, 52-53. When Poulos asked Petit about this listing, she did not deny that it represented a possible claim

[1] Poulos gained further information about the Bernstein Shur settlement after 1994 by reading depositions taken in the Key Bank litigation and in litigation between Petit and some Portland law firms concerning settlements in 1990 and 1991 with creditors having possible liens against that settlement. *Id*. at 49-50.

against him. *Id*. at 53. In the fall of 1994 Poulos contacted attorney Ronald Caron and told him that he was prepared to discharge his mortgage in return for a release from Petit, but Caron and Petit wanted to pursue a malpractice claim against him and were not interested in settlement. *Id*. at 89-91. The trustee in the involuntary bankruptcy rejected Poulos's contingency fee agreement with Petit regarding the Key Bank case and did not engage him to pursue that action on behalf of the bankruptcy estate. *Id*. at 91.

In April 1995 Poulos learned from an acquaintance that Petit had an extensive operation at 23 Water Street in Saco. *Id.* at 92. Poulos was very annoyed to discover this, inasmuch as Petit had been there for years before the bankruptcy but had never informed him of the fact. *Id*. at 59-60. He knew that the Key Bank case had been thoroughly prepared by 1993 and that the work at 23 Water Street could not have been related to that lawsuit. *Id*. at 61. Poulos knew that Petit was testifying in the bankruptcy case that she had no such operation and had no employees. *Id*. at 60-61.

Poulos started to investigate the Water Street operation by calling the landlord for the property. *Id*. at 93. He discovered that the named lessee was changed from Petit to attorney Caron just as the trustee was being appointed in the bankruptcy case. *Id.* at 94. He then contacted the bankruptcy trustee about the 23 Water Street office. *Id*. He met with the trustee and agreed to a compromise in which Poulos would not file claims in Petit's bankruptcy action in return for a release of claims against him. *Id*. at 97. The trustee filed a motion in the bankruptcy case for approval of this agreement, but Petit filed an objection and Fessenden withdrew the agreement. *Id*. at 97-99, 101.

A foreclosure action was initiated in October 1992 by P & M Associates that affected Poulos's mortgage on the Old Orchard Beach house. *Id*. at 38. As a result and in response to Petit's

suggestion that she might bring a malpractice action against him, Poulos did some research during the summer of 1995 and found a number of liens on the mortgaged property that had been placed between 1988 and 1990. *Id*. at 38-40, 51-52. He reviewed the complaints related to the liens and concluded that there were fraudulent transactions involved. *Id*. at 38.

In July 1995 Petit was trying to have Poulos investigated for criminal activity in connection with his mortgage on her house. *Id*. at 53-54. Also in July 1995 Peter Fessenden, the bankruptcy trustee, was deposed regarding a possible malpractice claim against Poulos by the Petit bankruptcy estate. *Id*. at 54. No malpractice claim has been filed against Poulos by Petit or her bankruptcy estate. *Id*. at 54, 57.

In August 1995 Poulos filed an objection to the trustee's report in the involuntary bankruptcy case (Government Exhibit 9) in which he set forth the information that he had provided to the trustee earlier. *Id*. at 104-06. Neither the trustee nor Petit filed an objection to the disclosure of this information. *Id*. at 108.

Poulos learned from his partner, John Campbell, Esq., that Petit was "peddling" her lawsuit against Key Bank to investors. *Id*. at 109. In December 1995 Robert Adam gave Poulos the names and addresses of some of the investors. *Id*. at 110. Campbell presented this information at a hearing in Petit's involuntary bankruptcy case. *Id*. Petit's bankruptcy attorney, Stephen F. Gordon, ridiculed Campbell's presentation but did not object to disclosure of the information. *Id*. at 111. The trustee did not object to this disclosure. *Id*. at 112.

On January 2, 1996 Poulos met with Assistant United States Attorney Paula Silsby. *Id*. at 27, 29. He told her that he thought crimes were being committed in the bankruptcy court by Petit and others. *Id*. at 28. He testified that he had an obligation under the Maine Bar Rules to make this

report. *Id*. Defendants' Exhibit 1 is his memorandum to the file which he created before meeting with Silsby. *Id*. at 29. The meeting lasted 60-90 minutes, no one else was present, and neither Poulos nor Silsby took notes. *Id*. at 30. Poulos told Silsby that Petit had been his client. *Id*. at 31. He had not obtained a waiver of attorney-client privilege from Petit before speaking with Silsby and did not believe that he needed to do so. *Id*. Poulos testified that he did not disclose any information to Silsby that was subject to the attorney-client privilege, including the Key Bank litigation. *Id*. at 35, 40-41. He did provide background information that included a chronological outline of the events leading to Petit's bankruptcy. *Id*. at 35-36.

All of the information that Poulos gave to Silsby he had previously given to the bankruptcy trustee or the bankruptcy court. *Id*. at 114. He later gave the FBI more information because by that time he had interviewed Ronald Shields, who was the source of additional information, and had become familiar with the state court investigation. *Id*. at 115.

Poulos met in October 1996 with FBI Special Agent James Osterrieder. *Id.* at 68. Osterrieder initiated the meeting. *Id*. at 69. He did not ask about the subjects that Poulos had discussed with Silsby. *Id.* at 68. Poulos told Osterrieder that Petit was his former client but did not discuss the attorney-client privilege with him. *Id*. at 70. Poulos essentially related to Osterrieder the same information he had provided to the bankruptcy trustee in December 1995 about the investors in Petit's Key Bank litigation. *Id.* at 71. He gave Osterrieder no documents. *Id*. He met with Osterrieder again on December 12, 1998. *Id.* at 72. He also spoke with Assistant Attorney General Peter Brann and people from the "state securities bureau." *Id*. at 79-80. Poulos knew that Petit did not want him to talk with others about her business affairs. *Id*. at 76. He testified that he never divulged any confidential conversation he had had with Petit to anyone. *Id*. at 89.

Osterrieder testified that he did not obtain any information from Silsby about what she had learned from Poulos. *Id.* at 122. He never saw Defendant's Exhibit 1, Poulos's outline of his discussion with Silsby, until some time in 1998. *Id.* at 122-23. When Osterrieder spoke with Poulos in 1996, Poulos did not mention his meeting with Silsby. *Id*. at 123. He was aware that investigators for the state attorney general had talked to Poulos; indeed, they suggested he talk with Poulos. *Id*. He knew that Poulos was not representing Petit at the time of their conversation and he did not consider that there might be an attorney-client privilege issue. *Id*. at 124. He did not think that Poulos was divulging privileged information. *Id*. at 125.

Poulos formally withdrew as counsel for Petit in the Key Bank litigation in January 1997. Affidavit of Richard E. Poulos, submitted with Government's Memorandum of law in Opposition to Defendants' Pretrial Motions (Docket No. 130), ¶ 20.

B. Blackburn

Thomas Blackburn, a lawyer, pleaded guilty to bankruptcy fraud in connection with Petit's bankruptcy case pursuant to a plea agreement. Transcript of Hearing — Day Two ("Tr. II") (Docket No. 182) at 4, 6-7. He has not yet been sentenced. *Id*. at 6. In February 1997 he began cooperating with the government in connection with the instant case, a process that Blackburn initiated. *Id*. at 7.

Blackburn met Petit in 1986 in connection with a real estate transaction in which he represented P & M Associates in its capacity as the lender. *Id.* at 8. He met Richard in 1988 in connection with a real estate transaction in which Blackburn represented a different lender, Northeast

Mortgage. *Id*. at 8-9. He spoke frequently with Petit about her lawsuit against Bernstein Shur and Key Bank, but he did not represent her in that action and she did not retain him. *Id*. at 10-11. Petit showed him documents from the lawsuit. *Id*. at 12. In 1989, at Petit's request, Blackburn began working to raise money to capitalize the Petit lawsuit. *Id*. at 13. He spoke to potential investors, interpreted legal documents for them, received money from them and issued assignments in return, put the money into his client trust account and distributed the money from that account as Petit directed. *Id*. He kept a running tally of the assignments he issued (Government Exhibit 207). *Id*. at 14.

Blackburn had taken in several hundred thousand dollars by October 1990. *Id*. at 15. It was his understanding that attorney Caron drafted the assignment document he routinely used; in any event, Blackburn was not the author. *Id*. at 16-17. Petit provided Blackburn with information to share with investors. *Id*. at 17. She never told him that any information she gave him was confidential. *Id*. He was compensated with promissory notes that were to be paid upon conclusion of the lawsuit. *Id*. at 18. He has not been paid. *Id*. He never took a promissory note from a client in payment for legal services. *Id*.

Blackburn also received two assignments from Petit. *Id*. at 19. He would take his costs from the money received from investors when Petit told him to do so. *Id*. at 19-20. She told him that these payments would be characterized as loans until the final outcome of the lawsuit, when an accounting would take place and taxes would be paid. *Id*. at 20. Petit told Blackburn to tell potential investors that investing in the proceeds of her litigation was a "sure thing" and that the invested funds were to be used for litigation expenses. *Id*. at 20-21. Petit also told him that the funds invested after the Bernstein Shur settlement were used for staff that was necessary due to the reduced

role of her lawyers. *Id*. at 21. Petit called the documents memorializing the investments in her litigation "assignments of proceeds." *Id.* at 23. In late 1988 and into 1989 Petit kept Blackburn advised about settlement negotiations that were initiated by Key Bank so that he could tell investors. *Id*. at 24.

Blackburn worked with Petit until May 1995. *Id*. at 25. He provided no legal advice or services to her and no legal advice to Richard or to Steven Hall in the context of capitalizing Petit's lawsuit. *Id.*

Petit told Blackburn to distribute the investors' money by obtaining bank checks payable to certain others, but never to her directly. *Id*. at 26-27. When Petit told Blackburn about the settlement with Bernstein Shur in the amount of $3.9 million, she said that the attorneys were taking no fees, that $2.4 million was put into an escrow account pending resolution of the claims against Key Bank, that $700,000 was put in another escrow account to pay creditors, and that she would receive money to cover her living expenses until the Key Bank litigation was resolved. *Id*. at 28-34. Petit showed Blackburn the confidentiality order entered by the court in connection with the settlement and instructed him nevertheless to tell investors about the terms of the settlement. *Id*. at 30-31.

Petit told Blackburn that the insurer for Bernstein Shur insisted upon the creation of the $2.4 million escrow account pending resolution of a related question of liability. *Id*. at 33. Petit told Blackburn to tell investors that the escrow account guaranteed their principal and that it was an interest-bearing account. *Id*. at 33-35. She told him that the account balance was growing based on additional contributions due to the discovery of an additional claim against Bernstein Shur. *Id*. at 35. The account was supposedly maintained at Manufacturers Hanover Bank and controlled by

Bernstein Shur's insurance carrier. *Id*.

Petit gave Blackburn two letters to show investors to lead them to believe the account existed (Government Exhibits 202 and 203). *Id*. at 36. She also gave him two memoranda concerning the account to disseminate to investors (Government Exhibits 204 and 205). *Id*. at 37-38. When an investor named Allen Fernald asked for the balance in the escrow account, Petit generated Exhibit 204 to show to him. *Id*. at 38-39. Exhibit 205 was generated to show to an investor named Stephen Winter. *Id*. at 40-41. Blackburn thought that Exhibit 204 understated the claims against the escrow account, but Petit told him that some investors had removed their claims against the account. *Id*. at 40. When he reviewed Petit's bankruptcy schedules in late 1996 or early 1997, Blackburn became convinced that he had been misled about the escrow account. *Id*. at 42-43. He also noticed that attorney fees had been paid out of the settlement. *Id*. at 43. When he talked with Petit about the existence of the escrow account in 1997 during a conversation that was taped, she acknowledged that it did not exist and then said, "I can't talk about that, but you know that the money is there." *Id*. at 43-44.

Before the 1990 settlement with Bernstein Shur, Blackburn sent executed assignments he had procured to Caron who forwarded them to Looney & Grossman. *Id*. at 44. After the settlement, Petit told Blackburn to hold on to the executed assignments because she was concerned that her lawyers would have to disclose their existence to opposing counsel and that would affect her ability to prosecute the lawsuit against Key Bank. *Id*. at 44-45. Petit told Blackburn that she had denied raising any funds in a deposition and that she had not told the truth. *Id*. at 45.

Petit called Blackburn to forewarn him that the involuntary bankruptcy was about to be filed against her so that he could assure investors that it would not affect their status. *Id*. She told him

that she would not list the investors as creditors in the bankruptcy because she was trying to conceal the existence of the escrow account and her fundraising activity. *Id*. at 45-46. Petit said that her attorneys had engaged in creative accounting and the escrow account was not an asset of the bankruptcy estate as a result. *Id*. at 46. Blackburn knew this to be wrong and encouraged Petit to list her assets and creditors but she refused. *Id*. at 46-47. Blackburn had been paid slightly more than $100,000 by this time as a loan advance to cover his costs, but neither the loan nor his promissory notes were listed in the bankruptcy schedules. *Id*. at 47. He did not file a claim in the bankruptcy proceeding. *Id*. at 47-48.

Petit told Blackburn that she had perjured herself in the bankruptcy action in 1994 when she testified that she was not engaged in fundraising activity. *Id*. at 49-50. Petit instructed Blackburn to invoke the attorney-client privilege if he was approached by the bankruptcy trustee. *Id*. at 51. Blackburn did not think that there was a valid attorney-client privilege to invoke. *Id*.

Petit was initially personally obligated on the assignments but at some point she asked Blackburn to issue the assignments in the names of three corporations of which she was the sole owner. *Id*. at 51-52. He continued to transfer the funds in the same manner as previously described. *Id*. at 52-53. Petit told Blackburn that Gordon, her attorney in the bankruptcy action, had advised her that the corporations should issue the assignments because she was in bankruptcy and the corporations were not. *Id*. at 53. Petit also told Blackburn that she had characterized Richard as a large investor in the litigation and that he had filed as such in the bankruptcy action in order to obtain a disproportionate position on the creditors' committee. *Id*. at 54-55. She also substituted assignments in the name of Richard for those in her name to make them consistent with her prior testimony. *Id*. at 55-56. Petit told Blackburn that Caron had also filed an inflated claim in the

bankruptcy for the same reason as Richard. *Id*. at 61. In 1993 Blackburn discussed with Petit his concern that the assignments were securities. *Id*. at 57. She said that her attorneys had assured her that they were not. *Id*.

Blackburn's relationship with Petit was contentious at times and he became concerned that she would sue him in the future. *Id*. at 62-63. In 1994 he asked her to sign a memorandum of understanding regarding their relationship (Government Exhibit 208). *Id*. at 61-62. In April 1995 he asked Petit to waive any privilege with regard to potential investors in Buffalo, New York who asked him for a legal opinion as their counsel. *Id*. at 63-64. Blackburn testified that he sought this conflict waiver as a defensive measure, even though he told the investors that he had no attorney-client relationship with Petit or Richard. *Id*. at 65. Petit told Blackburn that she had testified in the Key Bank suit and in the bankruptcy action that Blackburn did not represent her. *Id*. at 66. This was consistent with his understanding of their relationship. *Id*. He wrote the letter seeking a conflict waiver because he was concerned that Petit would later characterize him as her counsel, not because he thought he was. *Id*. at 107-08.

When Blackburn wrote to investors he used the letterhead from his law practice. *Id*. at 74-75. At Petit's request, in 1990 he prepared invoices on his law practice letterhead addressed to her, but they are not true or accurate legal invoices (Defendants' Exhibit 35a-35f). *Id*. at 83-86. No payment was made on these bills and Blackburn was not paid to draw them up. *Id*. at 87-88. He also drew up an agreement with Petit to "identify" his remuneration as the Key Bank litigation seemed to be coming to a close (Defendants' Exhibit 31). *Id*. at 90.

Blackburn testified that he terminated his relationship with Petit in 1995 when she asked him to commit what he perceived to be insurance fraud. *Id*. at 6, 123-24. She had asked him to issue a

legal opinion to World Wide Funding and refused to provide information about the escrow account that he requested in connection with this opinion. *Id*. at 124.

Blackburn kept no record of the time he worked for Petit. *Id*. at 130. He did not share any income from this work with his law partners. *Id.* He testified that he did not hold himself out to investors as Petit's attorney. *Id*. at 141.

Blackburn did some deed work for Richard in three or four transactions in 1988. *Id*. at 188-90. He may possibly have drawn up a deed for Richard as late as 1990. *Id*. at 191. He is not aware that Richard used any other attorneys for his real estate work. *Id*. at 194-95. He had a number of discussions with Richard in 1989 about Petit's lawsuit. *Id*. at 195-96. Richard was a solicitor of funds for Petit at that time and later assumed the role of her confidant. *Id*. at 196-98. Blackburn wrote checks to Richard, at Petit's request, for money that was later transferred to her. *Id*. at 202-03. He asked Richard for a conflict waiver in connection with the World Wide Funding matter because he had represented Richard in the past, although he did not have a conflict at the time. *Id*. at 204-05. The only thing Blackburn discussed with Richard after 1990 was the Petit litigation and fundraising. *Id*. at 219. He never gave Richard legal advice about either. *Id*. at 220-21. Richard never shared any confidential information about the Petit litigation with him. *Id.* at 222.

Blackburn testified that he never disclosed any confidences from Richard as part of his cooperation with the government. *Id*. at 235. He believed that he had no attorney-client relationship with Richard in the context of the fundraising for Petit. *Id*. Although he discussed with Petit at times the use of the attorney-client privilege, he never felt that he had an attorney-client relationship with her. *Id*. at 239-40.

C. Paradis

Robert Paradis began working for Petit in 1987 or 1988 out of an office on Washington Street in Old Orchard Beach, where he did work related to the pier. Tr. I at 128-29. In 1989 he began working at 23 Water Street, Saco, where his job was to perform tasks assigned him by Petit which included financial bill paying and record keeping. *Id.* at 129-31. He did copying, picked up and delivered documents, kept receipts for bills paid, and did whatever needed to be done. *Id*. at 132. After a while he handled all of the office bills. *Id*. at 133. He also filed documents in court for attorney Caron. *Id*. He attended the meeting in Jupiter, Florida, and attorney Axelrod briefly discussed the concept of the attorney-client privilege with him there. *Id*. at 134. Paradis also did general maintenance at the 23 Water Street office. *Id*. at 137. He had a number code to disarm the security system. *Id*. at 137-38.

Paradis was arrested at the 23 Water Street location on October 8, 1997 and decided to cooperate with the FBI and the Maine attorney general after consulting his attorney. *Id.* at 138, 140. He met with Osterrieder and Assistant United States Attorney Donald Clark on October 9, 1997 and told them that there were documents at 23 Water Street that they might need. *Id*. at 139-40. Paradis believed that, given his status as Petit's office manager, he could consent to a search without consulting Petit. *Id*. at 143-45. He gave Osterrieder his security code and his key. *Id*. at 147. Paradis wanted to be sure that documents that would show where the money that had been entrusted to him by Petit had been spent would be removed by law enforcement authorities from 23 Water Street. *Id*. at 148-49. He described two boxes that contained such documents to Osterrieder during the October 9 meeting. *Id*. at 152.

Paradis first returned to 23 Water Street after his arrest on October 17, 1997, a Friday, in

order to look for the documents concerning the bank accounts that he controlled. *Id*. at 151-52. He had not seen what the government had taken when it executed its search warrant on October 9, 1997. *Id*. at 152. He used the key to the Coastal Associates office that Petit had given him and found the two boxes in question there. *Id*. at 152-53. He then left the building and called Osterrieder to ask him what he should do with the boxes. *Id*. at 154-56. Osterrieder told him to do nothing with them. *Id*. at 156. Paradis then called his attorney who told him to get the boxes. *Id*. at 156-57. On October 20, 1997 Paradis went back into the Coastal Associates office and took the boxes. *Id*. at 157-58. He also found a fax in the 23 Water Street office addressed to him which he copied, taking the copy with him. *Id*. at 158.

Paradis left the building and called his attorney, who told him to turn the boxes over to Osterrieder. *Id*. Paradis looked through the boxes quickly and saw some white envelopes that contained the records about which he was concerned, as well as some manila envelopes with his handwriting on them. *Id*. The initials "PBR" and "R. Paradis" were written on the boxes when he took them, but Paradis does not know who did the writing. *Id*. at 161-62. Paradis met with Osterrieder at Exit 5 of the Maine Turnpike, showed him the white envelopes and receipts and bills from Casco Northern Bank and Peoples Heritage Bank accounts, and gave him the boxes.[2] *Id*. at 159. At no time did Paradis tell Osterrieder about Petit's legal affairs, nor did he did talk to him about Blackburn. *Id*. at 177-78.

Paradis testified that the following items in one or the other of the two boxes as turned over to Osterrieder were not his property: a red folder and its contents, a letter from Robert York, a friend

[2] Paradis went into 23 Water Street one last time on the evening of October 22, 1997, on which occasion he found a yellow pad with his writing on it and a couple of pens that were his. *Id*. at 160.

of Petit, to Petit, a mortgage between P & M Associates and Old Orchard Ocean Pier Company ("OOOP"), an OOOP telephone bill, a letter from Petit to Barbara York, a file entitled "Accounting, Sherry Gerrard," a telephone bill sent to Caron for an apartment at 770 Boylston Street in Boston,[3] and some lawyers' bills. *Id*. at 165-71, 174-75. Paradis kept his personal things in these two boxes. *Id*. at 171. He did not put things that were not his into the boxes and he did not intend to take things that were not his when he retrieved the boxes. *Id*. at 171-72. Paradis obtained one of the boxes, with a Mary Kay emblem on it, from his wife. *Id*. at 172. The boxes were out of Paradis' control for a period of time. *Id*. at 171.

A list in an unmarked envelope in one of the boxes shows the dates upon which Paradis received money from Thomas Blackburn. *Id*. at 173. This money was received in the form of checks made payable to Paradis, who deposited the funds in a bank account that he opened in his name at Petit's request.[4] *Id*. at 174, 179. The funds were used to pay bills as directed by Petit. *Id*. at 179. Paradis paid the telephone bills for the Boston apartment that were sent to Caron. *Id*. at 175-76.

Paradis first saw his boxes in the Coastal Associates office in August 1997. *Id*. at 190. He did not discuss the contents of the boxes with Richard and did not ask permission from Richard to take them. *Id*. at 196.

The numerous white envelopes in the two boxes contain documents showing where the payments Paradis made on Petit's behalf went. *Id*. at 197-99. Hundreds of thousands of dollars went

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[3] Petit lived in this apartment in Boston, starting shortly after the Bernstein Shur settlement. *Id*. at 215.

[4] Paradis went to Blackburn's office to pick up the checks and took unsigned assignments of interest in the Key Bank litigation as well as sealed envelopes to Blackburn. *Id*. at 178-79.

through the accounts in Paradis' name. *Id*. at 199. Paradis paid for Petit's credit card transactions, the apartment in Boston and a home in Ogunquit. *Id.* at 201. Paradis was not Caron's employee. *Id*. at 202. Nor was he a lawyer or a paralegal. *Id*. In 1993 or 1994, employees at 23 Water Street began answering the telephone "law office." *Id*. at 202-03. Many of the documents in the two boxes existed before this office was called a law office. *Id*. at 203-04. Paradis started keeping the records found in the white envelopes in 1990. *Id*. at 204. He sometimes kept the boxes at home, in the office under his desk, or in his car. *Id*. at 204-05. Paradis took the boxes because he was "seriously concerned they'd go away forever" if he did not. *Id*. at 210.

Paradis had complete access to the 23 Water Street offices and the Coastal Associates office. *Id*. at 205. No one told him prior to October 17, 1997 that he could not go into the offices, no one has ever asked for his keys, and the security codes have not been changed. *Id*. at 206. The Coastal Associates suite opened about two months before Paradis' arrest. *Id*. Petit paid for the space; in fact, Rzasa refused to have a telephone installed there until Petit paid the rent. *Id*.

Osterrieder testified that when Paradis called him about the boxes, he said he did not want Paradis to do anything for him and told Paradis to call his attorney. *Id*. at 220. Paradis' attorney then called Osterrieder and asked him if Paradis' going into the office would hinder the investigation, whereupon Osterrieder responded that Paradis was not to go into 23 Water Street or the Coastal Associates office "on [Osterrieder's] behalf for any reason whatsoever." *Id*. On October 20 the attorney called again to tell Osterrieder that Paradis would be calling about the boxes. *Id*. at 221. When Paradis called him, Osterrieder asked Paradis if the records in the boxes were his and Paradis said "yes." *Id*. Osterrieder then met Paradis and picked up the boxes. *Id*. The boxes would have been taken during the warranted search on October 9 if they had been found then. *Id*. at 221-22.

For Caron, Paradis filed court documents that usually had to do with the Key Bank case. *Id*. at 180. Paradis did not discuss the case with Petit, although she sometimes would say things about it. *Id*. at 180-81. Her legal strategy was not known to him. *Id*. at 181. Paradis did not work with John Rzasa, an investigator and occupant of the Coastal Associates office, on any investigations. *Id*. Paradis did not work with attorney Gordon on the bankruptcy case. *Id*. Paradis worked occasionally at Poulos's office with Sherry Gerrard, organizing documents from the Ricci trial and copying. *Id*. at 182-83. He did not discuss his work there with Petit. *Id*. at 183. He "hardly understood" what was going on with Petit's lawyers and found it boring. *Id*. at 186.

III. Proposed Conclusions of Law

A. Poulos (Docket No. 95)

Petit bases her motion to suppress on the attorney-client privilege, the work-product doctrine and the Sixth Amendment. Petit does not appear to seriously press the Sixth Amendment claim, and there is no apparent basis for it, since there is no assertion that Poulos ever acted as Petit's counsel in a criminal matter. *Kirby v. Illinois*, 406 U.S. 682, 689-90 (1972) (Sixth Amendment guarantees only applicable after commencement of criminal prosecutions) (plurality opinion); *United States v. Edgar*, 82 F.3d 499, 507 (1st Cir. 1996) (no Sixth Amendment right implicated when attorney called to testify before grand jury was not criminal defense counsel). Similarly, Petit provides no citation to authority to support her claim that the work-product doctrine applies in this case, nor does she indicate which documents currently in the government's possession are allegedly subject to the doctrine. *See United States v. Cardiges*, 881 F. Supp. 717, 725 (D.N.H. 1995) (burden is on defendant to identify documents she seeks to suppress).

The party seeking to assert the protection of the work-product doctrine must meet a three-pronged test.

> The material in question must: 1) be a document or tangible thing, 2) which was prepared in anticipation of litigation, and 3) was prepared by or for a party, or by or for its representative.

Sham v. Hyannis Heritage House Hotel, Inc., 118 F.R.D. 24, 25 (D. Mass. 1987) (civil action); *United States v. Mitchell*, 372 F. Supp. 1239, 1245 (S.D.N.Y.), *appeal dismissed* 485 F.2d 1290 (2d Cir. 1973). Petit's submission fails to address any portion of the applicable test. She is not entitled to suppression of any documentary evidence on this basis.

Petit focuses on the attorney-client privilege in pressing her request for suppression. Federal law governs the assertion of the privilege under the circumstances of this case. Fed. R. Evid. 501. The privilege does not apply to all information that happens to be exchanged between a lawyer and his client, and the existence of an attorney-client relationship does not depend upon the perception of third parties. *Sheinkopf v. Stone*, 927 F.2d 1259, 1265 (1st Cir. 1991). Only when it is objectively determinable that such a relationship exists may the privilege arise.

> Whatever the form of the information, it is privileged if: (1) the client was, or sought to be, a client of the [lawyer]; (2) the lawyer acted as a lawyer in connection with the information at issue; (3) the information relates to facts communicated for the purpose of securing a legal opinion, legal services, or assistance in a legal proceeding; and (4) the privilege has not been waived.

In re Grand Jury Subpoenas, 123 F.3d 695, 699 (1st Cir. 1997). The communication must involve the seeking of legal advice from a professional legal advisor in his capacity as such. *United States v. MIT*, 129 F.3d 681, 684 (1st Cir. 1997). The First Circuit has listed some indicia of the existence of an attorney-client relationship: whether the client had retained other counsel; whether the client

paid the lawyer for his services; whether the client ever asked the lawyer to take any action on his behalf. *United States v. Bay State Ambulance & Hosp. Rental Serv., Inc.*, 874 F.2d 20, 28 (1st Cir. 1989).

Attorney Poulos represented Petit in the action against Key Bank concerning which she was selling assignments of the recovery, the basis of the criminal charges. He did not formally withdraw from that representation until January 27, 1997. He went to the bankruptcy trustee on August 8, 1995 to tell him what he had learned about Petit's post-petition activities at 23 Water Street. He went to Assistant U. S. Attorney Paula Silsby in January 1996 with information about Petit and, as impounded Form 302 shows, to the FBI on October 31, 1996. Poulos contends that Petit effectively discharged him in 1994 because she threatened to sue him for malpractice by listing "possible attorney malpractice claims" as an asset in her bankruptcy proceeding and because she never consulted him thereafter. Since the privilege continues after the attorney-client relationship ends, even if Poulos is correct any privileged information he acquired before the actual date of his "effective" discharge remains privileged. Poulos also contends that he was not representing Petit after the bankruptcy case was filed in 1993 because the trustee did not retain him to pursue the claims against Key Bank, which were an asset of the bankruptcy estate.

The government adopts Poulos's position and also asserts a waiver by failure to object to the Poulos disclosures in a hearing before the bankruptcy court on December 1, 1995 and after learning of his statement to Silsby in April 1996. The only allegedly confidential communications identified by Petit as having been disclosed by Poulos are reflected in the information contained in the memorandum Poulos prepared for his meeting with Silsby (Defendants' Exhibit 1), Motion at 2, and "Poulos' statement to Silsby providing his opinion as to the value of Petit's case as of January 4,

1993, *i.e.* pre-bankruptcy," Petit and Richard Consolidated Post-Hearing Memorandum in Support of Suppressing Information Provided by Poulos, Paradis and Blackburn (Docket No. 194) at 4, referring to page 100 of the transcript of the first day of the suppression hearing.

It is not necessary to reach the government's alternative arguments concerning waiver or the crime-fraud exception to the attorney-client privilege because the evidence presented at the hearing concerning information identified by Petit as having been provided to the government by Poulos in violation of the attorney-client privilege — solely as evidenced by the testimony of Poulos and Osterrieder — fails to establish an essential element of Petit's burden of proof. Assuming without deciding that Petit and Poulos had an attorney-client relationship even until his formal notice of withdrawal from the Key Bank lawsuit after he had spoken with various representatives of the government, of all of the items listed in Defendants' Exhibit 1, only portions of number 2, styled "Outline history of her acquisition of amusement park and Old Orchard Ocean Pier and other assets in 1979," was not explained by Poulos's credible and uncontradicted testimony as constituting information that he obtained from sources other than confidential communications from Petit. Accordingly, Petit is not entitled to suppression of any of that information on the grounds asserted in her motion.

Each of the nine items listed under heading number 2 on Defendants' Exhibit 1 will be addressed separately. Items (a), (d), that part of (e) that refers to the existence of loans, (f), (g), and (i) are all matters of public record, or at least they appear to be and Petit has made no attempt to show that they are not. Item (b) was not mentioned at the suppression hearing and I am unable to discern what it is, thus suppression cannot be warranted for whatever information that entry may represent. Items (c), which might relate to the subject matter of the lawsuit against Key Bank and

Bernstein Shur (although presented in a manner that is more likely to be detrimental to the defendants in that civil action than to Petit), and (h), which simply states "Chapter 11 cases, 1983," might include information that was conveyed to Poulos by Petit in confidence, but no such information was identified at the hearing. The items themselves are merely categories, too general to provide any basis for suppression. That portion of item (e) that refers to "Pier construction in 1979-80" is similarly vague and not tied by the defendants to any particular information provided to the government by Poulos. In addition, none of this information appears to be particularly relevant, other than perhaps as historical background, to the charges currently pending against Petit. Similarly, the following headings in Defendants' Exhibit 1 appear from the record to have no relevance to the pending charges: I.3, I.5, I.7, II.7, and V. Items III.3 and III.4 appear to be Poulos's attempt to suggest to the government how it might conduct a further investigation. In any event, Petit has failed to establish a legal basis for the suppression of any of the material in Defendants' Exhibit 1.

With respect to Poulos's statement to Silsby concerning his opinion about the value of Petit's lawsuit after the settlement with Bernstein Shur, the government argues that this disclosure was essential in order for Poulos to defend himself against Petit's malpractice claim against him and to prevent the commission of the bankruptcy fraud "as to which Petit stands charged." Government's Post-Suppression Hearing Memorandum of Law in Opposition to Defendants' Pretrial Motions (Docket No. 196) at 32. There are two problems with the government's position. First, Petit has never filed a malpractice claim against Poulos. *See, e.g., Industrial Clearinghouse, Inc. v. Browning Manuf. Div. of Emerson Elec. Co.*, 953 F.2d 1004, 1007 (5th Cir. 1992) (even formal complaint only waives privilege if it or response, or testimony in ensuing proceeding, reveal confidential

communications, and then only as to subject matters of the disclosed communications). Second, the bankruptcy fraud about which Poulos believed he was informing Silsby in January 1997 had already taken place. A review of the page of the transcript of the hearing to which Petit refers, however, reveals that the challenged statement of opinion by Poulos was made in response to a question from Ms. Silsby at the hearing, and that the defendants made no objection. Tr. I at 100. There is no reference in the transcript to the statement having been made during the January meeting. Thus, there appears to be nothing to suppress.

B. Blackburn (Docket No. 93)

Petit seeks suppression of all taped conversations between herself and Thomas Blackburn and all documents provided by Blackburn to the government on the grounds of attorney-client privilege, the work-product doctrine and the Sixth Amendment (Docket No. 93). The claims based upon the Sixth Amendment and the work product doctrine are without merit for the reasons discussed above in connection with the motion concerning Poulos. As was the case with that motion, Petit concentrates on an alleged attorney-client relationship between her and Blackburn. Richard also claims such a relationship.

Petit alleges that Blackburn served as her attorney for almost ten years and that he was still her attorney when, in February 1997, he began "telling the government about the very same matters for which he had served as her legal advisor." Motion at 1. She submits bills from Blackburn to her dated January 12, 1990 and a Memorandum of Understanding among her and three of her corporations, collectively referred to as "Petit," on the one hand and Blackburn on the other in which Blackburn is "confirmed" as "her counsel to interface with investors, but not as an attorney of record

for any of the lawsuits set forth herein." Defendants' Exhibits 35a-35f (bills), 31 (Memorandum of Understanding) at B-1042. The agreement also states that Blackburn has been named a co-trustee with Caron of a trust in which "monies received from the litigation identified as CV-86-608 will be channeled," that Blackburn has received certain monies and has distributed them through his client trust account or directly to various parties at Petit's request or at his discretion "based upon a mutual understanding of the efforts to capitalize the PETIT litigation," and otherwise confirms that Blackburn will essentially serve as a sales agent for the assignments of proceeds sold by Petit to finance the Key Bank litigation. Memorandum of Understanding at B-1043. The agreement is dated November 4, 1994. *Id.* at B-1042. Also in evidence are unsigned letters from Blackburn to Petit and Richard dated May 4, 1995 in which Blackburn asks them to waive a conflict of interest "[i]n light of my legal representation of you," Defendant's Exhibits 121 and 200,[5] and a sealed document dated January 23, 1996 in which Blackburn refers to a directive from Petit that he not violate the attorney-client privilege, Defendant's Exhibit 130 at 2.

Blackburn testified on cross-examination by Richard's counsel that he represented Richard in three or four real estate transactions in 1988 and may have drawn up a deed for Richard as late as 1990. He also testified that he never discussed anything with Richard after 1990 other than the Petit litigation against Key Bank and the fundraising connected with that lawsuit in which both he and Richard were engaged. Richard has not identified any confidential communications between him

[5] Petit also relies on Defendant's Exhibit 47, a draft letter dated January 13, 1994 to a Bruce Leiter (the name is spelled in two different ways on the draft, one of which is handwritten) with a signature line bearing Blackburn's name and the title "general counsel." It is unclear from the document for what entity Blackburn was representing himself as general counsel and, in any event, the evidence indicates that the letter was never sent. Tr. II at 110-11. Under these circumstances, the letter has little or no value in establishing an attorney-client relationship between Blackburn and Petit.

and Blackburn arising out of the real estate transactions in which Blackburn represented him that are implicated by his testimony or activities in this case. This failure requires denial of the motion to suppress as to Richard concerning any period of time for which there is evidence that Blackburn did serve as Richard's attorney. *See United States v. Arruda*, 715 F.2d 671, 685 (1st Cir. 1983) (defendant's failure to make clear what documents he claimed government failed to produce means court cannot find violation of *Brady v. Maryland*, 373 U.S. 83 (1963)). There is no evidence other than the draft letter from Blackburn to Richard, Defendant's Exhibit 200, that he ever represented Richard in connection with the matters at issue in this proceeding, and Blackburn's testimony that he prepared that document solely out of fear that Richard would later sue him, claiming that he had been Richard's attorney, and denying that any such relationship existed, is fully credible.

The government contends that Petit has failed to establish the existence of any attorney-client relationship between herself and Blackburn. In the alternative, the government relies upon the crime-fraud exception to the attorney-client privilege, which "does not shield the disclosure of communications relating to the planning or commission of ongoing fraud [or] crimes." *Commodities Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 354 (1985). "[T]he attorney-client privilege is forfeited . . . where the client sought the services of the lawyer to enable or aid the client to commit what the client knew or reasonably should have known to be a crime or fraud." *United States v. Rakes*, 136 F.3d 1, 4 (1st Cir. 1998). The government has also provided excerpts from deposition testimony of Petit and Richard in which they deny that Blackburn ever represented them personally. Excerpts from Deposition of Catherine Duffy Petit, Exh. T to Affidavit of James Osterrieder ("Osterrieder Aff.") (Docket No. 131), at 254-55; Excerpt from Deposition of Paul Richard, Exh. U to Osterrieder Aff., at 33.

Because Petit has failed to establish that she and Blackburn had an attorney-client relationship at any time relevant to this proceeding, it is not necessary to reach the government's argument concerning the crime-fraud exception to the attorney-client privilege. The only evidence in the record other than the documents upon which Petit relies is the testimony of Blackburn, which establishes that Petit was not in fact his client and sought to be his client only in the sense that she intended to assert the attorney-client privilege should the need arise to prevent information concerning her activities known to Blackburn from becoming available to individuals whom she did not want to know about them, and that Blackburn did not act as a lawyer in connection with any information that he could have supplied to the government concerning the activities that form the basis of the charges against Petit. This testimony is credible, as is Blackburn's explanation for each of the documents upon which Petit relies. He created the bills at Petit's request, knowing that they were false and that he would never be paid for the charges represented there, as he has not been. Tr. II at 83-88. He discussed the attorney-client privilege with Petit but never provided her with any legal services or asserted the privilege on her behalf to third parties. *Id.* at 17, 25, 239-40, 246-47. He signed the Memorandum of Understanding, which he had prepared as a defensive measure, but never served as her attorney. *Id*. at 11, 62-63. He prepared the unsigned request for a waiver of the privilege by Petit as a defensive measure because he was afraid that she might sue him in the future. *Id.* at 64-65.

Given these facts, Petit has failed to establish the existence of an attorney-client relationship between herself and Blackburn. *United States v. MIT*, 129 F.3d at 684; *In re Grand Jury Subpoenas*, 123 F.3d at 699. Accordingly, she is not entitled to suppression of any of the information provided by Blackburn to the government.

C. Paradis (Docket No. 97)

In this motion, Petit seeks suppression of "purloined evidence provided to the government by Robert Paradis," Motion at 1, specifically the contents of two boxes taken from the Rzasa office several days after the search made pursuant to the warrant had been completed, on the grounds that Paradis was acting as an agent of the government at the time he took the boxes and that the attorney-client privilege covers the documents because Paradis was "a member of the support staff for Petit's legal affairs," *id*. at 3. Petit also asserts that she "suspect[s]" that other unidentified documents and "evidentiary items" were "taken" by Paradis, *id*. at 2, but none were identified at the hearing.

Richard has joined in this motion. However, I have already concluded in my Recommended Decision on Motion of Defendants Steven Hall and Richard to Suppress Seizures Outside the Scope of the October 9, 1997 Search Warrant (Docket No. 192) that Richard lacks standing to challenge the search of the Coastal Associates office by the government pursuant to warrant, *id.* at 3-4. That reasoning extends to any "search" of that office that might have been conducted by Paradis, resulting in his obtaining possession of the boxes and their contents.

The government contends that Petit lacks standing to seek suppression of any material taken by Paradis, that Rzasa abandoned the Coastal Associates office a week before Paradis removed the boxes, that Paradis was not acting as an agent of the government when he removed the boxes, that the boxes contain "largely" records assembled by Paradis of transactions conducted through accounts in the names of Paradis and his wife, that Paradis had common authority over the Coastal Associates office that allowed him to take the boxes and consent to their search by the government, and that discovery of the boxes, the contents of which are within the scope of the previously executed

warrant, was inevitable. In reply, Petit repeats her initial arguments and contends that Paradis did not have authority to consent to a search of either Suite 7 or the Rzasa office and that his arrest divested him of any authority even to enter either office.

Paradis was the office manager for Suite 7 and was paid by Petit. Petit identified him in her bankruptcy filing as a bookkeeper and accountant in possession of her books and records. Paradis had a key to Suite 7 and a personal security code to arm and disarm Suite 7's alarm system. He knew where the key to Rzasa's office was kept in Suite 7. Paradis went to Suite 7 on October 17, 1997 to retrieve documents that might aid in his defense. The locks and security codes had not been changed, and no one had asked him to surrender his keys or told him that he could not enter either office. While in the Rzasa office on that date, he saw the two boxes in issue where he had placed them several months earlier.

The boxes were marked with Paradis' name and he knew them to contain financial records which he had accumulated and maintained since 1990. He had kept the boxes at his home and in his car at times. The boxes contained financial records concerning accounts in his name and other bank accounts, none of which were in Petit's name, through which Petit moved funds. In 1995, defendant Richard had moved these two boxes from Suite 7 to the Coastal Associates office. Paradis kept the records in the boxes because he was concerned that Petit would accuse him of taking money from her, as she had another employee in the past. Paradis took the boxes form the Coastal Associates office because he believed them to contain his own records and to protect himself from claims by Petit that he had taken money improperly.

The government again raises the standing issue in connection with this motion. Rzasa's affidavit asserts that he considered the contents of his office to be "a combination of work product

and attorney/client privileged material which was gathered and stored in my office solely for the purpose of litigation involving or related to Catherine Petit, Paul Richard or related corporations." Affidavit of John Rzasa, Exh. 5 to Petit's Motion to Suppress Fruits of October 9, 1997 Search of 23 Water St. (Docket No. 94), ¶ 5. Rzasa abandoned the office effective October 31, 1997, stating in a letter to the landlord dated October 13, 1997 that any furniture and files remaining in the office at that time "I would guess belongs [sic] to Catherine Petit and associates." Exh. M to Osterrieder Aff. He enclosed a key to the office with the letter. The government argues that this letter establishes that Rzasa had no expectation of privacy in the office on October 20, 1997 when the boxes were removed, but that is not the only possible interpretation of the letter. In any event, Petit asserts that her standing arises from her status as Caron's client, and that because Rzasa was working for Caron, she has a reasonable expectation of privacy concerning "litigation related records, documents and files" in Rzasa's office. Petit and Richard's Consolidated Reply to the Government's Memorandum of Law in Opposition to Defendants' Pre-Trial Motions (Docket No. 138) at 3.

The problem with Petit's argument here is that she has had access to the contents of the boxes but does not identify any documents therein that are in fact privileged or "litigation records, documents and files." None of the items taken from the two boxes and shown to Paradis at the suppression hearing which he testified were not his appear to come within the description "litigation documents." She does not assert any other basis for an expectation of privacy in the contents of these boxes. Both Caron and Rzasa state in affidavits that boxes marked "REP" were in both offices and that these boxes contained files from Richard E. Poulos concerning his representation of Petit in the Key Bank litigation, but neither box shows any REP marking. Both are marked "PBR" and "R. Paradis."

However, because Paradis testified that some of the documents in the boxes appeared to belong to Petit, it may be necessary to address Petit's arguments as to those documents. Even if Petit could establish standing, Paradis had the power to consent to the search. He had a key to Suite 7 and knowledge of the location of the key to the Rzasa office. The boxes contained documents that he had generated or maintained, and over which he had exercised control in the past. "[W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *United States v. Matlock*, 415 U.S. 164, 171 (1974). Authority justifying consent to search requires only mutual use of the property, which may be evidenced by possession of a key to the premises and access throughout it. *United States v. Dubrofsky*, 581 F.2d 208, 212 (9th Cir. 1978). Petit cites no authority for her assertion that Paradis' arrest automatically deprived him of any right to enter the premises and I have located none.

Of course, the Fourth Amendment does not apply at all in the absence of governmental action. If there is "no suggestion that the government initiated or participated in" Paradis' removal of the boxes, there is no Fourth Amendment violation. *United States v. Mendez-de Jesus*, 85 F.3d 1, 2-3 (1st Cir. 1996). Here, Paradis discovered the boxes on his own, without any contact with the government. He did contact Osterrieder before removing the boxes, but Osterrieder told him to do nothing about the boxes. Petit offers nothing but speculation to dispute the testimony of Osterrieder and Paradis on this point. She suggests that a confidential informant becomes an agent of the government for Fourth Amendment purposes merely by virtue of that status, but the law is otherwise. The determination whether a confidential informant was acting as a government agent is made on

a case-by-case basis; if the informant has a legitimate independent reason for engaging in the challenged conduct, the fact that he might also have intended to assist the government does not transform him into a government agent for Fourth Amendment purposes. *United States v. McAllister*, 18 F.3d 1412, 1417-18 (7th Cir. 1994).

When a defendant asserts that a third party was acting as a government agent for Fourth Amendment purposes, the First Circuit considers several factors in evaluating that party's status:

> the extent of the government's role in instigating or participating in the search, its intent and the degree of control it exercises over the search and the private party, and the extent to which the private party aims primarily to help the government or to serve its own interests.

United States v. Pervaz, 118 F.3d 1, 6 (1st Cir. 1997). The fact that there would have been no search but for the fact that the searcher was put on notice by the government that it was investigating a possible crime by the defendant is not determinative. *Id.* Here, the government did not instigate Paradis' search, nor did it participate in it. It does not appear to have exercised any control over the search, and the only influence it could have had over Paradis was the extent to which he perceived that performing some act that pleased the government might serve the purpose of reducing the charges or sentence he faced. Based on Paradis' testimony, it is reasonable to conclude that his primary aim was to serve his own interests, although he must also have been aware that he was helping the government.

Nor can Petit succeed on her argument that the contents of the boxes are subject to the attorney-client privilege because Paradis was part of her "legal team." Petit has not offered evidence that any of the documents in either box were created for the purpose of seeking or rendering legal advice or assistance in a legal proceeding. *In re Grand Jury Subpoenas*, 123 F.3d at 699. Even if

this hurdle had been successfully overcome, the facts do not establish that Paradis enjoyed the status of a representative of Petit's lawyer to whom the privilege extends. While the fact that Paradis was employed by Petit rather than any of her attorneys is not determinative, the only task Paradis testified that he performed for any of Petit's lawyers was the delivery of documents. The attorney-client privilege extends to agents and representatives of the attorney for the person invoking the privilege whose services are necessary for effective representation of the client's interests. *Andritz Sprout-Bauer, Inc. v. Beazer East, Inc.*, 174 F.R.D. 609, 632 (M.D.Pa. 1997). Paradis' services do not fit that definition. There is no sense in which the evidence suggests that Paradis assisted any of Petit's lawyers in the rendition of professional legal services. *See* 24 C. Wright & K. Graham, *Federal Practice & Procedure* § 5482 (1986) at 268 ("representative" of the lawyer for purposes of attorney-client privilege does not include office administrator, chauffeur, janitor, etc.); *City of Worcester v. HCA Management Co.*, 839 F. Supp. 86, 88 (D.Mass. 1993) (privilege extends to communications made to representative of attorney for sake of obtaining attorney's advice). While it might be possible to argue that information learned by Paradis during meetings between Petit and her counsel that he attended is subject to the privilege because Paradis was present as Petit's employee, agent or representative, *see Atwood v. Burlington Indus. Equity, Inc.*, 908 F. Supp. 319, 322-23 (M.D.N.C. 1995), Petit has not identified any of the documents in the boxes as containing such information or arising from such meetings. Her broad-brush approach to the privilege, asserting that every document Paradis created, touched or produced to the government is subject to the privilege due solely to his status, even though he was employed as her office manager, is insupportable.

The foregoing conclusions make it unnecessary to address the government's arguments concerning Rzasa's abandonment of the office or inevitable discovery. Petit's motion concerning

the materials delivered to the government by Paradis should be denied.

IV. Conclusion

For the foregoing reasons, I recommend that Petit's motions to suppress concerning Poulos, Blackburn and Paradis (Docket Nos. 93, 95, and 97) be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 5th day of August, 1998.

David M. Cohen
United States Magistrate Judge