U.S. Department of Justice

United States Attorney
Southern District of New York

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April 7, 2026

Via ECF
The Honorable Katharine H. Parker
United States District Court
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: *United States of America v. Anthem, Inc.*, No. 20 Civ. 2593 (ALC) (KHP)

Dear Judge Parker:

We write pursuant to the Court's order (ECF No. 448), and in response to Anthem's March 31, 2026, letter ("Anthem Letter") asserting that the work product doctrine and the common interest doctrine protect communications between Anthem's counsel and third-party witness Deborah Bradley, a former employee of Cotiviti, Inc., formerly known as Verscend ("Verscend"). Anthem has not met its burden to establish that its communications with Ms. Bradley are privileged. First, the Government's inquiry into Ms. Bradley's preparation sessions with Anthem's counsel is directly relevant to evaluating her credibility on topics central to the Government's claims. Second, the work product doctrine does not bar questions on this topic because Anthem voluntarily chose to communicate with a third-party witness represented by her own counsel, and its joint defense agreement cannot independently conceal those communications from discovery. Third, Anthem has failed to meet its burden of establishing a common legal interest with Verscend or Ms. Bradley, because neither shares an identical legal interest with Anthem—Verscend has no stake whatsoever in the legal outcome of this litigation. Accordingly, the Court should direct Ms. Bradley to answer questions regarding her communications with Anthem's counsel.

I. Background

Anthem contracted with Verscend to perform retrospective chart review services. Ms. Bradley is a former Verscend employee who oversaw the chart review program for Verscend. The Government alleges that Anthem designed and operated a chart review program that generated hundreds of millions of dollars in overpayments because Anthem failed to delete diagnosis codes it identified as unsupported by the medical record. The Government further alleges that Anthem instructed Verscend to perform chart reviews to identify diagnosis codes supported by medical records, but "did not ask [Verscend] to take any step to determine whether . . . flagged records supported or would not support the diagnosis codes that Anthem had already reported to CMS for risk adjustment purposes," thus failing to delete unsupported codes. Am. Compl. ¶ 127.

The Government has not brought any claims against Verscend relating to any of the allegations in the amended complaint, and the statute of limitations for any such claims has lapsed. The Government deposed Ms. Bradley to learn, among other things, what instructions Anthem gave Verscend in conducting the chart review program, what information Anthem provided, and how Anthem could have instructed Verscend to conduct Anthem's chart review differently.

During Ms. Bradley's February 24, 2026, deposition, Anthem's and Verscend's counsel directed Ms. Bradley not to answer questions about her communications with Anthem's counsel

that occurred before the deposition. When the Government asked Ms. Bradley, [redacted] counsel for Anthem and Verscend objected and instructed Ms. Bradley not to answer, asserting that [redacted] and that [redacted] Bradley Tr. 11:8–16. The parties thereafter called the Court to address the dispute, and the Court directed them to raise the issue in briefing. *Id.* at 117:12–25.

II. Anthem's Communications with Ms. Bradley Are Relevant

Testimony about Ms. Bradley's preparation with Anthem's counsel is plainly relevant to the credibility of her testimony. Anthem mischaracterizes the Government's request, arguing that it does not need further testimony because the Government is not seeking additional testimony on the merits. Anthem Letter at 1. The issue is not whether Ms. Bradley answered factual questions—she did—but whether the *substance and reliability* of those answers on disputed subjects central to the case may have been shaped by Anthem's counsel during preparation. Questions posed to a third-party witness regarding deposition preparation are "plainly directed at witness credibility." *S.E.C. v. Gupta*, 281 F.R.D. 169, 173 (S.D.N.Y. 2012). "The ability of a party to meet with a non-party witness, show him documents and ask him questions, and then mask the entire preparation session in the cloak of work product protection would serve to facilitate even the most blatant coaching of a witness if it could not be the subject of inquiry. To allow the invocation of work product protection to succeed in such circumstances would leave the party taking a deposition with no remedy to determine how, if at all, a witness's testimony was influenced." *Id.*

The need to test Ms. Bradley's credibility is not speculative; it is grounded in the testimony itself. Central to the Government's claims is the allegation that Anthem submitted additional revenue-generating diagnosis codes to the Centers for Medicare & Medicaid Services ("CMS") but failed to delete codes that Anthem knew or should have known were unsupported by the medical record. Ms. Bradley's testimony on this topic was internally contradictory. When describing [redacted] Bradley Tr. at 41:13–23, 44:19–25. She emphasized that [redacted] *Id.* at 43:21–22, 44:15–16. Yet when the Government asked [redacted] *Id.* at 111:5–7. She described [redacted]. This disparity raises concrete questions about whether and how Ms. Bradley's testimony was shaped by preparation sessions with Anthem's counsel.

Anthem's remaining arguments do not resolve the issue. The credentials of Anthem's counsel are irrelevant. *See* Anthem Letter at 1–2. As Judge Rakoff has explained, questions about deposition preparation sessions are "plainly directed at witness credibility," and by asking the witness "what topics he recalls were discussed, what questions he was asked and what documents he was shown" the defendants appropriately sought to discover "how the preparation sessions affected [the] testimony" and did not inappropriately attempt to obtain "legal opinions and strategy." *Gupta*, 281 F.R.D. at 172–73. The Government does not, and need not, allege misconduct to inquire into the circumstances of a witness' preparation to test their credibility. The

Government also disagrees with Anthem's characterization of Ms. Bradley's testimony and its assertion that "key aspects of her testimony were entirely consistent with testimony from other witnesses." Anthem Letter at 2. In any event, consistency is irrelevant to the privilege question before the Court. It does not establish privilege, defeat waiver, or foreclose the possibility that testimony was shaped during preparation. If anything, consistency with Anthem's litigation positions may reflect the effect of preparation rather than refute it. The Government is entitled to test Ms. Bradley's preparation through ordinary examination.[1]

III. The Work Product Doctrine Does Not Bar the Requested Inquiry

The work product doctrine protects "documents and tangible things that are prepared in anticipation of litigation." Federal Rule of Civil Procedure 26(b)(3)(A). "[D]isclosure to a third-party witness in the action waives privilege where the witness does not share a common interest with the disclosing party." *City of Almaty, Kazakhstan v. Ablyazov*, No. 15 Civ. 5345 (AJN) (KHP), 2019 WL 2865102, at *9 (S.D.N.Y. July 3, 2019). "[T]he question is . . . whether, at the time of the disclosure, the disclosing party had reason to believe that further disclosure, to its party-opponent, would be likely." *Hedgeserv Ltd. v. SunGard Sys. Int'l Inc.*, No. 16 Civ. 5617 (LGS) (BCM), 2018 WL 6538197, at *2 (S.D.N.Y. Nov. 20, 2018) (quotation marks omitted).

Gupta is instructive. In that case, the defendants deposed a non-party witness and learned that in preparing for the deposition he had met with his own lawyers and also with government attorneys and an FBI agent. *See Gupta*, 281 F.R.D. at 170. When defense counsel asked what the government's lawyers had asked the witness and what documents they had shown him, the government objected on work-product grounds and instructed him not to answer. *Id*. at 170–71. Judge Rakoff held that any work-product protection had been waived because the plaintiffs had voluntarily shared their preparation with the witness—"[t]hey were under no obligation to do so"—and because the witness did not share a common legal interest with them. *Id.* at 172–73.

The same analysis applies here. Anthem's counsel was under no obligation to meet with Ms. Bradley, a former employee of a non-party vendor who has her own counsel. Anthem chose to do so. And like the witness in *Gupta*, Ms. Bradley does not share a common legal interest with Anthem, for the reasons set forth below. Anthem therefore had every reason to believe that the information it shared would be further disclosed to the Government. Ms. Bradley was being prepared to testify in an adversarial deposition about disputed facts central to this case. She would inevitably be asked about the basis for her recollections, and the circumstances of her preparation—as she in fact was. This materially increased the likelihood that any information Anthem conveyed to Ms. Bradley would shape her testimony, surface during examination, and become a proper subject of inquiry. Anthem cannot insulate its voluntary decision to prepare a non-party witness from appropriate scrutiny by invoking the work product doctrine.

Anthem relies heavily on its purported joint defense agreement ("JDA") with Verscend, claiming that its confidentiality creates "a reasonable expectation . . . that disclosures pursuant to the JDA would be maintained as confidential." Anthem Letter at 3. But a JDA does not provide an independent source of privilege. *See Lazare Kaplan Int'l, Inc. v. KBC Bank N.V.*, No. 11 Civ. 9490 (ALC), 2016 WL 4154274, at *2 (S.D.N.Y. July 22, 2016) ("The common legal interest doctrine does not provide an independent source of privilege." (citation and quotation marks omitted)).

[1] Likewise, Anthem's denial that its counsel met with Ms. Bradley during deposition breaks, *see* Anthem Letter at 2, sidesteps the real issue. The Government does not contend that improper conduct occurred during breaks. The focus of the Government's concern is the substantive preparation sessions that preceded the deposition.

Were it otherwise, parties could declare their communications confidential to shield them from discovery. Anthem's argument thus rests fully on the validity of the common interest doctrine. If it does not apply, the JDA cannot save any work product from waiver because the disclosure was to a party outside the attorney-client relationship without a valid privilege basis for maintaining confidentiality. And as explained below, the common interest doctrine does not apply here.

IV. Anthem Has Failed to Establish a Common Legal Interest with Verscend

"The common interest privilege is a limited exception to the general rule that the attorney-client privilege is waived when a protected communication is disclosed to a third party." *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props. LLC*, No. 01 Civ. 9291 (JSM), 2002 WL 1334821, at *3 (S.D.N.Y. June 19, 2002). "It is not a separate source of privilege, and the Second Circuit has warned that courts should be cautious about extending the attorney-client privilege under the common interest rule." *Id.* The party asserting the doctrine bears the burden of establishing its applicability. *See United States v. Schwimmer*, 892 F.2d 237, 244 (2d Cir. 1989). That requires a showing that: "(1) the party asserting the privilege must share a common legal interest with the party with whom the communications were shared, (2) the communications must have been made in furtherance of that common legal interest, and (3) the parties should not have subsequently taken positions adverse to each other with respect to the shared legal interest." *Gray v. Paramount Glob.*, No. 25 Civ. 3484 (JSR), 2025 WL 2639902, at *3 (S.D.N.Y. Sept. 15, 2025) (citation omitted).

The required common interest must be legal, not "a business strategy which happens to include a concern about litigation." *In re F.T.C.*, No. 18 Misc. 304 (RJW), 2001 WL 396522, at *5 (S.D.N.Y. Apr. 19, 2001). The doctrine protects communications only "where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel." *Schwimmer*, 892 F.2d at 243. "Key to successfully invoking the common interest privilege is a demonstration that the common interest is not merely similar but identical." *Pereira, Tr. for Est. of Capala v. Capala*, No. 17 Civ. 3434 (ILG) (SMG), 2019 WL 13392880, at *1 (E.D.N.Y. Apr. 16, 2019). The parties must have reached an agreement "embodying a cooperative and common enterprise towards an identical legal strategy." *Fireman's Fund Ins. Co. v. Great Am. Ins. Co. of New York*, 284 F.R.D. 132, 139 (S.D.N.Y. 2012) (quotation marks omitted). Moreover, a mere desire for "a favorable outcome in the litigation" is "insufficient." *Gulf Islands Leasing, Inc. v. Bombardier Cap., Inc.*, 215 F.R.D. 466, 473 (S.D.N.Y. 2003) (collecting cases).

Anthem devotes considerable space to whether the federal or state standard applies. The federal standard governs this federal-question case, but the distinction makes no difference here. The core difference between the standards is that New York law requires the parties to reasonably anticipate litigation. *See Pereira, Tr. for Est. of Capala v. Capala*, No. 17 Civ. 3434 (ILG) (SMG), 2019 WL 13392880, at *2 (E.D.N.Y. Apr. 16, 2019). And while, under the federal standard, "[p]arties may share a common legal interest even if they are not parties in ongoing litigation," they must be engaged in an "ongoing common enterprise" of a "sufficient legal character" that reflects a "strong common interest in the outcome of that *legal* encounter." *Schaeffler v. United States*, 806 F.3d 34, 40–41 (2d Cir. 2015) (emphasis added; quotation marks omitted).

Judge Caproni's decision in *SEC v. Alderson*, 390 F. Supp. 3d 470, 480–81 (S.D.N.Y. 2019), is particularly instructive. There, as here, the party asserting the privilege, the defendant's former employer (an investment advisory firm), relied heavily on *Schaeffler* for the proposition that it and a third-party accounting firm were engaged in a common legal enterprise. *See id.* Judge Caproni rejected the claim on multiple grounds. Applying *Schaeffler*, Judge Caproni examined,

among other things, whether the firm and the third party shared an interest in a "particular legal outcome"—there, the tax treatment of an investment product. *Id.* Judge Caproni held that the common interest doctrine did not apply because: (1) the third party "had no stake" in whether the product would be taxable or non-taxable; (2) the firm failed to meet its burden of showing that it and the third party were engaged in a joint enterprise; and (3) the disclosure of the tax opinions was not in "furtherance of [a] legal objective" because, among other reasons, the firm's only objective was to convince the third party to echo the firm's own advice. *Id.* The case for common interest here is no stronger. The potential legal outcomes of this litigation are whether Anthem is held liable under the False Claims Act ("FCA") or common law claims. Verscend has no stake in the legal outcome here, as no legal consequences will flow to Verscend from any judgment adverse to Anthem in this case. Anthem does not argue otherwise.[2] As a result—and consistent with Judge Caproni's analysis—*Schaeffler* instructs that the common interest doctrine does not apply here.[3]

Indeed, Verscend can claim no interest in a particular legal outcome of this case because the Government has not asserted claims against Verscend after years of investigation and litigation, it does not intend to assert such claims, and the statute of limitations for any such claims has lapsed. Verscend has taken no position on the merits of the case and has no legal interest in its outcome. *See Egiazaryan v. Zalmayev*, 290 F.R.D. 421, 434 (S.D.N.Y. 2013) (common interest did not apply because "an agent's desire for its principal to win a lawsuit" is not sufficient; and third party was "not a party to any of [the] various lawsuits and thus ha[d] no need to develop a common litigation strategy in defending those lawsuits"); *SR Int'l Bus. Ins.*, 2002 WL 1334821, at *4 (the parties did not have an "identical legal interest" where the third party was "not a party to th[e] litigation, and its legal position [would] be unaffected by the outcome of th[e] case").

Anthem points out that Verscend appears throughout the amended complaint, but factual relevance is not the same as a shared legal interest in the outcome. And even a generalized interest in seeing Anthem prevail would not suffice, as "[s]imply sharing an interest in prevailing in a litigation is not sufficient to constitute a protected common interest." *Pereira*, 2019 WL 13392880, at *1. Ms. Bradley is even further removed. She is a retired former employee of Verscend, represented by her own counsel, with no discernible stake in this litigation. There is no common interest where the witness is "simply a third-party" who is "represented by his own attorneys" and where "neither he nor his attorneys takes a position in the . . . dispute." *Gupta*, 281 F.R.D. at 172.

To be sure, Verscend was Anthem's vendor, acting within a program that Anthem designed, directed, and controlled. Anthem retained Verscend, dictated the program's structure, and controlled the use of the results. Those facts show coordination and a commercial strategy, but they do not establish an identical legal interest. *See In re F.T.C.*, 2001 WL 396522, at *5.

For the foregoing reasons, the Government respectfully requests that the Court reject Anthem's assertion of the work product doctrine and common interest privilege and compel Ms. Bradley to answer questions regarding her communications with Anthem's counsel.

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[2] To the extent Anthem argues a shared legal outcome in an *ex parte* filing, such an argument should be unsealed and the Government should be permitted an opportunity to respond as such arguments are not privileged.

[3] To be clear, the Government does not contend that only Medicare Advantage Organizations ("MAOs") such as Anthem can be liable under the FCA; non-MAOs can be liable under the FCA as well. Rather, based on the claims the Government has asserted in this case, the fact that the statute of limitations for any claims against Verscend related to this case has lapsed, and the other reasons explained herein, Verscend has no stake in the legal outcome here.

Respectfully submitted,

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