

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
March 31, 2003

SECURITIES & EXCHANGE COMMISSION
MAILED FOR SERVICE

APR 01 2003

CTFD. NO. _____

In the Matter of :
:
JEFFREY R. PATTERSON and : ORDER
TERRANCE TURMAN :
:
:

The hearing in this proceeding is scheduled to commence April 21, 2003. On March 17, David H. Marion, Esq., Receiver for the property of Robert L. Bentley, Bentley Financial Services, and Robert L. Bentley DBA Entrust Group (Receiver), moved to quash the February 28, 2003, subpoena duces tecum issued at Respondent Turman’s request to Francis C. Brulenski, CPA, of Nihill Riedley & Co. (Nihill Riedley).¹ Respondent Turman filed a Response on March 19, and the Receiver, a Reply on March 24.

The subpoena requires the production of:

reports, analyses, findings, conclusions and recommendations by Nihill Riedley (including any correspondence, attachments, exhibits, appendices), for the period October 2001 to the present, prepared in connection with the engagement of Nihill Riedley by the SEC and/or the BFS receiver to provide forensic, accounting or other professional services relating to the business of Bentley Financial Services and the Entrust Group.

The Division of Enforcement (Division) intends to call Mr. Brulenski to testify as a “summary witness.” Additionally, the Receiver engaged Nihill Riedley to perform general accounting services to assist his management of still-functioning receivership entities, and the Receiver’s counsel engaged Nihill Riedley to provide forensic accounting services with an eye toward expected litigation.

By Order of March 13 (March 13 Order), the undersigned ruled, on the motion of the Division, that, as described, the material prepared in connection with the SEC engagement is work product within the meaning of Hickman v. Taylor, 329 U.S. 495 (1947), and Federal Rule of Civil Procedure 26(b)(3). The March 13 Order noted that the Division provided Respondent

¹ Pursuant to 17 C.F.R. § 201.232(e)(1), “Any person to whom a subpoena is directed or who is an owner, creator or the subject of the documents that are to be produced pursuant to a subpoena may . . . request that the subpoena be quashed or modified.”

Turman with a summary of Mr. Brulenski's anticipated trial testimony, copies of the "summary" trial exhibits he prepared, and all underlying documents on which his summaries are based. The subpoena was modified to exclude production of material prepared in connection with the SEC engagement as unreasonable, oppressive and unduly burdensome within the meaning of 17 C.F.R. § 201.232(e)(2).

The Receiver argues that the subpoena is overbroad, encompassing general accounting services as well as forensic material that has no relevance to this administrative proceeding, and calls for the production of material protected by the attorney-client and work product privileges. In response, Respondent Turman states that he is not seeking documents related to general accounting services performed by Nihill Riedley for the Receiver. Respondent Turman concedes that the attorney-client and work product privileges apply to forensic accounting services performed at the request of counsel and for the purpose of providing legal advice in advance of litigation. He argues, however, that the privileges must yield in the face of the competing need for materials on which to cross-examine Mr. Brulenski. He also requests reconsideration of the March 13 Order on the same basis.

The attorney-client and work product privileges must be balanced against Respondent Turman's right to cross-examine Mr. Brulenski effectively. See generally, Clarke T. Blizzard, 77 SEC Docket 1505 (Apr. 23, 2002). The March 13 Order assumed that the Division had provided Respondent Turman with all Nihill Riedley documents necessary for cross-examination of Mr. Brulenski. The subpoena will now be modified, pursuant to 17 C.F.R. § 201.232(e)(2), to specify that production is restricted to documents, redacted of opinion content, that Mr. Brulenski created, relied on, or considered. Respondent Turman will bear the cost of retrieving, copying, and transporting the documents.

IT IS SO ORDERED.



Carol Fox Foelak
Administrative Law Judge