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GC Learnings: What I Wish I Had Known

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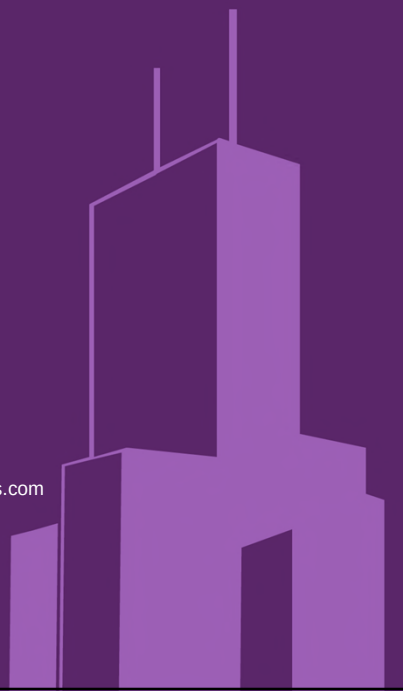

CLE SEMINAR FOR IN-HOUSE COUNSEL
CHICAGO I JUNE 2019

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I. Who is the client?
Role clarification

Multiple hats

In re Processed Egg Products Antitrust Litigation, 278 F.R.D. 112 (2011) (included in the materials as 1)

- The documents at issue during discovery were found to not be protected by attorney-client privilege because defendant did not demonstrate that they were prepared in connection with a request for, or the provision of, legal advice.
- The documents, including memoranda, unsent letters, and emails from the president and vice president to trade cooperative executives were not privileged even though some were also sent to the corporate counsel or referenced comments made by counsel.
- See also *Southeastern Pennsylvania Transp. Authority v. Caremarkpcs Health, L.P.*, 254 F.R.D. 253 (2008) (included in the materials as 1a)

I. Who is the client?
Role clarification (cont.)

U.S. v. Askins, 2016 WL 4039204 (July 28, 2016) (included in the materials as 2)

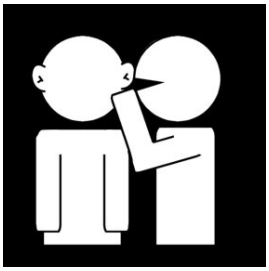
- Former executive director argued that statements in meeting that included discussion about possibly falsifying documents and embezzlement were protected by attorney-client privilege because she had an attorney-client relationship with firm that provided legal advice to employer
- Court held that firm did not represent executive director in her personal capacity and statements made in meeting were not made in confidence

- The privilege applies when the client is a corporation.
  - *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981).
- Model Rule of Professional Conduct 1.13: "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." [Adopted by Iowa, Kansas, Missouri, North and South Dakota, Michigan and Illinois.]

II. Attorney-client privilege:
What is it?

Subject to waiver, the client (or other holder of the privilege) has a "privilege to refuse to disclose, and prevent another from disclosing, a confidential communication between client and lawyer."
Iowa Evidence Code § 954

II. Attorney-client privilege:
What is it? (cont.)



The attorney-client privilege protects:

- communications,
- between the attorney and client,
- made in confidence,
- when the lawyer is acting in his capacity as a legal advisor,
- and legal advice of any kind is sought,
- unless waived.

Admiral Ins. Co. v. U.S. Dist. Ct., 881 F.2d 1486, 1492 (9th Cir. 1989).

II. Attorney-client privilege:
What communications are privileged?

- Discussions between the attorney and client in the course of the relationship.
- Some states construe privilege narrowly, *e.g.*, Michigan: "[T]he scope of the [attorney-client] privilege is narrow: it attaches only to confidential communications by the client to its adviser that are made for the purpose of obtaining legal advice." *Fruehauf Trailer Corp. v. Hagelthorn*, 208 Mich. App. 447, 450, 528 N.W.2d 778, 780 (1995). However, "[t]he privilege does not . . . automatically shield documents given by a client to his counsel." *McCartney v. Attorney General*, 231 Mich. App. 722, 731, 587 N.W.2d 824, 828 (1998)." *US Fire Insurance Company v. City of Warren*, Dist. Court, ED Michigan, June 14, 2012. Key: If document wasn't privileged before it went to counsel, it's not privileged afterwards.
- Only "communications," not facts. Thus, facts contained in the communication are not protected.
  - Meeting minutes and facts discussed at a meeting do not become privileged just because counsel is present. Legal advice regarding those facts might be privileged if the client is directly seeking legal advice about them.

II. Attorney-client privilege:
What communications are privileged? (cont.)

"Confidential" (Cal. Evid. Code § 952)

- **Communication must be made in confidence**: As far as the client is aware, the communication is not disclosed to any third party other than those who are reasonably necessary for the transmission of the information.
- May extend "to **communications with third parties who have been engaged to assist the attorney in providing legal services**."
  - *U.S. v. Richey*, 632 F.3d 559, 566 (9th Cir. 2011).
  - However, the third party must be **assisting and reporting to** the attorney. (e.g., When an investigator was retained by an attorney to discover details of a marijuana-growing operation, conversations with the client were not privileged when the client told the investigator not to relay the conversation to the attorney.
    - *U.S. v. Haynes*, 216 F.3d 789, 798 (9th Cir. 2000).
- May extend to communications between non-lawyers within corporation if includes advice received from in-house counsel.

II. Attorney-client privilege:
When does it attach?

- Generally, the privilege only attaches when the attorney is giving legal advice.
- There is **no privilege** when the attorney is engaged in non-legal work, such as rendering business or technical advice.
- If legal advice is only incidental to a discussion of business policy, the communication may **not** be protected.
- There is no exact moment when privilege attaches. It is a balancing of the reasons for the communications and the advice given.
- A significant e-discovery issue for in-house counsel.

II. Attorney-client privilege:
Who can assert and waive it?

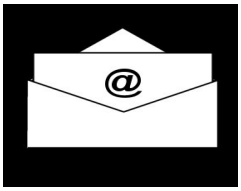
- The power to waive corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985) (included in the materials as 3).
- The privilege stays with the corporation, not the managers.
  - Displaced managers cannot assert the attorney-client privilege, and new management can waive the privilege with respect to communications made by former officers and directors.

II. Attorney-client privilege:
An exception

Crime-fraud exception

- If advice is sought in order to aid someone to commit or plan to commit a crime or fraud; or
- If the attorney reasonably believes that disclosure of the information is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death or substantial bodily harm to an individual.

II. Attorney-client privilege:
How is it destroyed?



If the privilege attaches but is lost

- Privilege can be lost:
  - Third parties are present during conversations.
  - Later disclosure of confidential information to third parties.
  - Giving non-legal (business) advice.
- **Email – Be careful who you cc and bcc!**
  - An initial email with an attorney may be privileged.
  - But forwarding that email to people not included in the attorney-client relationship destroys the privilege.
- Who retains consultants/agents and for what purpose (clear representation)

II. Attorney-client privilege:
How is it destroyed? (cont.)

A cautionary tale regarding work e-mail

Holmes v. Petrovich Dev. Co., 191 Cal.App.4th 1047 (2011)

- Communications sent from a company computer between an employee and her attorney regarding possible legal action against the employer were not privileged.
- "[T]he emails sent via company computer…were akin to consulting her lawyer in her employer's conference room, in a loud voice, with the door open, so that any reasonable person would expect that their discussion of her complaints about her employer would be overheard by him."
- Factors relied upon:
  - The computer was the company's property.
  - The company had specific policies regarding using emails for work only.
  - The policies made clear that emails were not private and may be monitored.
  - The employee knew of and agreed to these conditions.

III. European in-house counsel attorney-client privilege

AkzoNobel Chemicals, Sept. 14, 2010 (included in the materials as 4):

- Communications between in-house counsel and corporate client are not privileged in investigations conducted by the European Commission.
- Akzo involved a "dawn raid" procedure where investigators entered the business to recover documents that included communications between in-house counsel and company executives.
- Communications were for the purpose of seeking and providing legal advice; still not privileged.

See New Developments since November 2017

IV. Internal investigations:
"Yates memo"

"The Yates Memo"

- "Individual Accountability for Corporate Wrongdoing," Sally Yates, U.S. Deputy Attorney General (Sept. 9, 2015) (included in materials as 5)

Impact on Privilege

- "The Yates Memo and Prosecution of Corporate Individuals: Whose Team Does Your General Counsel Play for Now?, " Glenn Colton, Stephen Hill, Thomas Kelly, Lisa Krigsten, George Newhouse, (Sept. 29, 2015) (included in materials as 6)

IV. Internal investigations:
Conflicts of interest

"Corporate *Miranda* Warnings"

To avoid potential misunderstandings, provide the following "corporate *Miranda* warning":

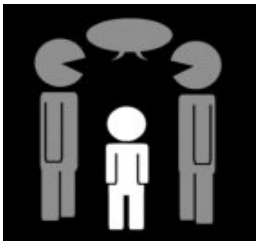
- Inform the individual that your allegiance and responsibility is owed to the corporation.
- Inform the individual that he or she should seek independent counsel to protect any potentially adverse interests.
- Instruct the individual that any confidential information will be used for the corporation's benefit.

These disclosures should be made in writing!

IV. Internal investigations:
Conflicts of interest (cont.)

Beneficial dual representations

- Should counsel represent both the corporation and one or more of its officers, directors, or employees?
  - Can save the cost of hiring outside counsel.
  - Can keep control of the matter within the corporation.
- Allowed, subject to the provisions of applicable Rules of Professional Responsibility.



IV. Internal investigations:
Retention of privilege to materials and interview reports underlying an internal investigation

- Privilege Protects Communications reflected in the Interview materials since they were made to provide legal advice. *In re Gen. Motors LLC Ignition Switch Litigation*, 80 F. Supp. 3d 521 (S.D.N.Y. 2015) (included in materials as 7)

V. New developments

- **European in-house counsel attorney-client privilege**
  - In November 2017, the Paris Court of Appeal decided that emails between in-house counsels relating to the defense strategy set up by the company's outside counsels, although they neither originated from, nor were addressed to, an outside counsel, should be considered, during dawn raids, as protected by legal privilege and not be seized by the French Competition Authority.
  - In 2018, the English Court of Appeal's much-anticipated decision on legal professional privilege in Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation Ltd. (The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Limited [2018] EWCA Civ 2006) contains mixed news for companies conducting internal investigations. While the decision provides some clarity regarding the availability of litigation privilege in the context of criminal investigations, the court held that it was unable to depart from the controversial decision in Three Rivers (No. 5) (Three Rivers District Council and Others v Governor and Company of the Bank of England (No. 5) [2003] QB 1556) which defined the "client" narrowly for the purposes of legal advice privilege. This means that companies, especially large corporations and multinational corporate groups, will continue to face difficulties in obtaining the information they need to investigate suspected wrongdoing, without losing the benefit of legal advice privilege under English law.

V. New developments (cont.)

- **CLO conflicts of interest**
  - "A CLO's Departure Shines Light on In-House Conflicts," *Corporate Counsel*, (Aug. 3, 2016)
- **Internal investigations - employee refusal to cooperate**
  - *Gilman v. Marsh & McLennan Companies, Inc.*, 826 F.3d 69 (2d Cir. 2016) (included in materials as 8)
    - Former employees brought suit for breaches of contract and implied covenant of good faith and fair dealing for failure to pay employees severance or other compensation when employees were terminated for refusal to comply with employer's order to sit for interviews regarding employee participation in a criminal bid-rigging scheme.
    - Order to sit for interview was reasonable because employees in question were named by AG as co-conspirators in the scheme; order was also direct and unequivocal and, under Delaware law, failure to "obey a direct, unequivocal, reasonable order of the employer" is a "cause" for termination.
- **Communications between Corporate Counsel and former employees**
  - *Newman v. Highland Sch. Dist. No. 203*, 381 P.3d 1188 (Wash. 2016) (included in materials as 9)

VI. Warning signs

- Everyone else is doing it" – technically legal, competitive disadvantage, can't all be wrong (Ed Clark story), Bear Sterns, Lehman Bros.
- Aggressive growth sales/strategy – Wells Fargo
- Excessive leverage
- "Failure is not an option" – Enron; Volkswagen; Theranos
- Marginalizing risk management function – lack of enterprise wide risk management framework – Wells Fargo
- Compensation systems rewarding excessive risk – Enron; Wells Fargo
- Lack of transparency - Enron
- Excessive risk culture – continually increasing risk limits

VI. Warning signs (cont.)

- Lack of transparency, especially with the Board - Enron; Wells Fargo; Theranos
- Marginalizing or indifference to internal audit
- Arrogant suspension of disbelieve – willful blindness - General Motors
- Too good to be true – isn't'
- No culture of doing the right thing
- Ignoring red flags – General Motors; BP (formerly British Petroleum); Theranos
- Lack of independent control functions like law, compliance, risk and internal audit
- Long standing market behavior

VII. Background resources

1. The Smartest Guys in the Room: The Amazing Rise and Scandalous Fall of Enron by Bethany McLean and Peter Elkind
2. Conspiracy of Fools: A True Story by Kurt Eichenwald
3. YouTube video: Documentary: The Smartest Guys in the Room
4. High Performance with High Integrity – Ben Heineman
5. The Inside Counsel Revolution – Ben Heineman
6. Integrity: Good People, Bad Choices and Life Lessons from the White House by Egil "Bud" Krogj
7. Corporate Counsel as Corporate Conscience: Ethics and Integrity in the Post Enron Era – Paul Patton, Queen's Facility of Law, Legal Studies Research Papers Series, Accepted Paper No. 07-08 (Canadian Bar Review, Volume 84, 3, 2006)

VII. Background resources (cont.)

8. Avoiding the San Andres Earthquake; Lessons Drawn from History for Corporate Counsel, June 11, 2015 – John K. Villa, Williams and Connelly LLP, Washington, DC - Association of Corporate Counsel
9. Corporate Governance and Crisis Management; a General Counsel's Perspective, Berkley Research Group – Chairman's Dinner, November 4, 2015, San Francisco, CA
10. Independent Directors of the Board of Wells Fargo and Company Sales Practices Investigation Report, April 10, 2017
11. Gate Keepers: The Profession of Corporate Governance – John C. Coffee, Jr. (Oxford Press)
12. Bad Blood: Secrets and Lies in a Silicon Valley Startup, by John Carreyrou
13. David Boies Pleads Not Guilty, by James B. Stewart, September 21, 2018, New York Times

01. *In re Processed Egg Products Antitrust Litigation*, 278 F.R.D. 112 (2011)

278 F.R.D. 112
United States District Court,
E.D. Pennsylvania.

In re PROCESSED EGG PRODUCTS ANTITRUST LITIGATION.
This Document Applies To All Direct Purchaser Actions.

MDL No. 2002.
|
No. 08–md–2002.
|
Oct. 19, 2011.

Synopsis

Background: Direct purchasers of eggs brought antitrust action against trade cooperative for egg producers. Direct purchasers moved to compel discovery.

Holdings: The District Court, Timothy R. Rice, United States Magistrate Judge, held that:

[1] memorandum from cooperative member to cooperative executives and others was not protected by attorney-client privilege;

[2] unsent letters from member to trade cooperative president were not protected by attorney client privilege;

[3] unsent letters from member to trade cooperative president were not protected by work-product doctrine;

[4] e-mail between member's counsel was not protected by attorney-client privilege; and

[5] common-interest privilege did not apply to protect fax sent to cooperative member.

Motion granted in part and denied in part.

West Headnotes (24)

[1] **Privileged Communications and Confidentiality**
Elements in general;definition

Attorney-client privilege applies to any communication that satisfies the following elements: it must be (1) a communication (2) made between the client and the attorney or his agents (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client.

3 Cases that cite this headnote

[2] **Privileged Communications and Confidentiality**
Elements in general;definition

Attorney-client privilege protects confidential disclosures by a client to an attorney made in order to obtain legal assistance.

Cases that cite this headnote

[3] **Privileged Communications and Confidentiality**
Factual information;independent knowledge;observations and mental impressions

Attorney-client privilege only protects the disclosure of communications; it does not protect disclosure of the underlying facts.

1 Cases that cite this headnote

[4] **Privileged Communications and Confidentiality**
Elements in general;definition

Communications made both by a client and an attorney are privileged if the communications are for the purpose of securing legal advice.

6 Cases that cite this headnote

[5] **Privileged Communications and Confidentiality**

Construction

Attorney-client privilege obstructs the truth-finding process and should be applied only where necessary to achieve its purpose.

1 Cases that cite this headnote

[6] **Privileged Communications and Confidentiality**

Business communications

Because the attorney-client privilege promotes the dissemination of sound legal advice, it applies only where the advice is legal in nature, and not where the lawyer provides non-legal business advice.

3 Cases that cite this headnote

[7] **Privileged Communications and Confidentiality**

Confidential character of communications or advice

Privileged Communications and Confidentiality

Communications Through or in Presence or Hearing of Others;Communications with Third Parties

Attorney-client privilege applies only to communications made in confidence, because a client who speaks openly or in the presence of a third party needs no promise of confidentiality to induce a disclosure.

2 Cases that cite this headnote

[8] **Privileged Communications and Confidentiality**

Common interest doctrine;joint clients or joint defense

Common-interest privilege allows attorneys representing different clients with similar legal interests to share information without having to disclose it to others.

2 Cases that cite this headnote

[9] **Privileged Communications and Confidentiality**

Common interest doctrine;joint clients or joint defense

To qualify for protection under the common-interest privilege, the communication must be shared with the attorney of the member of the community of interest, and all members of the community must share a common legal interest in the shared communication.

2 Cases that cite this headnote

[10] **Privileged Communications and Confidentiality**

Common interest doctrine;joint clients or joint defense

Common-interest privilege does not apply unless the conditions of privilege are otherwise satisfied; it is not an independent privilege, but merely an exception to the general rule that no privilege attaches to communications that are made in the presence of or disclosed to a third party.

2 Cases that cite this headnote

[11] **Privileged Communications and Confidentiality**

Presumptions and burden of proof

A party asserting the common-interest privilege has the burden of establishing the elements of the attorney-client privilege generally, as well as those of the common-interest privilege.

1 Cases that cite this headnote

[12] **Federal Civil Procedure**

Work Product Privilege;Trial Preparation Materials

Attorney work product is discoverable only upon a showing of rare and exceptional circumstances. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

Cases that cite this headnote

[13] **Federal Civil Procedure**
Work Product Privilege;Trial Preparation Materials

Burden of demonstrating that a document is protected as work-product rests with the party asserting the doctrine. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

Cases that cite this headnote

[14] **Federal Civil Procedure**
Work Product Privilege;Trial Preparation Materials

Work-product doctrine is designed to protect material prepared by an attorney acting for his client in anticipation of litigation; the doctrine does not protect documents prepared in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

3 Cases that cite this headnote

[15] **Federal Civil Procedure**
Work Product Privilege;Trial Preparation Materials

For the attorney-work product doctrine to apply, the material must have been prepared in anticipation of some litigation, not necessarily in anticipation of the particular litigation in which it is being sought. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

3 Cases that cite this headnote

[16] **Federal Civil Procedure**
Work Product Privilege;Trial Preparation Materials

A document will fall within the scope of the work-product doctrine only if it was prepared primarily in anticipation of future litigation. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

2 Cases that cite this headnote

[17] **Privileged Communications and Confidentiality**
In camera review

As a general matter, statements in briefs cannot be treated as evidence and a document for in camera inspection cannot establish all the elements of a privilege.

Cases that cite this headnote

[18] **Privileged Communications and Confidentiality**
Documents and records in general

Memorandum from egg producer's vice president to trade industry cooperative's senior vice president, animal welfare board, committee and others was not protected by attorney-client privilege in antitrust action against cooperative, even though it was also sent to cooperative's general counsel, where nothing about the memorandum or its contents suggested that the document was prepared in connection with a request for, or the provision of, legal advice.

Cases that cite this headnote

[19] **Privileged Communications and Confidentiality**
Letters and correspondence

Unsent letters from egg producer's president, to president of trade cooperative, in which egg producer's president expressed concerns about the legality and economic impact of cooperative's animal welfare program, were not protected by attorney-client privilege in antitrust action against cooperative, despite claim that letters were preliminary drafts of a document that was ultimately sent to counsel, where there were substantial differences in the content of the unsent letters and the letter ultimately sent to counsel, there was nothing to suggest that producer's president viewed unsent letters as drafts of the letter sent to counsel, and, even if unsent letters were drafts

of letter to counsel, there was nothing beyond the text of the letter to counsel to suggest that the unsent letters were privileged.

Cases that cite this headnote

[20] **Privileged Communications and Confidentiality**

Waiver of privilege

Even if unsent letters from egg producer's president, to president of trade cooperative, in which egg producer's president expressed concerns about the legality and economic impact of cooperative's animal welfare program, were privileged as drafts of a protected attorney-client communication, production of the unsent letters to plaintiffs would constitute waiver of any privilege.

Cases that cite this headnote

[21] **Federal Civil Procedure**

Work Product Privilege;Trial Preparation Materials

Unsent letters from egg producer's president, to president of trade cooperative, in which egg producer's president expressed concerns about the legality and economic impact of cooperative's animal welfare program, were not protected by work-product doctrine in antitrust action against cooperative; neither letter revealed anything about the mental processes of cooperative's counsel, nor was there any evidence that letters were prepared at counsel's direction. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

Cases that cite this headnote

[22] **Privileged Communications and Confidentiality**

E-mail and electronic communication

E-mail from egg producer's general counsel to its outside counsel, which summarized conversations to which both egg producer's and trade cooperative's representatives were parties was not protected by attorney-client privilege in antitrust action against trade cooperative; egg producer's counsel made no formal request that cooperative should obtain any legal opinions from its counsel, and there was no evidence to demonstrate that, notwithstanding the language of the document itself, the e-mail revealed a request by producer for legal advice from cooperative.

Cases that cite this headnote

[23] **Privileged Communications and Confidentiality**

E-mail and electronic communication

E-mails exchanged among egg producer's executives, which summarized a recent trade cooperative meeting and referenced general comments by cooperative's counsel about pending lawsuits, were not protected by attorney-client privilege in antitrust action against cooperative; documents themselves shed no light on precisely who was present when cooperative's counsel commented on the pending litigation, and evidence suggested that cooperative meetings, including committee meetings and sessions at which cooperative's counsel spoke, were open to the public.

Cases that cite this headnote

[24] **Privileged Communications and Confidentiality**

Common interest doctrine;joint clients or joint defense

Privileged Communications and Confidentiality

Waiver of privilege

Even if two-page fax sent to trade cooperative's president by its general counsel, which contained what appeared to be advice to cooperative about its policies regarding contact with its members' customers, was protected by attorney-client privilege, common-interest privilege did not apply to avoid waiver of attorney-client privilege in antitrust action against cooperative; cooperative forwarded the fax, in its entirety, to member's president in response to member's

cease-and-desist letter to cooperative, and there was no evidence to suggest that cooperative and member shared a common legal interest.

Cases that cite this headnote

*115 *MEMORANDUM OPINION*

TIMOTHY R. RICE, United States Magistrate Judge.

Direct purchaser plaintiffs ("Plaintiffs") seek to compel defendant United Egg Producers, Inc. ("UEP") to produce or remove from sequestration certain documents and information involving defendant Sparboe Farms ("Sparboe").[1] UEP maintains the attorney-client privilege, the common-interest privilege, and the work-product doctrine shield the communications at issue from disclosure. All privilege questions, including those raised in this motion, have been referred to me for resolution pursuant to Rule 72(a) of the Federal Rules of Civil Procedure. *See* Order, *In re Processed Egg Prods. Antitrust Litig.*, No. 08–md–2002 (E.D. Pa. Mar. 2, 2011) (Pratter, J.).[2]

This case presents issues concerning the existence and scope of the attorney-client privilege in the context of a trade industry cooperative of egg producers and related entities. At issue are several communications involving UEP officials, one of its member entities, and, at various times, attorneys. Although the parties debate the contours of nearly every aspect of privilege law, resolution of the pending motion depends on one fundamental question: Were any of the communications at issue made for the purpose of obtaining or providing legal advice? If not, they cannot fall within the bounds of the attorney-client privilege, regardless whether UEP and its members are treated as a single corporate entity or a group of entities sharing a common legal interest.

For the reasons set forth below, I conclude UEP has failed to meet its burden of establishing the communications at issue are protected by the attorney-client privilege. Only one of the documents at issue was related to a confidential request for legal advice, and any privilege as to that document was waived. I further conclude the record does not permit resolution of the parties' disputes over information conveyed to Plaintiffs during interviews with Sparboe personnel. Accordingly, the motion to compel is granted in part and denied without prejudice in part.[3]

I. BACKGROUND

The facts underlying this dispute are set forth in *In re Processed Egg Products Antitrust Litigation*, 821 F.Supp.2d 709, 712–16, No. 08–md–2002, 2011 WL 4465355, at *1–3 (E.D.Pa. Sept. 26, 2011) (Pratter, J.), and I will not repeat them at length here.

Plaintiffs allege UEP, its members, and other defendants conspired to limit supply and fix prices of eggs in violation of federal antitrust laws. ***116** *Id.* at 712–13, 2011 WL 4465355, at *1. To accomplish these violations, Plaintiffs allege UEP proposed, and its members adopted, an "animal welfare" program ("the Program"), which required egg producers to comply with guidelines reducing cage space densities for hens in order to sell "UEP-certified" eggs. *Id.* at 714, 2011 WL 4465355, at *2. Sparboe, a member of UEP and a former participant in the Program, settled the claims against it by agreeing to cooperate and provide information to Plaintiffs. *See* Order on Preliminary Approval of Sparboe Settlement at 2–3, ECF No. 214, *In re Processed Egg Prods. Antitrust Litig.*, No. 08–md–2002 (E.D. Pa. Oct. 23, 2009) (Pratter, J.). The information Sparboe disclosed to Plaintiffs—both in documents and witness interviews—in some instances included communications between Sparboe's officers and attorneys and UEP's officers and attorneys. *See* Pls.' Br. at 28–37; UEP's Br. at 18–44. Of particular interest here are communications from 2003 and later revealing Sparboe's concerns with, and objections to, the Program. *See* Pls.' Br. at 28–37; UEP's Br. at 18–44. UEP suggests those communications are protected by either the attorney-client privilege, the common-interest privilege, or the work-product doctrine. *See generally* UEP's Br.

Although Plaintiffs' motion to compel is focused on six specific documents and information conveyed in the interviews of four Sparboe witnesses, the parties assert much broader arguments. Specifically, Plaintiffs suggest UEP could not successfully invoke any privilege for communications between its counsel and any of its members before 2009. Pls.' Br. at 17–21. Conversely, UEP suggests all communications between its counsel or officers and any of its members are entitled to blanket

protection under a "single-entity" theory based on *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). UEP's Br. at 4–15. Neither of these sweeping pronouncements is necessary or appropriate to resolve the issues presented in Plaintiffs' motion. [4]

Plaintiffs' motion is properly resolved by examining the specific communications at issue and the circumstances under which they occurred. *Upjohn*, 449 U.S. at 396–97, 101 S.Ct. 677 (applying a "case-by-case" analysis, which "obeys the spirit of the Rules [of Evidence]"). Those communications are:

- A January 2003 memorandum from Sparboe's vice president to UEP officers, board members, and counsel about scientific committee recommendations, UEP's Br. at Ex. F (submitted in camera);
- June and July 2003 letters from Sparboe's president to UEP's president, neither of which were ever sent, raising questions about the wisdom and legality of the Program, UEP's Br. at Exs. C, D (submitted in camera);
- An October 2003 E-mail from Sparboe's in-house counsel to its outside counsel summarizing a meeting between Sparboe representatives and UEP's president at which Sparboe's concerns about the Program were discussed, UEP's Br. at Ex. E (submitted in camera);
- A September 2005 fax from UEP's counsel to UEP's president, which was later forwarded to Sparboe's counsel and Sparboe's president in response to Sparboe's belief that a UEP representative was interfering with relationships between Sparboe and its customers, UEP's Br. at Ex. 6 to Ex. A (submitted in camera); Pls.' Br. at Ex. F p. 6;
- A series of October 2008 E-mails among Sparboe representatives summarizing a recent UEP meeting, including comments by UEP's counsel about topics at issue in this litigation, UEP's Br. at Ex. 7 to Ex. A (submitted in camera); and
- Information disclosed to Plaintiffs, following Sparboe's settlement, by Sparboe's counsel and three of its officers who were interviewed regarding Sparboe's concerns about the Program and ***117** the witnesses' interactions with UEP's counsel, Pls.' Br. at Exs. E, H, I.

Pursuant to its settlement agreement, Sparboe produced to Plaintiffs copies of all documents except the October 2003 and October 2008 E-mails. *See* Oral Arg. Tr. at 107.

II. LEGAL FRAMEWORK

A. *The Attorney–Client Privilege*

[1] The attorney-client privilege is intended to encourage "full and frank communication between attorneys and their clients." *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 231 (3d Cir.2007). The privilege "applies to any communication that satisfies the following elements: it must be '(1) a communication (2) made between [the client and the attorney or his agents] (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client.' " *In re Teleglobe Communications Corp.*, 493 F.3d 345, 359 (3d Cir.2007) (quoting the Restatement (Third) of the Law Governing Lawyers § 68 (2000)); *accord In re Application of Chevron Corp.*, 650 F.3d 276, 289 (3d Cir.2011).

[2] **[3]** The privilege protects "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance." *Fisher v. United States*, 425 U.S. 391, 403, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976). "[T]he privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Upjohn*, 449 U.S. at 390, 101 S.Ct. 677. However, it "only protects the disclosure of communications; it does not protect disclosure of the underlying facts." *Id.* at 385, 101 S.Ct. 677. The communication between lawyer and client "is not, in and of itself, the purpose of the privilege; rather, it only protects the free flow of information because it promotes compliance with law and aids administration of the judicial system." *Teleglobe*, 493 F.3d at 360–61 (emphasis omitted). "The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn*, 449 U.S. at 389, 101 S.Ct. 677.

[4] Communications made both by a client and an attorney are privileged if the communications are "for the purpose of securing legal advice." *See In re Ford Motor Co.*, 110 F.3d 954, 965 n. 9 (3d Cir.1997); *United States*

v. Amerada Hess Corp., 619 F.2d 980, 986 (3d Cir.1980). Communications from an attorney are privileged for two reasons: first, to prevent "the use of an attorney's advice to support inferences as to content of confidential communications by the client"; and second, because "legal advice given to the client should remain confidential." *Amerada Hess Corp.*, 619 F.2d at 986.

[5] **[6]** **[7]** Nevertheless, the privilege obstructs the truth-finding process and should be "applied only where necessary to achieve its purpose." *Wachtel*, 482 F.3d at 231; *see Westinghouse Elec. Corp. v. Republic of Phil.*, 951 F.2d 1414, 1423 (3d Cir.1991) (construing the privilege narrowly). Because the privilege promotes the "dissemination of sound legal advice," it applies only where the advice is legal in nature, and not where the lawyer provides non-legal business advice. *Wachtel*, 482 F.3d at 231. In addition, the privilege applies only to communications made in confidence, because "a client who speaks openly or in the presence of a third party needs no promise of confidentiality to induce a disclosure." *Id.*

"Rule 501 requires the federal courts, in determining the nature and scope of an evidentiary privilege, to engage in the sort of case-by-case analysis that is central to common-law adjudication." *Id.* at 230; *see Upjohn*, 449 U.S. at 386, 396–97, 101 S.Ct. 677; *see also Harper–Wyman Co. v. Conn. Gen. Life Ins. Co.*, No. 86–9595, 1991 WL 62510, at *5 (N.D.Ill. Apr. 17, 1991) (analysis of whether communications between a trade association's counsel and association members are privileged "must be on a case-by-case basis, employing the usual concepts of attorney-client privilege"). "The party asserting the privilege bears the burden of proving that it applies to the communications at issue." *King Drug Co. of Florence, Inc. v. Cephalon, Inc.*, No. 06–1797, 2011 WL 2623306, at *4 n. 5 (E.D.Pa. July 5, 2011) (Goldberg, J.) (citing ***118** *In re Grand Jury Empanelled Feb. 14, 1978*, 603 F.2d 469, 474 (3d Cir.1979)).

B. *The Common–Interest Privilege*[5]

[8] The common-interest privilege "allows attorneys representing different clients with similar legal interests to share information without having to disclose it to others." *Teleglobe*, 493 F.3d at 364; *accord King Drug*, 2011 WL 2623306, at *2. Although the doctrine originated in the context of criminal co-defendants, it now "applies in civil and criminal litigation, and even in purely transactional contexts." *Teleglobe*, 493 F.3d at 364.

[9] To qualify for protection under the common-interest privilege, "the communication must be shared with the attorney of the member of the community of interest," and "all members of the community must share a common legal interest in the shared communication." *Id.* (emphasis omitted); *accord King Drug*, 2011 WL 2623306, at *2–3. "The attorney-sharing requirement helps prevent abuse by ensuring that the common-interest privilege only supplants the disclosure rule when attorneys, not clients, decide to share information in order to coordinate legal strategies." *Teleglobe*, 493 F.3d at 365. Meanwhile, the requirement that the parties to the communication share "at least a substantially similar legal interest"[6] prevents abuse of the privilege and "unnecessary information sharing." *Id.*

[10] **[11]** The common-interest privilege "does not apply unless the conditions of privilege are otherwise satisfied." *In re Diet Drugs Prods. Liability Litig.*, MDL No. 1203, 2001 WL 34133955, at *5 (E.D.Pa. Apr. 19, 2001); *accord In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir.1990). This is so because—despite its name—the common-interest privilege "is not an independent privilege, but merely an exception to the general rule that no privilege attaches to communications that are made in the presence of or disclosed to a third party." *Robinson v. Tex. Auto. Dealers Ass'n*, 214 F.R.D. 432, 443 (E.D.Tex.2003); *accord United States v. BDO Seidman, LLP*, 492 F.3d 806, 815 (7th Cir.2007); *see Teleglobe*, 493 F.3d at 365 (the privilege is "an exception to the disclosure rule"). Thus, the party asserting the privilege has the burden of establishing the elements of the attorney-client privilege generally, as well as those of the common-interest privilege. *See United States v. LeCroy*, 348 F.Supp.2d 375, 382 (E.D.Pa.2005); *Diet Drugs*, 2001 WL 34133955, at *4.

C. *The Work–Product Doctrine*

[12] **[13]** "[A] party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial" unless otherwise discoverable or a party shows substantial need for the material. Fed.R.Civ.P. 26(b)(3). Pursuant to the work-product doctrine, documents reflecting the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative concerning ... litigation,"

Fed.R.Civ.P. 26(b)(3)(B), are "generally afforded near absolute protection from discovery," *Ford Motor Co.*, 110 F.3d at 962 n. 7. *See Upjohn*, 449 U.S. at 400, 101 S.Ct. 677 ("Rule 26 accords special protection to work product revealing the attorney's mental processes."). Such information is discoverable "only upon a showing of rare and exceptional circumstances." *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 663 (3d Cir.2003). "The burden of demonstrating that a document is protected as work-product rests with the party asserting the doctrine." *Conoco, Inc. v. U.S. Dep't of Justice*, 687 F.2d 724, 730 (3d Cir.1982).

***119** **[14]** The work-product doctrine "is designed to protect material prepared by an attorney acting for his client in anticipation of litigation." *United States v. Rockwell Int'l*, 897 F.2d 1255, 1265 (3d Cir.1990); *see United States v. Nobles*, 422 U.S. 225, 238, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975) ("At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case."). The doctrine does not protect documents prepared " 'in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes.' " *Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1260 (3d Cir.1993) (quoting Fed.R.Civ.P. 26(b)(3) advisory committee note). The doctrine recognizes a lawyer must have a "certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Hickman v. Taylor*, 329 U.S. 495, 511, 67 S.Ct. 385, 91 L.Ed. 451 (1947).

[15] **[16]** For the doctrine to apply, Rule 26(b)(3) requires only "that the material be prepared in anticipation of some litigation, not necessarily in anticipation of the particular litigation in which it is being sought." *Ford Motor Co.*, 110 F.3d at 967 (emphasis omitted). "[T]he preparer's anticipation of litigation [must] be objectively reasonable." *Martin*, 983 F.2d at 1260. Litigation need not be threatened before a document can be found prepared in anticipation of litigation. *Hydramar, Inc. v. Gen. Dynamics Corp.*, 115 F.R.D. 147, 150 n. 3 (E.D.Pa.1986). However, a document will fall within the scope of the work-product doctrine only if it was prepared primarily in anticipation of future litigation. *See Diet Drugs*, 2001 WL 34133955, at *5.

III. DISCUSSION

The parties implore me to draw broad conclusions about whether entire categories of communications are privileged. *See* Pls.' Br. at 37 (seeking a ruling "that UEP has not sustained its burden of demonstrating that a common interest privilege existed over pre–2009 communications"); UEP's Br. at 8 (arguing "communications between counsel for UEP and individual representatives of UEP members must be treated and protected like those among counsel for a corporation and its employees"). Although such conclusions might be helpful to guide the parties as they engage in future discovery in this litigation, I must confine my analysis to the actual disputes at hand. *Cf. Upjohn*, 449 U.S. at 386, 101 S.Ct. 677 ("[W]e sit to decide concrete cases and not abstract propositions of law. We decline to lay down a broad rule or series of rules to govern all conceivable future questions in this area, even were we able to do so."). Accordingly, I must focus on the specific contents of each disputed communication, coupled with "the unique context that led to [each document's] creation." *Faloney v. Wachovia Bank*, 254 F.R.D. 204, 210 n. 7 (E.D.Pa.2008).

[17] UEP has the burden of establishing each document at issue is privileged. *LeCroy*, 348 F.Supp.2d at 382. To satisfy its obligation, UEP primarily has chosen to rely on the content of the documents themselves, as well as an affidavit of its current general counsel, Kevin Haley ("the Haley affidavit"). *See* UEP's Br. at 19–44. It offered no testimony or affidavits from the parties to the communications at issue, or from any UEP members, revealing their understanding of their relationship with UEP counsel or whether they intended such communications to be confidential. As a general matter, "statements in briefs cannot be treated as evidence and a document for in camera inspection cannot establish all the privilege's elements." *Faloney*, 254 F.R.D. at 212–13. With that in mind, I will address each communication in turn and explain how UEP has failed to satisfy its burden of establishing privilege. [7]

A. *January 2003 Memorandum*

[18] The earliest document at issue is a January 17, 2003 memorandum by Garth ***120** Sparboe, Sparboe's vice president and a member of UEP's Animal Welfare Committee. The memorandum is addressed to UEP's senior vice president Gene Gregory, UEP's board and executive committee chairman Mike Bynum, UEP's

Animal Welfare Committee chairman Paul Bahan, and UEP's general counsel Irving Isaacson. It "provides information and analysis ... regarding the economic impact of the animal welfare program." UEP's Br. at 32.

Although it would be possible for members of a UEP committee to engage in privileged attorney-client discussions with UEP's general counsel about legal matters related to the committee's work, *see In re Rail Freight Fuel Surcharge Antitrust Litig.*, 268 F.R.D. 114, 116 (D.D.C.2010), "merely copying an attorney on [a communication] does not establish that the communication is privileged," *IP Co.*, 2008 WL 3876481, at *3. UEP claims the memorandum is protected, arguing Isaacson was one of the recipients, Isaacson "understood [it] to be confidential and maintained it as such," and its topic was "the contours of the animal welfare program ... which was, at least in part, a legal exercise." *Id.* at 32–33 (citing and quoting the Haley affidavit). [8]

UEP's assertions fail to establish the memorandum is privileged. First, nothing about the memorandum or its contents suggests—either explicitly or implicitly—that the document was prepared in connection with a request for, or the provision of, legal advice. It is not marked "confidential" or "attorney-client privileged." [9] It contains no requests for Isaacson's opinion about any legal matter. It does not refer to any request by Isaacson for factual information from the committee related to a legal issue Isaacson was considering on behalf of UEP. Rather, the memorandum describes certain decisions made by a "scientific committee," primarily regarding cage density. As UEP correctly observed, it describes the "economic impact" of the Program, not any of the Program's legal ramifications. UEP's Br. at 32. Thus, the memorandum is not facially "for the purpose of obtaining or providing legal assistance." *See Teleglobe*, 493 F.3d at 359.

Second, nothing else in the record supplements the contents of the document and establishes the memorandum was, in fact, a request by Sparboe or his committee for legal advice or a response to a request by Isaacson for facts necessary to provide legal advice. The Haley affidavit asserts only that Isaacson "understood the ... memo ... to be the provision of factual information to assist [him] in providing legal advice to UEP regarding the development and negotiation of the [Program]." UEP's Br. at Ex. A ¶ 10; *accord id.* at Ex. B p. 4. Even if I were to credit that assertion, it sheds no light on the intent of the document's drafter or on the circumstances that led to the document's preparation. The Haley affidavit does not establish Isaacson asked the committee for facts that were necessary to resolve a legal issue on behalf of UEP, or that the memorandum was related to a request by the committee for legal guidance from Isaacson. Absent such evidence, UEP has not established a critical element of privilege. [10] *See Teleglobe*, 493 F.3d at 359; *IP Co.*, 2008 WL 3876481, at *3.

***121** B. *June & July 2003 Letters*

[19] The documents that appear to be at the heart of this motion, and the primary focus of the parties' briefs, are letters dated June 26 and July 10, 2003, from Robert Sparboe, Sparboe's president, to Al Pope, UEP's president. The parties agree neither letter was ever sent. *See* Pls.' Br. at 29, 31; *id.* at Ex. F pp. 3–4, 6. Neither Sparboe nor Pope is an attorney. The June letter is designated "Personal & Confidential"; the July letter bears only a "Certified Mail" marking. Sparboe's counsel was copied only on the July letter, while UEP's counsel was copied on neither. In both letters, Sparboe expresses concerns about the legality and economic impact of the Program. Similar—and, in some instances, nearly identical—concerns appear in a November 5, 2003 letter from Sparboe's counsel to UEP's counsel. [11]

UEP claims the June and July 2003 letters are privileged, characterizing them as drafts of the November 2003 letter, which it claims is privileged. *See* UEP's Br. at 19–29. Although "preliminary drafts of a document that is ultimately sent to counsel" may constitute privileged communications, *Laethem Equip. Co. v. Deere & Co.*, 261 F.R.D. 127, 140 (E.D.Mich.2009); *accord WebXchange Inc. v. Dell Inc.*, 264 F.R.D. 123, 127 (D.Del.2010), not every document containing facts later conveyed to counsel is automatically blanketed in privilege, *cf. Upjohn*, 449 U.S. at 395, 101 S.Ct. 677 (facts underlying an attorney-client communication are not privileged). As the party claiming the privilege, UEP must establish the June and July 2003 letters constitute drafts of a privileged communication. *Cf. King Drug*, 2011 WL 2623306, at *4 n. 5.

To sustain its privilege claims, UEP must offer evidence showing: (1) Sparboe prepared the June and July 2003 letters as drafts of the November 2003 letter; (2) Sparboe

intended the November 2003 letter to convey a privileged request for legal advice; and (3) Sparboe's disclosure of the June and July 2003 letters to Plaintiffs did not constitute waiver of any privilege. UEP has not adduced sufficient evidence to support any of these findings.

First, UEP relies entirely on the text of the two letters at issue to support its view that they are drafts of the November 2003 letter. Indeed, both letters contain passages that are echoed, sometimes verbatim, in the November 2003 letter. Nevertheless, there are also substantial differences in the letters' content, [12] and several passages that UEP construes as "explicit[ ] requests" for legal advice in the November 2003 letter, UEP's Br. at 22, are absent from the two earlier letters. UEP has offered no affidavits or other evidence showing Sparboe prepared the two earlier letters as drafts of the later one, or that Sparboe views them as such. [13] Although UEP suggests Sparboe's claim of privilege with respect to the November 2003 letter implies its production of the earlier letters was inadvertent, Sparboe has not claimed inadvertence or sought to claw back the earlier letters. Moreover, as Plaintiffs suggest, *see* Pls.' Reply at 19, Sparboe's production of the two letters while withholding the November 2003 letter could also imply it does not view the letters as drafts. Without additional evidence resolving these ambiguities and clarifying Sparboe's intent, UEP has not established the June and July 2003 letters are drafts of a privileged communication. Considered on their own, the two letters are merely communications from one executive to another with no apparent involvement by either executive's attorney and, therefore, are not privileged, even if Sparboe and UEP were viewed as parts of a "single entity" as ***122** UEP urges. *Cf. Upjohn,* 449 U.S. at 394, 396, 101 S.Ct. 677 (finding communications between corporate employees and general counsel "made at the direction of corporate superiors in order to secure legal advice from counsel" are protected, and declining to extend ruling beyond facts presented).

Second, assuming the documents at issue are drafts of the November 2003 letter, UEP has offered nothing beyond the text of the November 2003 letter to establish its privileged nature. According to UEP, the November 2003 letter contains six separate requests for legal opinions from UEP's counsel. UEP's Br. at 22. UEP, however, has failed to acknowledge, and offer evidence to resolve, ambiguities apparent on the face of the letter. *Cf. Faloney,* 254 F.R.D. at 212–13 (a party cannot establish all elements of privilege through the contested document itself). The November 2003 letter does not contain any "attorney-client privileged" markings. In fact, the record suggests the author of the letter—Sparboe's in-house counsel—"did not think [UEP's counsel] was acting as Sparboe's lawyer." Pls.' Br. at Ex. H (entry 14). The language used by Sparboe's counsel suggests he was writing on behalf of Sparboe as a separate corporation with its own legal advisor, and not as an agent or quasi-employee of UEP. [14] The letter itself contains some passages that resemble requests for legal advice, while other portions are better described as accusations and demands for explanations. For example, the third paragraph of the letter appears to be seeking a legal opinion about UEP's status under the Capper–Volstead Act. The fourth, fifth and sixth paragraphs, however, simply demand that UEP justify its legally questionable acts. In fact, those demands are the portions of the letter that also appear, in some form, in the earlier letters, both of which also included what might be viewed as a threat by Sparboe to terminate its membership in UEP. Without more, UEP has not established the November 2003 letter is privileged in its entirety. [15]

[20] Third, even if I were to conclude the June and July 2003 letters were privileged as drafts of a protected attorney-client communication, Sparboe's production of the June and July 2003 letters to Plaintiffs would constitute waiver of any privilege. [16] UEP has failed to adduce any evidence showing Sparboe—or any of its members—intended to be a party to a privileged, confidential, common-interest relationship with UEP's counsel for purposes of the letters at issue. The content of the letters suggests Sparboe, advised by ***123** its in-house counsel, was protecting its own interests by challenging what it perceived to be questionable policies and decision-making on the part of UEP. UEP has not established Sparboe's counsel intended the November 2003 letter (or the earlier letters) to be "in furtherance of" a common-interest relationship. *See LeCroy,* 348 F.Supp.2d at 381; *see also Robinson,* 214 F.R.D. at 451–52 (assessing an association member's relationship with association counsel on a case-by-case basis, and requiring proof beyond association counsel's perception that "an actual or sought after attorney-client relationship" existed between all association members and association counsel before applying a common-interest privilege).

[21] Finally, UEP's claim of work-product protection fails as to the June and July 2003 letters as well. Neither letter reveals anything about the mental processes of UEP's counsel, nor is there any evidence they were prepared at the direction of UEP's counsel. The only arguable link to any counsel is to Sparboe's in-house attorney—if the letters are viewed as drafts of the November 2003 letter. Sparboe has not claimed the letters are work-product protected, and it is not within UEP's power to invoke such a claim on Sparboe's behalf. [17]

C. *October 2003 and October 2008 E-mails*

Two other disputed communications are related in content and subject to similar analyses. Both are internal Sparboe E-mails that summarize conversations to which both Sparboe and UEP representatives were parties. The first, dated October 2, 2003, is from Sparboe's in-house counsel to its outside counsel, with Sparboe executives copied. It relates to a previous conversation among Sparboe's counsel regarding aspects of the Program and a July 2003 meeting between Sparboe representatives and UEP's president. The same meeting is referenced in the July and November 2003 letters discussed above. The E-mail is marked "attorney/client privileged communication."

The second set of E-mails are dated October 16 and 17, 2008, and were exchanged among a group of nine Sparboe executives. None of Sparboe's in-house or outside counsel are copied. The E-mails summarize a recent UEP Annual Meeting, and in two locations reference general comments made by UEP's counsel before the meeting about pending lawsuits. The E-mails do not describe under what circumstances, or to whom, such comments were made, nor do they contain any "privileged" or "confidential" markings.

Although neither its counsel nor any of its representatives were parties to the October 2003 and 2008 E-mails, UEP asserts both E-mails are privileged. *See* UEP's Br. at 30–32, 34–35. It argues the 2003 E-mail references a meeting between Sparboe and UEP, including "[n]o nonmembers," and is therefore a privileged communication under *Upjohn*. *Id.* at 31. It further suggests the E-mail is privileged because it reveals the substance of a subsequent "direct request for legal advice" made by Sparboe's counsel to UEP's counsel in the November 5, 2003 letter. *Id.* UEP characterizes the 2008 E-mails as including "classic legal advice" from Haley, and further suggests they "memorialize Haley's proposed litigation strategy." *Id.* at 34. In his affidavit, Haley avers he "do[es] not recall making [the] statement [attributed to him] in any UEP Board or Committee meeting ... or in the presence of non-UEP members." *Id.* at Ex. A ¶ 12; *see also id.* at Ex. B pp. 6–7 ("Haley does not recall specifically providing the legal advice attributed to him ... [and] does not believe he would have communicated this advice to anyone other than UEP members, UEP staff, and UEP committee members or advisors.").

[22] Again, UEP has failed to establish the E-mail communications are entitled to protection. [18] In the October 2003 E-mail, ***124** Sparboe's in-house counsel describes the July 2003 meeting with UEP's president as one in which Sparboe expressed its concerns about certain issues, but specifically notes it made no formal request that UEP should obtain any legal opinions from its counsel (who was not present at the meeting). [19] UEP has offered no evidence to demonstrate that, notwithstanding the language of the document itself, the 2003 E-mail reveals a request by Sparboe for legal advice from UEP. Its primary argument in support of its privilege claim regarding the 2003 E-mail depends on UEP's view that the E-mail reveals the content of the November 5, 2003 letter. Although the concerns referenced in the E-mail are similar to those outlined in the letter, for the reasons discussed above, *see supra* section III.B, UEP cannot rely on the letter to retroactively render privileged all previous communications on certain topics or containing certain facts. [20]

[23] UEP fares no better with respect to the October 2008 E-mails. The documents themselves shed no light on precisely who was present when UEP's counsel commented on the pending litigation before the October 2008 meeting. Plaintiffs have adduced evidence suggesting UEP meetings, including committee meetings and sessions at which UEP's counsel spoke, were open to the public and the trade press until 2009. *See* Pls.' Br. at Ex. B (deposition transcript at Ex. 10, announcing certain UEP committee meetings no longer "open to everyone" as of January 2009); *see also id.* (deposition transcript at Ex. 9, showing trade press present for UEP meetings, including those at which UEP counsel discussed legal issues). UEP's only evidence as to the circumstances under which its counsel made the statements summarized in the October 2008 E-

mails is essentially an averment by counsel that he cannot recall the statements, but probably would not have made them to anyone unaffiliated with UEP or its membership. *See* UEP's Br. at Ex. A ¶ 12; *id.* at Ex. B p. 6–7. That sort of speculation and conjecture cannot satisfy UEP's burden of proving the 2008 E-mails contain confidential, privileged legal advice. [21]

D. *September 2005 Fax*

[24] The final document at issue is a two-page fax dated September 12, 2005, sent to Al Pope (UEP's president) by Haley (its general counsel). The fax cover sheet contains boilerplate language stating it "may contain information that is privileged, confidential, and exempt from disclosure under applicable law." The second page of the fax contains what appears to be advice to UEP about its policies regarding contact with its members' customers. If that were the end of the story, the document likely would be protected, and Plaintiffs probably would not be seeking to compel its production.

However, the fax was precipitated by Sparboe's withdrawal from the Program, as well as a September 6, 2005 letter from Sparboe's president to UEP's chairman accusing a UEP staff member of interfering ***125** with Sparboe's relationships with its customers, and threatening legal action if the interference continued. *See* Pls.' Br. at Ex. A (UEPPRIV009). Moreover, the record reveals UEP forwarded the fax, in its entirety, to Sparboe's president as an attachment to its September 12, 2005 response to Sparboe's letter. *See* UEP's Br. at Ex. W; *see also id.* at Ex. B p. 6.

UEP claims the fax is privileged, offering an E-mail from its counsel to its president discussing the fax as evidence it contained legal advice sought by a client from his attorney. UEP's Br. at 35–37 & Ex. V (submitted in camera). Based on that evidence, I agree the fax would qualify for protection, assuming it remained confidential. Plaintiffs argue, however, that any privilege was waived when UEP's president and chairman attached the fax to their letter to Sparboe. [22] Pls.' Br. at 33–34. UEP responds by invoking a broad view of the common-interest privilege, pointing to Sparboe's status as a UEP member at the time, and characterizing the exchange as "sharing [a] corporation counsel's advice with the person within the corporation who raised [a] concern." UEP's Br. at 37 (citing *Upjohn*).

Although counsel for UEP suggested this document is the "closest call and probably the hardest one in the stack," Oral Arg. Tr. at 88, I disagree. Sparboe's September 6, 2005 letter to UEP was essentially a cease-and-desist letter. *See* Pls.' Br. at Ex. A (UEPPRIV009). It cannot be characterized as "rais[ing] a legal question" or "concern." UEP's Br. at 37. The letter did not request legal advice or assistance. It accused UEP of committing a tort, demanded that the actions cease, and threatened a lawsuit if they did not. *See* Pls.' Br. at Ex. A (UEPPRIV009). With respect to the issues raised in the letter and addressed in UEP's response, Sparboe and UEP shared no common legal interest; rather, they were poised as adversaries in threatened litigation. [23] Thus, UEP has not established a central element of the common-interest privilege with respect to the September 2005 fax. [24] *See Teleglobe,* 493 F.3d at 364 ("[A]ll members of the community must share a common legal interest in the shared communication.").

Moreover, for purposes of this exchange, there is no evidence Sparboe was acting as an agent of UEP, in its role as a member of the organization or any of its boards or committees. Instead, Sparboe was acting in its own interests, as an independent corporation advised by its own counsel. *See* Pls.' Br. at Ex. A (UEPPRIV009). To treat Sparboe as "person within [the UEP] corporation," at least as to this communication, would "fail[ ] to respect the corporate form." *Teleglobe,* 493 F.3d at 371. There may be instances in which the principles from *Upjohn* would render privileged communications between UEP's counsel and employees of its member companies. *See supra* note 16. For example, if Sparboe's president, acting in his capacity as a member of a UEP committee, sought advice about a legal issue confronting the organization as a whole; or if UEP's counsel were conducting a factual investigation related to a legal issue facing UEP, and in the course of his investigation interviewed Sparboe executives after making them aware of the purpose for the interview. This, however, is not one of those instances.

E. *Witness Interviews*

In addition to the six documents discussed above, UEP has asserted that certain information shared during interviews of Sparboe's representatives by Plaintiffs' counsel is privileged. UEP's Br. at 38–44. Those interviews were apparently memorialized in notes taken by Plaintiffs' counsel, and then summarized with little detail in a chart prepared by Plaintiffs for UEP's review. *See* Pls.' Br. at

*126 Ex. H. After receiving the chart, UEP prepared its own chart raising potential privilege claims regarding many of the entries on Plaintiffs' chart. *See* Pls.' Br., at Ex. E.

Neither chart is sufficient to allow me to determine whether, and to what extent, Plaintiffs have elicited privileged information from Sparboe witnesses. Although the burden is on UEP to establish the elements of its privilege claim, it cannot be faulted for failing to satisfy its burden when it had limited information from which to assess its claims as to the content of the interviews. I will deny Plaintiffs' motion with respect to the witness interviews without sustaining UEP's claims of privilege with respect to the chart. The parties should revisit the issue, mindful of the following:

- Any statements by Sparboe witnesses during interviews or in interrogatories related to the six documents at issue in this motion are not privileged, as I have determined the underlying documents are not privileged.

- Any statements related to communications between a Sparboe representative and UEP's counsel would be privileged only if UEP can establish either: (i) the Sparboe representative was acting in his capacity as a UEP member representative and communicated with UEP's counsel in connection with counsel's provision of legal advice to UEP; or (ii) the Sparboe representative intended to enter a privileged relationship with UEP's counsel and sought confidential legal advice.

- Failure to adduce evidence showing Sparboe's intent and expectations in connection with any disputed communications will likely complicate, if not defeat, any future privilege claims by UEP.

If the parties are unable to resolve the privilege issues related to the witness interviews on their own, they may request that I review Plaintiffs' interview notes to determine what, if any, attorney-client privileged or work-product protected information they contain.

An appropriate order follows.

ORDER

AND NOW, this 19th day of October, 2011, upon consideration of Direct Purchaser Plaintiffs' Motion to Compel Production of Sparboe Documents and Other Information (doc. 511), the accompanying memorandum of law (doc. 514), any responses and replies thereto (docs. 521, 528, 535), after oral argument on September 13, 2011, and for the reasons set forth in the accompanying Memorandum Opinion, it is hereby ORDERED that the motion is GRANTED in part and DENIED without prejudice in part.

The motion is granted with respect to the six documents at issue. Those documents identified in the sections III.A through III.D of the accompanying Memorandum Opinion, shall be produced to Direct Purchaser Plaintiffs and/or removed from sequestration, as appropriate, within fourteen (14) days of this Order.

The motion is denied without prejudice with respect to the contested witness interviews. The parties shall revisit the information contained in the interviews, endeavor to resolve any outstanding privilege issues left unresolved by the accompanying Memorandum Opinion, and request intervention from the Court if necessary within twenty-eight (28) days of this Order.

All Citations

278 F.R.D. 112

Footnotes

1 Plaintiffs filed their motion and the accompanying memorandum of law and exhibits under seal, and designated them "highly confidential." The same is true for UEP's responsive brief, UEP's exhibits, Plaintiffs' reply, and UEP's surreply. Copies of all of these documents (ECF Nos. 511, 513, 514, 520, 521, 528, 535) are on file with the Clerk. I will cite to them as follows: Pls.' Br., UEP's Br., Pls.' Reply, and UEP's Surreply. Oral argument on the motion was held on September 13, 2011. *See* Am. Tr. of Oral Arg., ECF No. 548, *In re Processed Egg Prods. Antitrust Litig.*, No. 08–md–2002 (E.D. Pa. Sept. 13, 2011) [hereinafter Oral Arg. Tr.].

2 All factual findings are made by clear and convincing evidence.

3 On July 1, 2010, after an in camera review in anticipation of this litigation, I ordered the return to UEP of documents "containing possible UEP privileged information." *See* Order at 1, *In re Processed Egg Prods. Antitrust Litig.*, No. 08–md–2002 (E.D. Pa. July 1, 2010). Based on letters from the parties, and without the benefit of full briefing, additional exhibits, or a factual record, I observed that, as an agricultural cooperative, "UEP may assert attorney-client privilege over the legal advice from its counsel and shared with its members." *Id.* at 3. That observation does not dictate any particular result here, now that the parties have extensively briefed the nuances of privilege law as it applies to the specific communications at issue. Although one could posit scenarios in which communications between UEP members and its counsel would be covered by a privilege held only by UEP, the record before me demonstrates none of the communications at issue are examples of such scenarios.

4 Both parties conceded as much during oral argument. *See* Oral Arg. Tr. at 38–40 (counsel for UEP admits categorical privilege determinations are inappropriate, and "the Court has to look at each specific communication and make a determination of all of the typical indicia of attorney-client privilege"); *id.* at 89 (counsel for Plaintiffs agrees the proper method is a "case-by-case [inquiry] applying the traditional principles of the attorney-client privilege").

5 The common-interest privilege is sometimes referred to as the "community-of-interest privilege" or the "joint-defense privilege." *Teleglobe,* 493 F.3d at 363–64. The three terms are synonymous. *Id.* They are distinct, however, from the "co-client privilege" or "joint-client privilege," which applies when two or more clients consult with the same attorney. *Id.* at 362–63. UEP has not invoked the co-client privilege here, so I need not discuss it. *See* Oral Arg. Tr. at 29, 100–01; Pls.' Br. at Exs. C–D.

6 The common interest binding parties to the communication must be legal in nature, and not merely commercial or business related. *See King Drug,* 2011 WL 2623306, at *3.

7 Because I conclude only one of the communications could be protected by the attorney-client privilege in the first instance, *see infra* section III.D, I need not reach issues of waiver or common-interest privilege except as to that document. *See IP Co. v. Cellnet Tech., Inc.,* No. C08–80126, 2008 WL 3876481, at *4 (N.D.Cal. Aug. 18, 2008); *Diet Drugs,* 2001 WL 34133955, at *5.

8 As to this document and others, the Haley affidavit contains paragraphs conveying Haley's description of what Isaacson "understood and intended." *See* UEP's Br. at Ex. A ¶¶ 9–10. According to UEP, ninety-six-year-old Isaacson is in poor health and "lacks the capacity to provide an affidavit on these issues." UEP's Surreply at 4 n. 5. Although I may consider Haley's account of what Isaacson told him for purposes of this motion, *see* Fed.R.Evid. 104(a), I conclude those portions of Haley's affidavit are entitled to little weight. First, they recount conversations between Haley and Isaacson that took place nearly a year ago. UEP's Br. at Ex. A ¶ 9. Second, they pertain to events that took place approximately eight years ago. *Id.* Third, I have no way of assessing whether, and to what extent, Isaacson's age and health problems may have impacted his ability to recall and accurately recount this information at the time of his conversations with Haley. And finally, Haley's belief about Isaacson's thought processes is inherently unreliable.

9 The absence of "privileged" or "confidential" markings on a document is not dispositive, but it is relevant to a privilege analysis. *Cf. Faloney,* 254 F.R.D. at 211 (absence of "confidential" marking outweighed by evidence the information in the document "was not public knowledge").

10 UEP has not suggested this memorandum is protected by the work-product doctrine. *See* UEP's Br. at 32–34; Pls.' Br. at Exs. C, D (entries 12 and 7–8, respectively).

11 Sparboe has not produced the November 2003 letter to Plaintiffs, and Plaintiffs have not sought to compel its production here. *See* Pls.' Reply at 19, 21 & n. 32. It is relevant to my discussion, however, because UEP's claims of privilege regarding the June and July letters largely depend on the status of the November letter.

12 For example, the June 2003 letter contains discussions of consumer confidence in the egg industry's "animal welfare friendliness," and the need for "consistent and thorough auditing procedures," neither of which appear in the subsequent letters.

13 Although not dispositive, I note that the June and July 2003 letters were addressed to and apparently written by non-lawyers. There is no evidence showing Sparboe's counsel assisted in their preparation.

14 The letter refers to "UEP, or you as their counsel," and asks how "UEP has prepared itself" to respond to certain claims. It does not use terms like "us," "we," or "our counsel" which would show Sparboe viewed itself and UEP as part of a single entity with the same attorney, as UEP maintains.

15 To date, Sparboe has withheld the November 2003 letter from its production to Plaintiffs. Based on the language of the letter, it is difficult to imagine either UEP or Sparboe establishing a legitimate privilege claim over the entire letter. However, Plaintiffs are not currently challenging Sparboe's privilege claim, so I will not evaluate it further.

16 For purposes of these letters, the record could not reasonably support the finding, urged by UEP, that Sparboe—which it views as a quasi-employee of "single entity" UEP—was incapable of waiving any privilege. *See* UEP's Br. at 26–27 (citing only cases holding dissenting corporate officers cannot waive the corporation's privilege). There is no evidence the letters were drafted by Sparboe's counsel while he was wearing his "UEP member representative hat," and not his "in-house counsel for Sparboe hat." *Cf. Teleglobe,* 493 F.3d at 372. At most, he may have been seeking legal advice for Sparboe from UEP's counsel, thus rendering Sparboe the "client" for privilege purposes. Any other view would extend *Upjohn* beyond its intended reach and ignore Sparboe's separate corporate form. *See id.* ("[A]bsent some compelling reason to disregard entity separateness, in the typical case courts should treat the various members of [a] corporate group as the separate corporations they are and not as one client."). UEP has cited cases acknowledging that, in some instances, communications between representatives of an organization's member entities and the organization's counsel may be privileged. *See, e.g., United States v. Ill. Power Co.,* No. 99–833, 2003 WL 25593221, at *3 (S.D.Ill. Apr. 24, 2003) (finding communications privileged where "[n]o one denie[d] that [the association] and its members possessed an expectation of privacy in the information provided by [the association's counsel]"). However, I have found no case categorically adopting the broad view espoused by UEP, without regard for the facts and circumstances surrounding the specific documents under consideration.

17 The parties dispute whether the letters were prepared "in anticipation of litigation." *See* Pls.' Br. at 30; UEP's Br. at 28–29. I need not reach that issue. There is no basis for finding the letters were "prepared ... by or for [UEP] or its representative." Fed.R.Civ.P. 23(b)(3)(A).

18 Sparboe has asserted its own attorney-client privilege as to both sets of E-mails. *See* Oral Arg. Tr. at 107; Sept. 19, 2011 Letter from T. Hutchinson to Hon. T. Rice (on file with the Court). The propriety of Sparboe's assertion of privilege is not before me, so I limit my analysis and my conclusions here to UEP's privilege claims only.

19 Because Sparboe asserts this document is privileged, I have not quoted from it, but have summarized the portion of it which is relevant to my analysis of UEP's privilege claim.

20 UEP's other privilege theories are inapplicable to the 2003 E-mail because its counsel was not present at the July 2003 meeting referenced therein, and it has offered no evidence the meeting took place at the request of its counsel or as part of a fact-gathering process initiated by its counsel. *Cf. Upjohn,* 449 U.S. at 394–95, 101 S.Ct. 677 ("The communications at issue were made by Upjohn employees to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel."); *Teleglobe,* 493 F.3d at 364 (common-interest privilege permits attorneys to share information with one another). Additionally, UEP has not sought work-product protection for the 2003 E-mail. *See* UEP's Br. at 30–32; Pls.' Br. at Ex. C (entry 19).

21 Moreover, UEP greatly overstates the level of "advice" at issue. My review of the 2008 E-mails reveals they contain no "proposed litigation strategy," UEP's Br. at 34; rather, the only comment attributed to UEP's counsel is a general statement that discussion of topics related to the litigation should occur privately. Such a comment does not amount to the sort of "mental processes" necessary to "analyze and prepare [a] client's case" that the work-product doctrine was intended to shelter, *see Nobles,* 422 U.S. at 238, 95 S.Ct. 2160, particularly where the record is devoid of proof regarding where, and to whom, the statement was made.

22 The letter to Sparboe was not marked "confidential" or "attorney-client privileged." *See* UEP's Br. at Ex. W.

23 Although counsel for both corporations were copied on Sparboe's letter and UEP's response, the letters were authored by and primarily addressed to executives of each company. This further calls into question the applicability of the common-interest privilege. *See Teleglobe,* 493 F.3d at 364 ("Sharing the communication directly with a member of the community may destroy the privilege.").

24 UEP has not suggested the fax is protected by the work-product doctrine. *See* UEP's Br. at 35–37; Pls.' Br. at Ex. C (entry 32).

End of Document

01.a. *Southeastern Pennsylvania Transp. Authority v. Caremarkpcs Health, L.P.*, 254 F.R.D. 253 (2008)

254 F.R.D. 253
United States District Court,
E.D. Pennsylvania.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, Plaintiff,
v.
CAREMARKPCS HEALTH, L.P., Defendant.

Civil Action No. 07–2919.
|
Dec. 9, 2008.

Synopsis

Background: Regional transportation authority brought state breach of contract action against corporation that agreed to provide prescription drug benefits for authority's members. Action was removed to federal court. The District Court, 2008 WL 5003032, denied defendant's motion to bar plaintiff from introducing claims or evidence and request that plaintiff amend first amended complaint, granted defendant's request to extend discovery, and denied its request to shift costs of additional discovery to plaintiff. Defendant objected to production of certain documents pursuant to attorney-client privilege.

[Holding:] The District Court, L. Felipe Restrepo, United States Magistrate Judge, held that defendant satisfied its burden of proving that nine contested documents were privileged and did not have to be produced.

Ordered accordingly.

West Headnotes (24)

[1] **Privileged Communications and Confidentiality**
In camera review

In camera review is appropriate method for resolving privilege disputes.

1 Cases that cite this headnote

[2] **Federal Courts**
Privilege and confidentiality

Pennsylvania law governed privilege dispute, as underlying diversity action arose under Pennsylvania law. Fed.Rules Evid.Rule 501, 28 U.S.C.A.

Cases that cite this headnote

[3] **Privileged Communications and Confidentiality**
Elements in general;definition

In Pennsylvania, elements that must be met in order for party to successfully assert attorney-client privilege are that (1) asserted holder of privilege is or sought to become client, (2) person to whom communication was made (a) is member of bar of court, or his or her subordinate, and (b) in connection with subject communication is acting as lawyer, (3) communication relates to fact of which attorney was informed (a) by his client (b) without presence of strangers (c) for purpose of securing primarily either (i) opinion of law or (ii) legal services or (iii) assistance in some legal proceeding, and (d) not for purpose of committing a crime or tort, and (4) privilege has been (a) claimed and (b) not waived by client.

1 Cases that cite this headnote

[4] **Privileged Communications and Confidentiality**
Legal secretaries, stenographers, paralegals, or clerks

Under Pennsylvania law, client communications with subordinate of attorney, such as paralegal, are also protected by attorney-client privilege so long as subordinate is acting as agent of duly qualified attorney under circumstances that would otherwise be sufficient to invoke the privilege.

Cases that cite this headnote

[5] **Privileged Communications and Confidentiality**

Corporations, partnerships, associations, and other entities

Under Pennsylvania law, fact that client is corporation does not vitiate attorney-client privilege, which applies to communications by corporate employee concerning matters within scope of his duties purposefully made to enable attorney to provide legal advice to corporation and may apply where communication is to in-house counsel rather than to outside counsel retained for particular matter.

7 Cases that cite this headnote

[6] **Privileged Communications and Confidentiality**

Corporations, partnerships, associations, and other entities

Privileged Communications and Confidentiality

Business communications

For attorney-client privilege to apply where communication is to in-house counsel rather than to outside counsel retained for particular matter, primary purpose of communication at issue must be to gain or provide legal assistance; in-house counsel may play dual role of legal advisor and business advisor.

4 Cases that cite this headnote

[7] **Privileged Communications and Confidentiality**

Corporations, partnerships, associations, and other entities

Privileged Communications and Confidentiality

Waiver of privilege

Scope of individual's employment is highly relevant to question of maintenance of confidentiality in context of attorney-client privilege, and communications retain their privileged status if information is relayed to other employees of officers of corporation on need to know basis; as such, privilege is waived if communications are disclosed to employees who did not need access to them.

Cases that cite this headnote

[8] **Privileged Communications and Confidentiality**

Mode or Form of Communications

Attorney-client privilege usually protects communications themselves.

1 Cases that cite this headnote

[9] **Privileged Communications and Confidentiality**

Documents and records in general

Privileged Communications and Confidentiality

Factual information;independent knowledge;observations and mental impressions

Documents sent to or prepared by counsel incorporating such information for purpose of obtaining or giving legal advice, planning trial strategy, etc. are protected from compelled disclosure, but to extent that purely factual material can be extracted from privileged documents without divulging privileged communications, such information is obtainable.

2 Cases that cite this headnote

[10] **Privileged Communications and Confidentiality**

Corporations, partnerships, associations, and other entities

Privileged Communications and Confidentiality

Documents and records in general

Document need not be authored or addressed to attorney in order to be properly withheld on attorney-client privilege grounds; when client is corporation, privileged communications may be shared by nonattorney employees in order to relay information requested by attorneys, and documents subject to privilege

may be transmitted between nonattorneys so that corporation may be properly informed of legal advice and act appropriately.

4 Cases that cite this headnote

[11] **Privileged Communications and Confidentiality**

Documents and records in general

Attorney-client privilege may extend to certain documents that, while not involving employees assisting counsel, still reflect confidential communications between client and counsel or subordinates of counsel for the purpose of either (1) providing legal services or (2) providing information to counsel to secure legal services.

2 Cases that cite this headnote

[12] **Privileged Communications and Confidentiality**

Business communications

Privileged Communications and Confidentiality

Effect of delivery of nonprivileged materials to attorney;preexisting documents

Attorney-client privilege does not shield documents merely because they were transferred to or routed through attorney, and what would otherwise be routine, nonprivileged communications between corporate officers or employees transacting general business of company do not attain privileged status solely because in-house or outside counsel is copied in on correspondence or memoranda; in order to successfully assert attorney-client privilege, corporation must clearly demonstrate that communication in question was made for express purpose of securing legal, not business, advice.

2 Cases that cite this headnote

[13] **Privileged Communications and Confidentiality**

Presumptions and burden of proof

Party asserting attorney-client privilege bears burden of proving that it applies to communication at issue, and it is important for party seeking to assert privilege to identify specific attorney with whom confidential communication was made in order to satisfy this burden; other relevant considerations are whether party has specifically identified all recipients of document, and whether document was widely distributed.

1 Cases that cite this headnote

[14] **Privileged Communications and Confidentiality**

Particular cases

Privileged Communications and Confidentiality

E-mail and electronic communication

Privileged Communications and Confidentiality

Legal secretaries, stenographers, paralegals, or clerks

Proposed contract language in e-mail sent from paralegal to associate vice president in underwriting group for corporation that agreed to provide prescription drug benefits for regional transportation authority's members was subject to attorney-client privilege; while authority argued it appeared that paralegal was merely discussing prices that would be offered, it was clear to court after in camera review that paralegal authored e-mail to relay legal advice and to seek additional guidance on particular contract terms from both legal and business personnel.

Cases that cite this headnote

[15] **Privileged Communications and Confidentiality**

Particular cases

Privileged Communications and Confidentiality

E-mail and electronic communication

Privileged Communications and Confidentiality

Legal secretaries, stenographers, paralegals, or clerks

String of e-mails sent by paralegal, acting as agent of senior legal counsel for corporation that agreed to provide prescription drug benefits for regional transportation authority's members, to associate vice president in underwriting group and her subordinate, were subject to attorney-client privilege despite regional transportation authority's claim they merely revealed which pharmacy networks would be offered; regardless of whether business concerns were intertwined in communications, their primary purpose was clearly to provide legal advice to businesspeople regarding contract language.

Cases that cite this headnote

[16] **Privileged Communications and Confidentiality**

Corporations, partnerships, associations, and other entities

Privileged Communications and Confidentiality

E-mail and electronic communication

E-mails sent from regional transportation authority's account executive to her supervisor and vice president of sales, and from vice president to account executive and senior legal counsel for corporation that agreed to provide prescription drug benefits for regional transportation authority's members, with paralegal and account executive's supervisor copied, were subject to attorney-client privilege even though they were not authored by attorney; after careful in camera review, court concluded that business people involved with account and contract were communicating with each other, and authority's senior legal counsel, to relay legal advice and to seek additional guidance on particular contract terms.

Cases that cite this headnote

[17] **Privileged Communications and Confidentiality**

E-mail and electronic communication

Affidavit of senior legal counsel for corporation that agreed to provide prescription drug benefits for regional transportation authority's members proclaiming that contested e-mails revealed her legal advice to her clients, was sufficient to establish that e-mails were privileged regardless of whether she was the sender.

1 Cases that cite this headnote

[18] **Privileged Communications and Confidentiality**

Particular cases

Privileged Communications and Confidentiality

E-mail and electronic communication

Privileged Communications and Confidentiality

Waiver of privilege

E-mail with cut-and-pasted excerpt from memorandum that was written by senior legal counsel for corporation that agreed to provide prescription drug benefits for regional transportation authority's members and addressed to its president, with general counsel and executive vice president of client management copied, was subject to attorney client privilege; documents revealed confidential legal communications between counsel and her corporate clients, purpose of disseminating memorandum was so that corporation could be properly informed of legal advice and act appropriately, privilege was not waived as memorandum was only disseminated to corporate employees on a "need to know" basis, and mere fact business concerns may have motivated communication at issue did not render documents unprivileged.

1 Cases that cite this headnote

[19] **Privileged Communications and Confidentiality**

Confidential character of communications or advice

Corporation's failure to specifically label senior in-house legal counsel's memorandum as "confidential" or "privileged" did not destroy attorney-client privilege; communications were confidential if they were not intended to be disclosed to third persons other than those to whom disclosure was in furtherance of rendition of professional legal services.

Cases that cite this headnote

[20] **Privileged Communications and Confidentiality**

E-mail and electronic communication

Privileged Communications and Confidentiality

Waiver of privilege

E-mail authored by senior underwriter of contract to provide prescription drug benefits for regional transportation authority's members and sent to senior in-house legal counsel, with copies to one of senior underwriter's subordinates, senior executive in networks group, paralegal, and account executive was subject to attorney-client privilege, which was not waived by e-mail's subsequent dissemination; primary purpose of e-mail was to keep counsel informed on contract terms at issue and status of contract negotiations so that she could render effective legal advice, and e-mail was disseminated only to other individuals who worked on account and needed to know about issues with contract terms and negotiations.

Cases that cite this headnote

[21] **Privileged Communications and Confidentiality**

Particular cases

Privileged Communications and Confidentiality

E-mail and electronic communication

Four redacted e-mails in e-mail string were protected by attorney-client privilege from discovery in breach of contract action against corporation; primary purpose of first e-mail was clearly to seek advice concerning contract language from both business and legal personnel and even if communications included consideration of various business concerns they were infused with legal concerns, second e-mail provided further feedback to both legal and business personnel regarding topics discussed in first, third e-mail contained feedback and advice from in-house attorneys and paralegal, the latter of whom sought further legal advice from her supervisors, and fourth e-mail provided paralegal with advice about contract terms and negotiations in order for legal department to provide their legal advice on contract.

1 Cases that cite this headnote

[22] **Privileged Communications and Confidentiality**

Conveyances and contracts

Privileged Communications and Confidentiality

Waiver of privilege

Draft addendum proposed to be attached to contract, which was drafted by senior in-house legal counsel for corporation and sent to paralegal and associate vice president in underwriting group was protected by attorney-client privilege from discovery in breach of contract action against corporation; privilege was not waived since draft addendum was not widely disseminated and not revealed to employees outside scope of those who needed to remain informed of counsel's legal advice.

1 Cases that cite this headnote

[23] **Privileged Communications and Confidentiality**

Conveyances and contracts

Privileged Communications and Confidentiality

Waiver of privilege

Draft contract that corporation's senior in-house legal counsel directed paralegal to prepare and revise, which counsel declared

set forth legal advice and incorporated confidential communications from her clients that were directly involved in finalization of contract and was disseminated to associate vice-president in underwriting group and her subordinate as well as account executive and was copied to client rebates manager, two of his subordinates, and subordinate of associate vice-president and of vice-president/ chief actuary was subject to attorney-client privilege, and that privilege had not been waived; draft contract incorporated counsel's legal advice and confidential communications from clients, and document was not disseminated among employees outside group of individuals who had "need to know" information.

Cases that cite this headnote

[24] **Privileged Communications and Confidentiality**
E-mail and electronic communication
Privileged Communications and Confidentiality
Conveyances and contracts
Privileged Communications and Confidentiality
Waiver of privilege

Red-lined draft contract attached to e-mail contained in document was protected by attorney-client privilege from discovery in breach of contract action against corporation; contract unequivocally contained legal advice from senior in-house counsel, and privilege was not waived as string of e-mails in document which contained red-lined draft contract were only disseminated to those corporate employees that worked on contract and had need to know of counsel's legal advice.

1 Cases that cite this headnote

Attorneys and Law Firms

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Andrea K. Zollett, Michael S. Baig, Foley & Lardner LLP, Chicago, IL, for Defendant.

MEMORANDUM AND OPINION

L. FELIPE RESTREPO, United States Magistrate Judge.

Before the Court is Defendant CaremarkPCS Health, L.P.'s ("Caremark") Memorandum of Law (Doc. No. 105) objecting to the production of certain documents pursuant to the attorney-client privilege. *See* Def.'s Mem. 1. Caremark's in-house attorney that worked on the contract at issue in this litigation, Sara Hankins, Esquire, has submitted an affidavit in support of Defendant's position. (Doc. No. 110). *See* Hankins Aff. ¶ 4. Caremark maintains that all communications at issue were "authored for the primary purpose of both obtaining and providing legal advice relative to the contract," and that all individuals involved in the communications were "directly involved in at least some aspect of the negotiation or finalization of the SEPTA contract." Def.'s Mem. 2, 5–6.

Plaintiff Southeastern Transportation Authority's ("SEPTA") Letter Memorandum (Doc. No. 106) argues that the documents are not privileged. *See* Pl.'s Mem. 1. SEPTA seeks production of e-mail strings, memoranda, and draft documents sent between those Caremark employees who worked on the SEPTA account and contract negotiations and Caremark's in-house counsel and paralegal responsible for providing legal advice on the SEPTA contract. [1] *See* Def.'s Amended ***257** Supp. Priv. Log. SEPTA argues that the "primary purpose" of these communications between business personnel and in-house legal staff was to obtain business advice, not legal advice and contends that in some cases, any potential

privilege was waived because the documents were too widely disseminated. *See* Pl.'s Mem. 3–4, 6–8, 10, 12–13.

[1] The Court finds that Caremark has satisfied its burden of proving that the documents are covered by the attorney-client privilege and need not be produced. The Court has reviewed these documents *in camera,* and will explain the application of the attorney-client privilege to each document below. [2]

I. DISCUSSION

[2] **[3]** "Pennsylvania privilege law governs this dispute because the underlying action arises under Pennsylvania law." *Santer,* 2008 WL 821060, at *1, 2008 U.S. Dist. LEXIS 23364, at *2 (citing Fed.R.Evid. 501; *Montgomery County v. Microvote Corp.,* 175 F.3d 296, 301 (3d Cir.1999)). In Pennsylvania, the following elements must be met in order for a party to successfully assert the attorney-client privilege:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his or her subordinate, and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding, and (d) not for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Santer, 2008 WL 821060, at *1, 2008 U.S. Dist. LEXIS 23364, at *2 (quoting *Rhone–Poulenc Rorer v. Home Indem. Co.,* 32 F.3d 851, 862 (3d Cir.1994)). The two disputed issues in the present case are whether the contested communications were made primarily to secure legal advice and whether the privilege was waived with respect to certain documents. *See e.g.,* Pl.'s Mem. 1, 6, 8.

[4] The attorney-client privilege has historically been applied only to "communications from a client to an attorney," but "Pennsylvania courts have ... developed a corollary doctrine covering communications from an attorney to a client when such communications reflect the communications from the client to the attorney." *Santer,* 2008 WL 821060, at *1 n. 3, 2008 U.S. Dist. LEXIS 23364, at *4–5 n. 3 (citations omitted); *See also Ford,* 110 F.3d at 965 ("the entire discussion between a client and an attorney undertaken to secure legal advice is privileged, no matter whether the client or the attorney is speaking."). Communications with the subordinate of an attorney, such as a paralegal, are also protected by the attorney-client privilege so long as the subordinate is "acting as the agent of a duly qualified attorney under circumstances that would otherwise be sufficient to invoke the privilege." *Dabney v. Investment Corp. of America,* 82 F.R.D. 464, 465 (E.D.Pa.1979) (citing 8 Wigmore, Evidence § 2301 (McNaughton Rev.1961)).

[5] **[6]** The fact that the client is a corporation does not vitiate the attorney-client privilege. *Kramer v. Raymond Corp.,* 1992 WL 122856, at *1, 1992 U.S. Dist. LEXIS 7418, at *2–3 (E.D.Pa. May 29, 1992) (citing *Upjohn Co. v. United States,* 449 U.S. 383, 389–90, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981)). "[T]he privilege applies to communications by a corporate employee concerning matters within the scope of his duties purposefully made to enable an attorney to provide legal advice to the corporation." *AAMCO Transmissions, Inc. v. Marino,* 1991 WL 193502, at *2, 1991 U.S. Dist. LEXIS 13326, at *8 (E.D.Pa. Sept. 24, 1991) (citing ***258** *Upjohn,* 449 U.S. 383, 101 S.Ct. 677; *Admiral Ins. Co. v. United States Dist. Court,* 881 F.2d 1486, 1492 (9th Cir.1989)). "Likewise, it is clear that the privilege may apply where the communication is to in-house counsel rather than to outside counsel retained for a particular matter." *Kramer,* 1992 WL 122856, at *1, 1992 U.S. Dist. LEXIS 7418, at *3 (citing *Upjohn,* 449 U.S. at 394–95, 101 S.Ct. 677). The "primary purpose" of the communication at issue must be "to gain or provide legal assistance" for the privilege to apply due to the fact that "in-house counsel may play a dual role of legal advisor and business advisor." *Kramer,* 1992 WL 122856, at *1, 1992 U.S. Dist. LEXIS 7418, at *3. In this regard, the Third Circuit has held that even when "the decision include [s] consideration

of" various business concerns, the attorney-client privilege still applies to the communications if the decision "was infused with legal concerns and was reached only after securing legal advice." *Faloney*, 254 F.R.D. at 209–10, 2008 WL 2631360, at *5 (quoting *Ford*, 110 F.3d at 966).

[7] "[T]he 'scope of an individual's employment is ... highly relevant to the question of maintenance of confidentiality.' " *SmithKline Beecham Corp. v. Apotex Corp.*, 232 F.R.D. 467, 476 (E.D.Pa.2005) (quoting *Smithkline Beecham Corp. v. Apotex Corp.*, 193 F.R.D. 530, 539 (N.D.Ill.2000)). "The communications retain their privileged status if they [sic] information is relayed to other employees of officers of the corporation on a need to know basis." *Andritz Sprout–Bauer, Inc. v. Beazer East, Inc.*, 174 F.R.D. 609, 633 (M.D.Pa.1997). As such, "[t]he 'privilege is waived if the communications are disclosed to employees who did not need access to' them." *SmithKline*, 232 F.R.D. at 476 (quoting *Baxter Travenol Lab. v. Abbott Lab.*, 1987 WL 12919, at *5, 1987 U.S. Dist. LEXIS 10300, at *14 (N.D.Ill. June 19, 1987)); *see also Andritz*, 174 F.R.D. at 633 ("Only when the communications are relayed to those who do not need the information to carry out their work or make effective decisions on the part of the company is the privilege lost." (citing *In re Grand Jury 90–1*, 758 F.Supp. 1411 (D.Colo.1991))).

[8] [9] It is important to note that the attorney-client privilege usually protects "the communications themselves." *Andritz*, 174 F.R.D. at 633. However, "[d]ocuments sent to or prepared by counsel incorporating such information for the purpose of obtaining or giving legal advice, planning trial strategy, etc. are protected from compelled disclosure[,]" but "[t]o the extent that purely factual material can be extracted from privileged documents without divulging privileged communications, such information is obtainable." *Id.* Additionally,

> [d]rafts of documents prepared by counsel or circulated to counsel for comments on legal issues are considered privileged if they were prepared or circulated for the purpose of giving or obtaining legal advice and contain information or comments not included in the final version. *Allegheny Ludlum Corp. v. Nippon Steel Corp.*, 1991 U.S. Dist. LEXIS 5173, 1991 WL 61144 at *5 (E.D.Pa. Apr. 15, 1991). **"Preliminary drafts of contracts are generally protected by attorney/client privilege, since '[they] may reflect not only client confidences, but also legal advice and opinions of attorneys, all of which is protected by the attorney/client privilege.' "** *Muller v. Walt Disney Productions*, 871 F.Supp. 678, 682 (S.D.N.Y.1994), quoting *Schenet v. Anderson*, 678 F.Supp. 1280, 1284 (E.D.Mich.1988). See also: *Upsher–Smith Laboratories, Inc. v. Mylan Laboratories, Inc.*, 944 F.Supp. 1411, 1444–45. Compare: *United States Postal Service v. Phelps Dodge Refining Corp.*, 852 F.Supp. 156, 163 (E.D.N.Y.1994).
>
> *Id.* (emphasis added).

[10] [11] "A document need not be authored or addressed to an attorney in order to be properly withheld on attorney-client privilege grounds." *SmithKline*, 232 F.R.D. at 477 (quoting *Santrade, Ltd. v. General Elec. Co.*, 150 F.R.D. 539, 545 (E.D.N.C.1993)). When the client is a corporation, "privileged communications may be shared by non-attorney employees in order to relay information requested by attorneys." *SmithKline*, 232 F.R.D. at 477 (citing *Santrade*, 150 F.R.D. at 545). Additionally, "documents subject to the privilege may be transmitted ***259** between non-attorneys ... so that the corporation may be properly informed of legal advice and act appropriately." *SmithKline*, 232 F.R.D. at 477 (quoting *Santrade*, 150 F.R.D. at 545). Furthermore, the privilege may also extend to certain "documents, [that] while not involving employees assisting counsel, still reflect confidential communications between client and counsel or subordinates of counsel for the purpose of either (1) providing legal services or (2) providing information to counsel to secure legal services." *SmithKline*, 232 F.R.D. at 477 (citing *Cuno, Inc. v. Pall Corp.*, 121 F.R.D. 198, 202 (E.D.N.Y.1988)).

[12] However, the "attorney-client 'privilege does not shield documents merely because they were transferred to or routed through an attorney.' " *SmithKline*, 232 F.R.D. at 478 (quoting *Resolution Trust Corp. v. Diamond*, 773 F.Supp. 597, 600 (S.D.N.Y.1991)). "What would otherwise be routine, non-privileged communications between corporate officers or employees transacting the general business of the company do not attain privileged status solely because in-house or outside counsel is 'copied in' on correspondence or memoranda." *SmithKline*, 232 F.R.D. at 478 (quoting *Andritz*, 174 F.R.D. at 633). Therefore, in order to successfully assert the attorney-client privilege, the corporation "must clearly demonstrate that the communication in question was made for the express purpose of securing legal not business advice." *Marino*, 1991 WL 193502, at *3, 1991 U.S. Dist. LEXIS

13326, at *9 (citing *Teltron, Inc. v. Alexander*, 132 F.R.D. 394, 396 (E.D.Pa.1990); *Avianca, Inc. v. Corriea*, 705 F.Supp. 666, 676 (D.D.C.1989)).

[13] The party asserting the attorney-client privilege "bears the burden of proving that it applies to the communication at issue." *Sampson v. Sch. Dist. of Lancaster*, 2008 WL 4822023, at *3 (E.D.Pa. Nov.5, 2008) (citing *In re Grand Jury Empanelled Feb. 14, 1978*, 603 F.2d 469, 474 (3d Cir.1979)). It is important for the party seeking to assert the privilege to "identify [a] specific attorney with whom a confidential communication was made" in order to satisfy this burden. *SmithKline*, 232 F.R.D. at 477 (citing *United States v. Construction Prods. Research, Inc.*, 73 F.3d 464, 473 (2d Cir.1996)). Other relevant considerations are whether the party has specifically identified all recipients of the document, and whether the document was "widely distributed." *SmithKline*, 232 F.R.D. at 478 ("The recipient lists were limited to between five and twenty-five individuals within a 50,000–person organization.").

In the present case, Sara Hankins, Esquire, has submitted an affidavit asserting that she was employed as Senior Legal Counsel at Caremark at the time the contested communications were made. *See* Hankins Aff. ¶ 4. She acted as "the principal in-house lawyer advising Caremark[ ] and its business representatives on the SEPTA contract, and the legal issues surrounding such contract" during that time frame. *Id.* Further, Ms. Hankins asserts that Joy Kershaw was a paralegal who acted as her subordinate, assisted with the SEPTA contract, and "was responsible for implementing the changes to the draft contract once [Ms. Hankins] had approved them." *Id.* ¶ 5. Ms. Hankins declares that she and Ms. Kershaw "worked on the contract in a strictly legal capacity." *Id.* ¶ 6. Bearing the above legal principles in mind, the Court will address the discoverability of each document separately.

A. Documents 225

[14] Document 225 is a string of e-mails that was produced to SEPTA with one exception; namely, Caremark redacted some proposed contract language from an e-mail sent from Ms. Kershaw to Allison Brown, the Associate Vice President in the Underwriting Group. Hankins Aff. ¶ 8. The four individuals carbon copied (hereinafter "CC'd") on the e-mail are Colette Millstone, the SEPTA account executive; Samantha Brown, in-house counsel for Caremark; Ms. Hankins; and Dan Parrish, one of Caremark's pharmacy network specialists. *Id.* Ms. Hankins asserts that she directed Ms. Kershaw to "convey legal advice by way of setting forth revised proposed contract language for consideration by the Caremark[ ] employees directly involved in the SEPTA contract negotiations, and to seek feedback from both business people and legal personnel regarding the ***260** proposed legal contract language." *Id.* SEPTA argues that it appears that Ms. Kershaw is merely discussing prices that would be offered to SEPTA rather than conveying legal advice. *See* Pl.'s Mem. 3.

After careful *in camera* review of this document, it is clear that Ms. Kershaw authored the redacted e-mail to relay legal advice and to seek additional guidance on particular contract terms from both legal and business personnel; as such, the document is privileged. *Andritz*, 174 F.R.D. at 633 (citing *Muller*, 871 F.Supp. at 682) ("[p]reliminary drafts of contracts are generally protected by attorney/client privilege ...."); *see also SmithKline*, 232 F.R.D. at 477 (citing *Cuno*, 121 F.R.D. at 202) (the privilege may extend to certain "documents, [that] while not involving employees assisting counsel, still reflect confidential communications between client and counsel or subordinates of counsel for the purpose of either (1) providing legal services or (2) providing information to counsel to secure legal services."). To require disclosure of this document would reveal client communications and legal advice that were incorporated into the proposed contract language. Furthermore, Ms. Hankins has asserted that she and Ms. Kershaw played solely a legal role in relation to the SEPTA contract. Hankins Aff. ¶ 6. Even if business concerns were at issue in the communications, as SEPTA suggests, it is clear that any business decisions were only being made after securing legal advice from Ms. Hankins and Ms. Kershaw concerning the contract language. *See Faloney*, 254 F.R.D. at 209–10, 2008 WL 2631360, at *5 (quoting *Ford*, 110 F.3d at 966). Therefore, the "primary purpose" of the communications was to relay legal advice, not business advice. *See Kramer*, 1992 WL 122856, at *1, 1992 U.S. Dist. LEXIS 7418, at *3. The fact that Ms. Kershaw authored the e-mail does not destroy the privilege because she was acting as the agent of Ms. Hankins under circumstances where the attorney-client privilege applies.

See Dabney, 82 F.R.D. at 465; *see also* Hankins Aff. ¶¶ 5, 8.

The e-mail was sent to those that needed to stay informed. Three of the individuals involved in the communication were members of Caremark's in-house legal staff and the other three individuals were those who were intimately involved with the SEPTA contract negotiation and formation. Because this e-mail was not widely disseminated and was only sent to individuals who had a "need to know" the legal advice, Caremark has satisfied its burden of establishing that the privilege has not been waived. *See SmithKline*, 232 F.R.D. at 476, 478 (quoting *Baxter*, 1987 WL 12919, at *5, 1987 U.S. Dist. LEXIS 10300, at *14); *see also Andritz*, 174 F.R.D. at 633.

B. DOCUMENT 486

[15] Document 486 is a string of e-mails which begins with the same e-mail that was redacted in-part in Document 225. Hankins Aff. ¶ 8. SEPTA argues that the communications merely reveal which pharmacy networks would be offered to SEPTA. Pl.'s Mem. 3. This string of e-mails contains the same redaction as that in Document 225. Hankins Aff. ¶ 8. The only difference is that in this string of e-mails, in addition to those personnel listed above, this information was also sent to Barbara Pollio, who was Ms. Brown's subordinate in the Underwriting Department. *See* Def.'s Mem. Ex. A (filed under seal).

As stated above, these communications are privileged because they contain legal advice regarding proposed contract language. *Andritz*, 174 F.R.D. at 633 (citing *Muller*, 871 F.Supp. at 682); *see also SmithKline*, 232 F.R.D. at 477 (citing *Cuno*, 121 F.R.D. at 202). Regardless of whether business concerns were intertwined in the communications, the primary purpose of the communications was clearly to provide legal advice to businesspeople regarding the contract language. *See Faloney*, 254 F.R.D. at 209–10, 2008 WL 2631360, at *5 (quoting *Ford*, 110 F.3d at 966); *see also Kramer*, 1992 WL 122856, at *1, 1992 U.S. Dist. LEXIS 7418, at *3. Since Ms. Kershaw was acting as the agent of Ms. Hankins when she sent the contested e-mail, the privilege is not lost. *See Dabney*, 82 F.R.D. at 465; *see also* Hankins Aff. ¶¶ 5, 8. Finally, since this e-mail was not widely disseminated and was only sent to individuals who had a "need to know" the legal advice, Caremark has established that ***261** the privilege was not waived. *See SmithKline*, 232 F.R.D. at 476, 478 (quoting *Baxter*, 1987 WL 12919, at *5, 1987 U.S. Dist. LEXIS 10300, at *14); *see also Andritz*, 174 F.R.D. at 633.

C. DOCUMENT 237

[16] Document 237 contains four e-mails, two of which are redacted. The first redacted email was sent by Ms. Millstone, the SEPTA account executive, to Scott Bond, Vice President of Sales, and Sara Sullivan, who was Ms. Millstone's Supervisor. Hankins Aff. ¶9. Ms. Hankins and Ms. Kershaw are CC'd on the e-mail. *Id.* The next redacted e-mail was sent from Mr. Bond to Ms. Millstone and Ms. Hankins, with Ms. Kershaw and Ms. Sullivan CC'd on the e-mail. *Id.*

SEPTA argues that Ms. Hankins is merely a recipient of these e-mails and that "there is no evidence of any communication let alone legal advice flowing from attorney Hankins." Pl.'s Mem. 5 (quoting *In re Vioxx Prods. Liab. Litig.*, 501 F.Supp.2d 789, 809 (E.D.La.2007)) ("When e-mail messages were addressed to both lawyers and non-lawyers for review, comment, and approval, we concluded that the primary purpose of such communications was not to obtain legal assistance since the same was being sought from all."). [3]

Ms. Hankins asserts that the first e-mail does in fact reveal legal advice that she gave concerning the SEPTA contract and calls for input from Mr. Bond. Hankins Aff. ¶ 9. With regard to the second e-mail, Ms. Hankins asserts that Mr. Bond responded and provided her with feedback "regarding specific contractual terms and strategy for contract negotiations." *Id.*

After careful *in camera* review of the contested e-mails, the Court finds that Caremark has met its burden of establishing that the attorney-client privilege applies. Here, it is evident that business people involved with the SEPTA account and contract were communicating with each other, and Ms. Hankins, to relay legal advice and to seek additional guidance on particular contract terms; as such, the documents are privileged even though they are not authored by an attorney. *See SmithKline*, 232 F.R.D. at 477 (quoting *Santrade*, 150 F.R.D. at 545). Furthermore, the privilege also applies because these documents reveal confidential legal communications

between Ms. Hankins and her corporate clients. *See SmithKline,* 232 F.R.D. at 477 (citing *Cuno,* 121 F.R.D. at 202).

[17] Absent specific evidence to the contrary, the Court finds that Ms. Hankins' affidavit proclaiming that the contested e-mails reveal her legal advice to her clients is ***262** sufficient to establish that they were privileged, regardless of whether or not she was the sender. *See RCN Corp. v. Paramount Pavilion Group LLC,* 2003 WL 23112381, at *3–4, 2003 U.S. Dist. LEXIS 24004, at *9–10 (E.D.Pa. Dec. 19, 2003) (holding that in-house counsel's affidavit that he was only involved in the communications in his legal capacity was sufficient to establish privilege when the opposing party merely accused him of acting in a business capacity in its brief (citing *Georgine v. Amchem Prods., Inc.,* 160 F.R.D. 478, 485 n. 3 (E.D.Pa.1995); *Meridian Mortgage Corp. v. Spivak,* 1992 U.S. Dist. LEXIS 12319, 1992 WL 205640, at *3 (E.D.Pa. Aug. 14, 1992))); *see also SmithKline,* 232 F.R.D. at 477 (quoting *Santrade,* 150 F.R.D. at 545) ("A document need not be authored or addressed to an attorney in order to be properly withheld on attorney-client privilege grounds."). Furthermore, because Caremark has established that these e-mails were only sent to employees that were involved with the SEPTA account and contract, and thus needed to stay informed of the legal advice, the privilege was not waived. *See SmithKline,* 232 F.R.D. at 476 (quoting *Baxter,* 1987 WL 12919, at *5, 1987 U.S. Dist. LEXIS 10300, at *14); *see also Andritz,* 174 F.R.D. at 633.

D. DOCUMENT 480

[18] Document 480 contains an e-mail with a cut-and-pasted excerpt from a memorandum that was written by Ms. Hankins and addressed to David George, Caremark's President, with Susan de Mars, Caremark's General Counsel, and Joe Filipek, Caremark's Executive Vice President of Client Management CC'd on the memorandum. Hankins Aff. ¶ 10. Ms. Hankins notes that the complete version of this memorandum was also sent to Mr. Bond and Ms. Millstone. *Id.* In the e-mail, Mr. Bond sends an excerpt of the memorandum to Andrew Thomas, Ms. Millstone's supervisor, Ms. Millstone, and Ms. Brown. *Id.* ¶ 11. Ms. Hankins notes that "the primary purpose of this memorandum was to set forth my legal analysis of the proposed SEPTA contract." *Id.* ¶ 10. Ms. Hankins asserts that all individuals that received the memorandum "needed to know what [her] advice was with respect to the contract at issue." *Id.* ¶¶ 10–11.

SEPTA contends that this memorandum "was disseminated to non-legal employees for the purposes of analyzing a business decision and further it was disseminated without regard to whether the underlying communication contained privileged legal advice," partially because the document does not state on its face that it contains legal advice and must be kept confidential. Pl.'s Mem. 5–6. Caremark argues that these communications reveal Ms. Hankins' legal advice only to those on a "need to know" basis and that the mere fact that the document is not "labeled 'privileged' " does not vitiate the privilege. Def.'s Mem. 8–9 (citing *Lifewise Master Funding v. Telebank,* 206 F.R.D. 298, 301 (D.Utah 2002)) (citations omitted).

The excerpted memorandum clearly reveals the legal advice of Ms. Hankins. Further, Mr. Bond's e-mail disseminating the excerpted memorandum clearly demonstrates that the purpose of this further dissemination is for the purpose of relaying the Ms. Hankins' legal advice contained in the memorandum. The privilege applies because these documents reveal confidential legal communications between Ms. Hankins and her corporate clients. *See SmithKline,* 232 F.R.D. at 477 (citing *Cuno,* 121 F.R.D. at 202). Further, the privilege applies because the purpose of disseminating the memorandum was "so that the corporation may be properly informed of legal advice and act appropriately." *SmithKline,* 232 F.R.D. at 477 (quoting *Santrade,* 150 F.R.D. at 545). As the memorandum was only disseminated to those corporate employees in a "need to know" position, the privilege was not waived. *See SmithKline,* 232 F.R.D. at 476 (quoting *Baxter,* 1987 WL 12919, at *5, 1987 U.S. Dist. LEXIS 10300, at *14); *see also Andritz,* 174 F.R.D. at 633. Moreover, the mere fact that business concerns may have motivated the communication at issue does not render the documents unprivileged because the Court finds that any business decisions being made were "infused with legal concerns and [were] reached only after securing legal advice." ***263** *Faloney,* 254 F.R.D. at 209–10, 2008 WL 2631360, at *5 (quoting *Ford,* 110 F.3d at 966).

[19] Caremark persuasively argues that its failure to specifically label Ms. Hankins' memorandum as

"confidential" or "privileged" does not destroy the privilege. Communications are confidential "if 'not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services.' " *Faloney,* 254 F.R.D. at 209–10, 2008 WL 2631360, at *5 (quoting *United States v. Moscony,* 927 F.2d 742, 752 (3d Cir.1991)). The *Faloney* court held that communications were confidential even though an employee discussed them with other employees of the Defendant and even though the communications were not labeled as "confidential," because "the information was not public knowledge." *Faloney,* 254 F.R.D. at 210-11, 2008 WL 2631360, at *6 (citing *In re U.S. Healthcare, Inc. Sec. Litig.,* 1989 WL 11068, at *2 n. 2 (E.D.Pa. Feb. 8, 1989); *Moscony,* 927 F.2d at 752). Further, the communications were held to be confidential because "[t]he conveyed information was within the scope of [the employees] employment," and it had been established that the employees knew that the attorneys needed the information in order to render legal advice. *Faloney,* 254 F.R.D. at 212, 2008 WL 2631360, at *7.

Similarly, in the present case, all employees involved in the discussion surrounding the disputed memorandum were acting within the scope of their employment on the SEPTA contract. *See* Hankins Aff. ¶¶ 10–11. Furthermore, the portion of the e-mail that was produced is clear on its face that, while Mr. Bond originally thought the concerns were merely business decisions, the legal issues outlined in the memorandum were of consequence to the businesspeople involved in the communications. There is no evidence to indicate that the information contained in the memorandum was public knowledge or that it was disseminated to other employees that were not acting in the scope of their employment; as such, the fact that the memorandum was not labeled "confidential" or accompanied by instructions not to disclose, does not render it discoverable. *See Faloney,* 254 F.R.D. at 209–12, 2008 WL 2631360, at *5–7 (citations omitted).

E. DOCUMENT 481

[20] Document 481 consists of four e-mails, the first of which was redacted by Caremark. The redacted e-mail is authored by Ms. Allison Brown, "senior underwriter of the SEPTA contract," and is sent to Ms. Hankins. Hankins Aff. ¶ 12. Becky Hedberg, one of Ms. Brown's subordinates, and Ren Elder, "senior executive in the networks group," Ms. Kershaw, and Ms. Millstone are all CC'd on the e-mail. *Id.* Ms. Hankins declares that, in the e-mail, "Ms. Brown advises [her] and the SEPTA business team about a contract term, and apprises [them] of the status of the contract negotiations." *Id.* Ms. Hankins asserts that she needed to be kept abreast of this type of information in order to render her legal advice on the contract. *Id.* Subsequent e-mails in the chain reveal that this information was also shared with Mr. Bond, Andrew Thomas, who took over as Ms. Millstone's supervisor at some point, and Margaret Wear, who is "Vice President, Chief Actuary." *Id.; see also* Def.'s Mem. Ex. A (filed under seal).

Caremark argues that this e-mail should be privileged because it involves Ms. Brown "advis[ing] in-house counsel and the SEPTA business team about a new contract term and the reasons for resisting same, and appris[ing] them of the status of the contract negotiations." Def.'s Mem. 9 (citing *American Nat'l Bank and Trust Co. of Chicago v. AXA Client Solutions, LLC,* 2002 WL 1058776, at *4 (N.D.Ill. Mar. 22, 2002) (finding e-mail "correspondence with counsel regarding contract language on market timing" amongst in-house counsel and employees to be protected by the attorney-client privilege)). In response, SEPTA argues that Caremark has failed to establish that Ms. Brown was seeking legal advice from Ms. Hankins in the original email and further argues that the privilege was waived because the e-mail was disseminated to other non-lawyer Caremark employees. Pl.'s Mem. 8 (citing *Vioxx,* 501 F.Supp.2d at 812).

It is clear that the primary purpose of the redacted e-mail was to keep Ms. Hankins informed on the contract terms at issue and ***264** the status of contract negotiations so that she could render effective legal advice. Thus, Caremark has satisfied its burden of proving that the attorney-client privilege applies. *See Kramer,* 1992 WL 122856, at *1, 1992 U.S. Dist. LEXIS 7418, at *3. The e-mail was subsequently disseminated to other individuals who worked on the SEPTA account and needed to know about the issues with the contract terms and negotiations. For these reasons, the Court finds that the privilege was not waived. *See SmithKline,* 232 F.R.D. at 476, 478 (quoting *Baxter,* 1987 WL 12919, at *5, 1987 U.S. Dist. LEXIS 10300, at *14); see also *Andritz,* 174 F.R.D. at 633.

F. DOCUMENT 485

[21] Document 485 consists of an e-mail string of which four e-mails have been redacted by Caremark. Hankins Aff. ¶ 13. In the first e-mail, which was produced, Ms. Millstone asks Ms. Kershaw to forward a copy of the document discussed above in Document 225. After Ms. Kershaw does so, Ms. Millstone then drafts an e-mail, which was redacted, that is addressed to Ms. Kershaw, Ms. Brown, Mr. Elder, and Ms. Hankins. *Id.* Mr. Bond and Ms. Sullivan are CC'd on the e-mail. *Id.* Ms. Hankins states that the e-mail seeks legal advice from her regarding "proposed changes to the contract." *Id.* In the next redacted e-mail, Ms. Brown addresses Ms. Millstone regarding to the issues raised in the first e-mail. *Id.* The e-mail is addressed to Ms. Millstone, with Ms. Kershaw, Mr. Elder, Ms. Hedberg, Ms. Hankins, Ms. Sullivan, and Mr. Bond CC'd on the e-mail. *See* Def.'s Am. Supp. Priv. Log. Ms. Hankins asserts that the purpose of this e-mail was to "impart information to [her] for the purpose of seeking legal advice." Hankins Aff. ¶ 13. Two e-mails follow, both of which were produced; in both e-mails, Ms. Kershaw and Ms. Millstone contact each other regarding how to proceed.

The next redacted e-mail is from Ms. Kershaw to Ms. Millstone, with Ms. Brown, Ms. Hedberg, Ms. Hankins, Ms. Samantha Brown, another in-house lawyer at Caremark, and Cheryl Hall, Manager of Pricing, all CC'd on the e-mail. *Id.; see also* Def.'s Mem. Ex. A. Ms. Hankins asserts that this e-mail "both provides and directions from the Legal Department as well as seeking legal advice from one of her attorney supervisors." Hankins Aff. ¶ 13. This e-mail contains a red-lined "version of the referenced contract," which will be addressed separately. *Id.* The final redacted e-mail is from Ms. Allison Brown to Ms. Kershaw with CC's to Ms. Hedberg, Ms. Millstone, Ms. Samantha Brown, Ms. Hankins, Ms. Hall, Mr. Elder, and Colleen Currie, a subordinate of Mr. Elder. *See* Def.'s Am. Supp. Priv. Log; Def.'s Mem. Ex. A. Ms. Hankins asserts that in this e-mail, Ms. Brown responds to Ms. Kershaw's e-mail regarding the contract language and "discusses contract negotiation strategy." Hankins Aff. ¶ 13.

Six e-mails follow, all of which were produced, that contain correspondence between Ms. Millstone, Ms. Brown, Ms. Pollio, and Mr. Elder. A redacted e-mail follows, which contains the same document that was withheld pursuant to the e-mail string in Document 225. Hankins Aff. ¶ 8. Subsequent e-mails in the chain reveal this document and discussions related thereto between Ms. Brown, Mr. Parrish, Ms. Pollio, and Mr. Elder. These e-mails were produced. Ms. Hankins declares that "[t]he redacted portions of this string were drafted with the primary purpose of seeking legal advice and also revealed my legal advice." *Id.* ¶ 13. Caremark asserts that these communications were made to seek advice from both counsel and businesspeople concerning the pricing exhibit to the contract. Def.'s Mem. 10. It argues that the privilege applies to both the information communicated to the attorney and the advice the attorney has given. *Id.* at 11 (citing *Santrade, Ltd.*, 150 F.R.D. at 545; *Faloney*, 254 F.R.D. at 209–10, 2008 WL 2631360, at *5). Caremark also contends that even if the communications contained business-related concerns, the privilege should not be vitiated. Def.'s Mem. 11 (citing *Faloney*, 254 F.R.D. at 209–10, 2008 WL 2631360, at *5; *Ford*, 110 F.3d at 966). SEPTA argues that Caremark has not satisfied its burden to prove that all communications contained in the e-mail string were made for the purpose of securing legal advice and that even if the documents would be privileged, Caremark's wide dissemination of ***265** the information deems the privilege waived. Pl.'s Mem. 10.

The primary purpose of first redacted e-mail is clearly to seek advice concerning the contract language from both business and legal personnel. Even if these communications "include[d] consideration of" various business concerns, the attorney-client privilege still applies to the communications because they were "infused with legal concerns." *Faloney*, 254 F.R.D. at 209–10, 2008 WL 2631360, at *5 (quoting *Ford*, 110 F.3d at 966). Furthermore, all business personnel involved in the communications at issue were within the core group of individuals working on the SEPTA contract that had a "need to know" the information. *See SmithKline*, 232 F.R.D. at 476 (quoting *Baxter*, 1987 WL 12919, at *5, 1987 U.S. Dist. LEXIS 10300, at *14); *see also Andritz*, 174 F.R.D. at 633.

It is clear that the second redacted e-mail provides further feedback to both legal and business personnel regarding the topics discussed in the first redacted e-mail. The Court has considered Ms. Hankins' assertion that the purpose of this e-mail was to provide her with information necessary to render legal advice. Hankins Aff. ¶ 13. As

a result, the Court finds that for the same reasons the first e-mail is privileged, the second redacted e-mail is also privileged. The third e-mail is also privileged because it contains feedback and advice from Caremark's in-house attorneys and paralegal, and also because in the e-mail, Ms. Kershaw seeks further legal advice from her supervisors. *See Ford,* 110 F.3d at 965 ("the entire discussion between a client and an attorney undertaken to secure legal advice is privileged, no matter whether the client or the attorney is speaking.").

The fourth e-mail is also clearly privileged as it provides Ms. Kershaw with advice about contract terms and negotiations in order for the legal department to provide their legal advice on the contract. *See SmithKline,* 232 F.R.D. at 477 (citing *Cuno,* 121 F.R.D. at 202) (documents that "reflect confidential communications between client and counsel" in order to "provid[e] information to counsel to secure legal services" may be privileged). Finally, for the reasons discussed above, the cut-and-pasted contract language that Ms. Kershaw e-mailed to both business and legal personnel is privileged. Because none of the above communications were revealed to individuals outside of the core group of individuals who had a "need to know" of the information, the privilege was not waived. *See SmithKline,* 232 F.R.D. at 476 (quoting *Baxter,* 1987 WL 12919, at *5, 1987 U.S. Dist. LEXIS 10300, at *14); *see also Andritz,* 174 F.R.D. at 633.

G. DOCUMENT 553

[22] Document 553 "is a draft addendum that was proposed to be attached to the SEPTA contract," which was drafted by Ms. Hankins and sent to Ms. Kershaw and Ms. Brown. Hankins Aff. ¶ 14. SEPTA requests that the Court determine whether or not it contains legal advice or "non-legal editing or wordsmithing and/or basic comments." Pl.'s Mem. 12–13. Ms. Hankins asserts that this addendum "set[s] forth [her] legal advice." Hankins Aff. ¶ 14. "Preliminary drafts of contracts are generally protected by attorney/client privilege, since '[they] may reflect not only client confidences, but also legal advice and opinions of attorneys, all of which is protected by the attorney/client privilege.' " *Andritz,* 174 F.R.D. at 633 (quoting *Muller,* 871 F.Supp. at 682 (citations omitted)); *see also SmithKline,* 232 F.R.D. at 477 (citing *Cuno,* 121 F.R.D. at 202) (the privilege may also extend to certain "documents, [that] while not involving employees assisting counsel, still reflect confidential communications between client and counsel or subordinates of counsel for the purpose of either (1) providing legal services or (2) providing information to counsel to secure legal services."). The Court is satisfied that Caremark has satisfied its burden of proving that Document 553 is privileged. Since the draft addendum was not widely disseminated and not revealed to employees outside the scope of those who needed to remain informed of Ms. Hankins' legal advice, the privilege was not waived. *See SmithKline,* 232 F.R.D. at 476, 478 (quoting *Baxter,* 1987 WL 12919, at *5, 1987 U.S. Dist. LEXIS 10300, at *14); *see also Andritz,* 174 F.R.D. at 633.

H. DOCUMENT 554

[23] Document 554 "is a draft contract that [Ms. Hankins] directed Ms. Kershaw to ***266** prepare and revise." Hankins Aff. ¶ 15. Ms. Hankins declares that it "sets forth legal advice and incorporated confidential communications from [her] clients that were directly involved in the finalization of the SEPTA contract." *Id.* This draft contract was disseminated to Cyndi Street, a subordinate of Ms. Allison Brown, Ms. Brown herself, and Ms. Millstone. Def.'s Mem. 12; see also Def.'s Mem. Ex. A. Copied on this document are Patrick O'Neal, the client rebates manager, Michael Satre, a subordinate of Mr. O'Neal, Michael Caley, another subordinate of Mr. O'Neal, Ms. Pollio, Amy Companik, a subordinate of Ms. Brown, and Bonnie Stone, a subordinate of Margaret Wear. Def.'s Mem. 12; *see also* Def.'s Mem. Ex. A.

SEPTA extends its argument concerning Document 553 to the draft contract contained in Document 554. Pl.'s Mem. 12–13. After consideration of Ms. Hankins' assertion that this draft contract incorporates her legal advice and confidential communications from clients and the fact that the document was not disseminated amongst employees that were outside the group of individuals who had a "need to know" the information, the Court is again satisfied that the document is privileged and that the privilege has not been waived. *See Andritz,* 174 F.R.D. at 633 (quoting *Muller,* 871 F.Supp. at 682); *see also SmithKline,* 232 F.R.D. at 476 (quoting *Baxter,* 1987 WL 12919, at *5, 1987 U.S. Dist. LEXIS 10300, at *14).

I. DOCUMENT 555

[24] Document 555 is a red-lined draft contract, which was attached to an e-mail contained in Document 485. Hankins Aff. ¶ 13. Ms. Hankins declares that the draft contract contains her legal advice. *Id.* SEPTA extends its arguments concerning Documents 553 and 554 to Document 555. Pl.'s Mem. 12–13. This red-lined draft contract unequivocally contains legal advice from Ms. Hankins, leaving no doubt that it is privileged. *Andritz,* 174 F.R.D. at 633 (quoting *Muller,* 871 F.Supp. at 682) ("[p]reliminary drafts of contracts are generally protected by attorney/client privilege ...."); *see also SmithKline,* 232 F.R.D. at 477 (citing *Cuno,* 121 F.R.D. at 202). Moreover, because the string of e-mails in Document 485 which contained this red-lined draft contract were only disseminated to those Caremark employees that worked on the SEPTA contract and had a "need to know" of Ms. Hankins' legal advice, the privilege was not waived. *See SmithKline,* 232 F.R.D. at 476 (quoting *Baxter,* 1987 WL 12919, at *5, 1987 U.S. Dist. LEXIS 10300, at *14); *see also Andritz,* 174 F.R.D. at 633.

II. CONCLUSION

For the reasons stated above, the Court finds that Caremark has satisfied its burden of proving the contested documents are covered by the attorney-client privilege. Caremark has also demonstrated that it did not waive the privilege with respect to any of the disputed communications. Therefore, the Court will not require Caremark to produce Documents 225, 237, 480, 481, 485, 486, 553, 554, nor 555 to SEPTA. An appropriate order follows.

ORDER

AND NOW, this 8th day of December, 2008, upon consideration of the Affidavit of Sara Hankins, Esquire (Doc. No. 110), Caremark's Memorandum of Law (Doc. No. 105), and SEPTA's Letter Memorandum (Doc. No. 106), it is hereby **ORDERED** that Documents 225, 237, 480, 481, 485, 486, 553, 554, and 555 are **PRIVILEGED** and **NEED NOT** be produced.

All Citations

254 F.R.D. 253

Footnotes

1 The Court must take special caution not to discuss the specific content of the documents in detail, otherwise "the very purposes of [*in camera*] review" would be subverted, creating a risk that "the privilege will be destroyed." *In re Ford Motor Co.,* 110 F.3d 954, 966 n. 11 (3d Cir.1997); *See also Faloney v. Wachovia Bank, N.A.,* 2008 WL 2631360, at *3 n. 3 (E.D.Pa. June 25, 2008).

2 The Third Circuit has recognized that "*in camera* review is the appropriate method for resolving privilege disputes." *Santer v. Teachers Ins. & Annuity Ass'n,* 2008 WL 821060, at *1 n. 1, 2008 U.S. Dist. LEXIS 23364, at *3–4 n. 1 (E.D.Pa. Mar. 24, 2008) (citing *United Coal Cos. v. Powell Constr. Co.,* 839 F.2d 958, 966 (3d Cir.1988)).

3 SEPTA relies heavily on *Vioxx* throughout its letter memorandum. *See e.g.,* Pl.'s Mem. 2–3, 5, 6, 8, 9, 12. Not only is *Vioxx* not controlling law in this jurisdiction, but there are reasons to discount its persuasive force. The *Vioxx* Court enlisted the assistance of Special Master Paul Rice, a well known scholar in the area of attorney-client privilege, and Special Counsel Brent Barriere to resolve a number of attorney-client privilege disputes. *Vioxx,* 501 F.Supp.2d at 791–92. In *Vioxx,* as Caremark points out, two major privilege disputes dealt with a "pervasive regulation" theory and a "reverse engineering" theory. *Id.* at 800–805; *see also* Def.'s Mem. 1 n. 1. Under the "pervasive regulation" theory, Merck attempted to assert the attorney-client privilege with respect to certain documents on the basis that due to the heavy regulation of the drug industry, almost all activities of drug companies "carr[y] potential legal problems vis-a-vis government regulators." *Id.* at 800. The Special Master rejected this theory, noting that it "would effectively immunize most of the industry's internal communications because most drug companies are probably structured like Merck where virtually every communication leaving the company has to go through the legal department for review, comment, and approval." *Id.* at 801. The Special Master also noted that, while pervasive regulation "is a factor that must be taken into account when assessing" the application of the attorney-client privilege to communications with in-house counsel, the party asserting the privilege must still satisfy its "burden of persuasion on the elements of attorney-client privilege" with respect to each document. *Id.* at 800–801. Under the "reverse engineering" theory, Merck unsuccessfully argued that

even if things such as "studies" and "proposals," not normally privileged, were attached to communications, they should be privileged because "adversaries can discern the content of the legal advice that was subsequently offered." *Id.* at 804–05. In the present case, the communications at issue clearly involve negotiation of the SEPTA contract and its formation. *See* Hankins Aff. ¶¶ 7–15; Def.'s Mem. 1–2 n. 1. Because the factual scenarios and arguments being advanced in the present case are distinguishable from those in *Vioxx*, the Court is hesitant to rely on the *Vioxx* case as persuasive authority.

End of Document

0.2 *U.S. v. Askins*, 2016 WL 4039204 (July 28, 2016)

2016 WL 4039204
Only the Westlaw citation is currently available.
United States District Court,
M.D. Tennessee, Nashville Division.

United States of America,
v.
Wendy Askins.

Civil No. 3:13-cr-00162
|
Filed 07/28/2016

Attorneys and Law Firms

Darryl Anthony Stewart, Office of the United States Attorney, Nashville, TN, for United States of America.

MEMORANDUM

ALETA A. TRAUGER, United States District Judge

***1** This matter comes before the court on a Motion to Dismiss Indictment and Disqualify Counsel filed by the defendant, Wendy Askins (Docket No. 150), to which the United States has filed a Response (Docket No. 156). For the reasons discussed herein, the motion will be denied.

BACKGROUND [1]

Askins is a former executive director of the Upper Cumberland Development District ("UCDD"), a quasi-governmental entity established by the State of Tennessee to further the economic development of the state's Upper Cumberland region. (Docket No. 131 ¶¶ 1, 4.) UCDD is governed by a board of directors and an executive committee, but its day-to-day operations are managed by the executive director. UCDD oversees the administration of the Cumberland Regional Development Corporation ("CRDC"), which is primarily focused on creating affordable housing, and the Cumberland Area Investment Corporation ("CAIC"), which administers an at least partially federally funded program offering loans to small businesses. (*Id.* at ¶¶ 1–3.)

In 2007, UCDD retained the Rader Law Firm to provide periodic legal assistance to UCDD as needed. (Docket No. 156-3, pp. 24, 168.) Throughout the relationship, the firm's services were paid for by UCDD with its discretionary funds. (*Id.* at pp. 53–55.) As executive director, Askins served as UCDD's primary contact with the Rader Law Firm, although the firm's senior partner, Daniel H. Rader, III ("Dan Rader"), has testified that, at times, he communicated with several other individuals at UCDD as well. (*Id.* at p. 193.) Askins has testified that, prior to 2011, UCDD called on the Rader Law Firm rarely, at a rate that she estimated as no more than twice per year. (*Id.* at p. 24.) In summer of 2011, Askins and UCDD deputy director Larry Webb met twice with Dan Rader to discuss the management of an allegedly UCDD-funded property known as the "Living the Dream" project, located at 1125 Deer Creek in Cookeville, Tennessee. (*Id.* at p. 26; Docket No. 131 ¶ 9(b), (j)–(m).) Askins and Webb were interested in forming a company to provide services to residents of the Living the Dream project, but Rader advised them that such steps would create a conflict of interest in light of their professional positions with UCDD. (Docket No. 156-3, pp. 59, 182–83.)

In the fall of 2011, UCDD received a number of requests from media outlets under Tennessee's Open Records Act and sought the assistance of the Rader Law Firm in responding to the requests. (*Id.* at pp. 59–61.) In the course of its review, the Rader Law Firm discovered irregularities in UCDD's records that prompted Dan Rader to call Askins and request that she set up a meeting with Mike Foster, the chairman of the UCDD board of directors. (*Id.* at pp. 134– 39.) Dan Rader has testified that he told Askins that she was "welcome to" attend the meeting as well. (*Id.* at p. 186.) The resulting meeting was held on January 12, 2012, and was attended by the following people: Askins; Foster; the vice chairman of the UCDD board of directors, John Pelham; Dan Rader; and Rader's son, another member of the firm, Daniel H. Rader, IV ("Danny Rader"). (*Id.* at pp. 64–65.) At the meeting, the Raders distributed a letter from Danny Rader addressed to Askins and Foster under their formal UCDD titles and at their UCDD work addresses. The letter detailed the scope of what had so far been requested by the media and produced by UCDD, and noted, in particular, issues related to the minutes of a February 16, 2010, board meeting. (Docket No. 150-2.) Throughout, the letter used the word "you" without clearly identifying whether it was referring to one of the recipients, both of the recipients, or UCDD itself. (*Id.*)

*2 The January 12, 2012, meeting was electronically recorded and has been transcribed. (Docket No. 150-1.) Among the topics discussed in the meeting were the possibility that documents had been falsified or destroyed, the possibility that an audit might reveal embezzlement by Askins, and the possibility of an eventual criminal investigation. (*Id.* at pp. 15, 18, 34–35, 38.) The transcript shows that: early in the meeting, Dan Rader stated that he had "been the lawyer for UCDD for a couple of years"; he later said, "[W]e represent the UCDD and we feel like we have an obligation to have you guys here to try to protect UCDD and its reputation"; and he later reiterated, "I want to protect UCDD, and that's who we represent, UCDD." (*Id.* at pp. 3, 18–19, 38) Shortly thereafter, Dan Rader said to Askins that, in light of some of the facts the Rader Law Firm had uncovered so far and the media's persistence in the matter, he thought Askins "need[ed] to probably consult a personal attorney." (*Id.* at p. 42.) Before the conversation ended, Dan Rader mentioned a final time that he was not Askins' criminal defense attorney. (*Id.* at p. 56.) Askins has testified that, until Dan Rader mentioned her need to get her own attorney, she believed that he represented her as well as UCDD. (Docket No. 156-3, pp. 67–68.)

In the spring of 2013, Dan Rader was contacted by the FBI about his dealings with Askins and the UCDD. (*Id.* at 190.) Dan Rader discussed the matter over the phone with Mark Farley, who had by that time succeeded Askins as executive director of UCDD. Dan Rader confirmed with Farley that UCDD wished to waive its attorney-client privilege in the matter. (*Id.*) Dan Rader went on to speak with the FBI in May of 2013, and again in early 2016. (*Id.*) Danny Rader met with a TBI special agent and an investigator with the Tennessee Attorney General's Office in August of 2013. (Docket No. 150-4.) Over the course of the interviews, both Dan and Danny Rader conveyed information they had received from Askins in the January 12, 2012, meeting.

On September 25, 2013, a federal grand jury charged Askins with one count of conspiracy to commit an offense against or defraud the United States, six counts of theft of public money, four counts of bank fraud, three counts of money laundering, and two counts of making false statements in a matter under federal jurisdiction. (Docket No. 1.) The grand jury returned a superseding indictment on February 24, 2016, charging Askins with one count of conspiracy to commit an offense against or defraud the United States, two counts of embezzlement from a program receiving government funds, one count of theft of government property, four counts of bank fraud, and four counts of money laundering. (Docket No. 131.) Many, if not all, of the charges Askins faces touch in some way on documents, actions, or transactions discussed in the January 12, 2012, meeting with the Rader Law Firm attorneys. (*Id.*) On July 27, 2016, Askins filed an *in camera* motion asking the court to dismiss the indictments in light of the Government's reliance on communications between Askins and the Rader Law Firm, which Askins asserts were protected by attorney-client privilege. (Docket No. 150.)

LEGAL STANDARD

Motions to dismiss indictments are governed by Rule 12 of the Federal Rules of Criminal Procedure, which states that "[a] party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits." Fed. R. Crim. P. 12(b). The Sixth Circuit guides district courts to "dispose of all motions before trial if they are capable of determination without trial of the general issue." *United States v. Jones*, 542 F.2d 661, 665 (6th Cir. 1976). A defense raised in a motion to dismiss indictment is "capable of determination if trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense." *Id.* at 664 (citing *United States v. Covington*, 395 U.S. 57, 60 (1969)). On a motion to dismiss indictment, "the [c]ourt must view the [i]ndictment's factual allegations as true, and must determine only whether the [i]ndictment is 'valid on its face.' " *United States v. Campbell*, No. 02-80863, 2006 WL 897436, at *2 (E.D. Mich. Apr. 6, 2006) (citing *Costello v. United States*, 350 U.S. 359, 363 (1956)). Accordingly, the court must resolve factual issues in this case, such as they exist, in favor of the allegations in the indictment. With this standard in mind, the court turns to an analysis of the defendant's motion.

ANALYSIS

*3 Askins contends that, at the time of the January 12, 2012, meeting, she enjoyed an attorney-client relationship with the Rader Law Firm, and she reasonably and correctly believed that her statements in the meeting

were covered by attorney-client privilege. She argues that she never consented to the firm's decision to break the privilege and that the information that the Raders provided to investigators has so tainted the proceedings in this matter that the only appropriate remedy is dismissal of the indictment. Alternately, she challenges the adequacy of UCDD's waiver of its attorney-client privilege in the same communications. The government counters that the Rader Law Firm never represented Askins in her personal capacity, that its only relevant attorney-client relationship was with UCDD, and that UCDD validly waived the relevant attorney-client privilege through Farley, its executive director.

"The attorney-client privilege protects from disclosure 'confidential communications between a lawyer and his client in matters that relate to the legal interests of society and the client.' " *Ross v. City of Memphis*, 423 F.3d 596, 600 (6th Cir. 2005) (quoting *In re Grand Jury Subpoena (United States v. Doe)*, 886 F.2d 135, 137 (6th Cir. 1989)). The Sixth Circuit has described the elements of attorney-client privilege as follows:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser (8) except the protection be waived.

Humphreys, Hutcheson & Moseley v. Donovan, 755 F.2d 1211, 1219 (6th Cir. 1985) (quoting *United States v. Goldfarb*, 328 F.2d 280, 281 (6th Cir.), *cert. denied*, 377 U.S. 976 (1964)). "The privilege's primary purpose is to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.' " *Ross*, 423 F.3d at 600 (quoting *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998)). Attorney-client privilege "applies only where necessary to achieve its purpose and protects only those communications necessary to obtain legal advice." *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 294 (6th Cir. 2002) (quoting *In re Antitrust Grand Jury*, 805 F.2d 155, 162 (6th Cir. 1986)). "The attorney-client privilege is 'narrowly construed because it reduces the amount of information discoverable during the course of a lawsuit.' " *Ross*, 423 F.3d at 600 (quoting *United States v. Collis*, 128 F.3d 313, 320 (6th Cir. 1997)).

"The client, not the attorney, is the holder" of the rights attendant to attorney-client privilege. *Fausek v. White*, 965 F.2d 126, 132 (6th Cir. 1992). Because the client owns the rights, the client may also waive them. *See Cooper v. United States*, 5 F.2d 824, 825 (6th Cir. 1925) ("The rule which forbids an attorney from divulging matters communicated to him by his client in the course of professional employment is for the benefit of the client. But it may be waived by the client...."). Askins and the government agree that UCDD and the Rader Law Firm enjoyed an attorney-client relationship capable of giving rise to attorney-client privilege. (Docket No. 151, p. 11; Docket No. 156, p. 9.) Askins, however, argues that the firm also represented her in her personal capacity, and that any waiver of attorney-client privilege was therefore incomplete unless both she and UCDD consented. (Docket No. 151, p. 11.) *See Anderson v. Clarksville Montgomery Cty. Sch. Bd. & Sch. Dist.*, 229 F.R.D. 546, 548 (M.D. Tenn. 2005) (noting that, in case where single attorney represented multiple clients, "it appears appropriate to maintain the attorney-client privilege absent a waiver by all plaintiffs").

***4** The Sixth Circuit has recognized that, when an attorney for an entity communicates with the entity's employees, "[t]he default assumption is that the attorney only represents the corporate entity, not the individuals within the corporate sphere...." *Ross*, 423 F.3d at 605 (quoting *In re Grand Jury Subpoena*, 274 F.3d 563, 571 (1st Cir. 2001)). That assumption, however, can be overcome in certain cases if the employee demonstrates, as a threshold matter, that he clearly "indicate[d] to the lawyer that he [sought] advice in his individual capacity." *Id.* (citing *United States v. Dakota*, 197 F.3d 821, 825 (6th Cir. 1999)).

Askins relies on the following in support of her claim that the Rader Law Firm represented her in her personal capacity: her contemporaneous belief that the firm represented her; the lack of a clearer warning from UCDD's attorneys that they did not represent her; the ambiguous use of "you" in Danny Rader's letter from the day of the meeting; the fact that she was a "high managerial agent" whose activities might give rise to criminal liability for UDCC under Tenn. Code Ann. §

39-11-404(a)(2); and her two prior meetings with Dan Rader in which they had discussed her potential conflict of interest related to Living the Dream. All of the factors Askins has identified, however, are either inapposite to the test adopted by the Sixth Circuit or inadequate to the purpose for which she has presented them.

The Sixth Circuit does not direct a court considering a claim of personal privilege with corporate counsel to weigh the general equities of the situation. Rather, the court must determine whether the communications between the officer or employee claiming privilege and the relevant attorney or attorneys affirmatively establish the formation of a personal attorney-client relationship that is distinct from the preexisting attorney-client relationship between the attorney and the corporate entity. *See Ross*, 423 F.3d at 605 ("Our court, like many others, requires that the individual officer seeking a personal privilege 'clearly claim[ ]' he is seeking legal advice in his individual capacity.") (quoting *In re Grand Jury Proceedings, Detroit, Michigan, August 1977*, 570 F.2d 562, 563 (6th Cir. 1978)).

The only communications on which Askins can base her argument that she sought to form a personal attorney-client relationship with the Rader Law Firm are her 2011 meetings about her potential conflict of interest regarding Living the Dream and the January 12, 2012, meeting itself. Nothing about the 2011 meetings, however, suggests that they amounted to a departure from the firm's ordinary role as counsel to UCDD. The advisability of UCDD's executive director starting a private business that would give rise to a conflict of interest with her UCDD duties is well within the range of topics appropriate for UCDD's counsel to opine upon. Askins' 2011 meetings with Dan Rader were, therefore, insufficient to establish a newfound relationship of personal representation. The transcript of the January 12, 2012, similarly reveals no evidence of a personal attorney-client relationship. Whatever Askins' subjective belief going into the meeting, the meeting itself was plainly conducted as a discussion between UCDD's counsel and relevant personnel about UCDD's obligations and predicament. [2] Accordingly, the attorney-client privilege in this case remained UCDD's to waive.

***5** Moreover, even if Askins had established an attorney-client relationship with the Rader Law Firm, her communications during the January 12, 2012, meeting would not be entitled to attorney-client privilege, because they were not made in confidence. "The essence of the privilege is confidentiality, and when confidentiality is destroyed, there is little justification for incurring the heavy cost to the production of relevant evidence which the privilege exacts." *360 Const. Co., Inc. v. Atsalis Bros. Painting Co.*, 280 F.R.D. 347, 351 (E.D. Mich. April 12, 2012). Because attorney-client privilege applies only to confidential communications, it "will not shield from disclosure statements made by a client to his or her attorney in the presence of a third party." *Reed v. Baxter*, 134 F.3d 351, 357 (6th Cir. 1998) (citing 8 John Henry Wigmore, Wigmore on Evidence § 2311 (3d ed.1940)). The January 12, 2012, meeting was not attended only by Askins and the Raders, but also by Foster and Pelham in their capacities as chairman and vice chairman of UCDD's board. Insofar as Askins committed any of the acts with which she has been charged, her interests were highly adverse to UCDD's. She could have no reasonable expectation of confidentiality of statements made in front of members of its board of directors.

Askins also challenges the adequacy of UCDD's waiver of its attorney-client privilege through Farley. Askins takes issue with the fact that Farley's waiver was not in writing, was not approved by UCDD's board, and was not preceded by a more detailed discussion of the waiver sought. The Government contends that Farley's waiver was valid, and that, in any event, Askins does not have standing to assert UCDD's privilege. *See In re Grand Jury Proceedings*, 469 F.3d 24, 26 (1st Cir. 2006) (holding that executive, intervening only in his personal capacity, lacked standing to assert the corporation's privilege). Both of the Government's arguments are well-taken. "[W]hen control of a corporation passes to new management, the authority to assert...the corporation's attorney-client privilege passes as well." *CFTC v. Weintraub*, 471 U.S. 343, 349 (1985). UCDD's attorney-client privilege is no longer Askins' to assert. Moreover, even if Askins had standing to assert UCDD's rights, she has not established that the alleged defects she identifies would render the waiver invalid.

CONCLUSION

For the reasons discussed herein, the Motion to Dismiss Indictment and Disqualify Counsel by the defendant (Docket No. 150) will be denied.

An appropriate order will enter.

All Citations

Slip Copy, 2016 WL 4039204

Footnotes

1 In addition to the federal charges pending in this court, Askins is currently facing state charges in the Criminal Court for Putnam County, Tennessee. Askins filed a motion to dismiss her indictment in Putnam County, raising essentially the same arguments she raises here. (Docket No. 156-1.) That court held an evidentiary hearing on the motion and heard testimony from several witnesses, including Askins, before denying the motion. (Docket No. 156-2.) The government has provided excerpts from that hearing. (Docket No. 156-3.) The facts in this section come variously from the state court hearing, other materials the parties have produced relevant to this motion, and Askins' indictments.

2 The letter from Danny Rader does nothing to complicate the court's analysis. Askins is correct that, at least at times, the "you" in the letter appears clearly to refer to her. (E.g., Docket No. 150-2, p. 5.) Such use of the second person, however, is hardly surprising, given that Askins was an identified recipient of the letter. What matters is that both the content and context of the letter are consistent with the Rader Law Firm's communicating with her in her capacity as its client's executive director.

End of Document

03. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985)

105 S.Ct. 1986
Supreme Court of the United States

COMMODITY FUTURES TRADING COMMISSION, Petitioner
v.
Gary WEINTRAUB et al.

No. 84–261.
|
Argued March 19, 1985.
|
Decided April 29, 1985.

Officer and director of corporate debtor appealed from an order of the United States District Court for the Northern District of Illinois, Nicholas J. Bua, J., which affirmed a United States Magistrate's order that debtor's trustee in bankruptcy had authority to waive corporation's attorney-client privilege. The Court of Appeals, 7th Cir., 722 F.2d 338, reversed, and certiorari was granted. The Supreme Court, Justice Marshall, held that the trustee of a corporation in bankruptcy has the power to waive the corporation's attorney-client privilege with respect to prebankruptcy communications.

Reversed.

West Headnotes (21)

[1] **Privileged Communications and Confidentiality**
Corporations, partnerships, associations, and other entities

Attorney-client privilege attaches to corporations as well as to individuals.

60 Cases that cite this headnote

[2] **Privileged Communications and Confidentiality**
Purpose of privilege

Both for corporations and individuals, the attorney-client privilege serves the function of promoting full and frank communications between attorneys and their clients; it thereby encourages observance of the law and aids in the administration of justice.

33 Cases that cite this headnote

[3] **Corporations and Business Organizations**
Reliance on attorneys, accountants, professionals, and experts as defense
Privileged Communications and Confidentiality
Waiver of privilege

As an inanimate entity, a corporation must act through agents; it cannot speak directly to its lawyers and, similarly, it cannot directly waive the attorney-client privilege when disclosure is in its best interest.

44 Cases that cite this headnote

[4] **Privileged Communications and Confidentiality**
Corporations, partnerships, associations, and other entities

Attorney-client privilege for a corporation does not only cover communications between counsel and top management; under certain circumstances, communications between counsel and lower-level employees are also covered.

19 Cases that cite this headnote

[5] **Privileged Communications and Confidentiality**
Waiver of privilege

For solvent corporations, power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors; the managers, of course, must exercise the privilege in a manner consistent with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals.

126 Cases that cite this headnote

[6] **Corporations and Business Organizations**
Directors, officers, or agents in general

Authority of corporate officers derives legally from that of the board of directors.

2 Cases that cite this headnote

[7] **Privileged Communications and Confidentiality**
Corporations, partnerships, associations, and other entities

Privileged Communications and Confidentiality
Waiver of privilege

When control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well.

131 Cases that cite this headnote

[8] **Privileged Communications and Confidentiality**
Waiver of privilege

New managers installed as the result of a corporate takeover, merger, loss of confidence by shareholders, or simply normal succession may waive the attorney-client privilege with respect to communications made by former officers and directors.

67 Cases that cite this headnote

[9] **Privileged Communications and Confidentiality**
Corporations, partnerships, associations, and other entities

Displaced corporate managers may not assert the corporate attorney-client privilege over the wishes of current managers, even as to statements that the former might have made to counsel concerning matters within the scope of their corporate duties.

65 Cases that cite this headnote

[10] **Bankruptcy**
Privilege

Legislative history of Bankruptcy Code provision, stating that "Subject to any applicable privilege, after notice and a hearing, the court may order an attorney * * * that holds recorded information * * * relating to the debtor's property or financial affairs, to disclose such recorded information to the trustee", makes clear that Congress did not intend to give a corporate debtor's directors the right to assert the corporation's attorney-client privilege against the bankruptcy trustee; indeed, statements made by members of Congress regarding the effect of said provision specifically deny any attempt to create an attorney-client privilege assertable on behalf of the debtor against the trustee. Bankr.Code, 11 U.S.C.A. § 542(e).

98 Cases that cite this headnote

[11] **Bankruptcy**
Privilege

In regard to Bankruptcy Code provision relating to disclosure to the trustee of recorded information held by an attorney, accountant, or other person, the provision's "subject to any applicable privilege" language is merely an invitation for judicial determination of privilege questions. Bankr.Code, 11 U.S.C.A. § 542(e).

4 Cases that cite this headnote

[12] **Bankruptcy**
Privilege

Bankruptcy Code provision relating to disclosure to the trustee of recorded information held by an attorney, accountant or other person was not intended to limit the trustee's ability to obtain corporate information; the provision was intended to restrict, not expand, the ability of accountants

and attorneys to withhold information from the trustee. Bankr.Code, 11 U.S.C.A. § 542(e).

5 Cases that cite this headnote

[13] **Bankruptcy**
Privilege

Because the attorney-client privilege is controlled outside of bankruptcy, by corporation's management, the actor whose duties most closely resemble those of management should control the privilege in bankruptcy, unless such a result interferes with policies underlying the bankruptcy laws.

7 Cases that cite this headnote

[14] **Bankruptcy**
Privilege

Bankruptcy Code gives the trustee wide-ranging management authority over the debtor, whereas the powers of the debtor's directors are severely limited; thus, the trustee plays the role most closely analogous to that of a solvent corporation's management, and the directors should not exercise the traditional management function of controlling the corporation's attorney-client privilege unless a contrary arrangement would be inconsistent with policies of the bankruptcy laws. Bankr.Code, 11 U.S.C.A. §§ 323, 343, 363(b), (c)(1), 521, 541, 547, 547(b)(4)(B), 548, 704(1, 2, 4).

131 Cases that cite this headnote

[15] **Bankruptcy**
Privilege

No federal interest would be impaired by the trustee in bankruptcy's control of a debtor corporation's attorney-client privilege with respect to prebankruptcy communications; on the other hand, vesting such power in the corporate directors would frustrate the Bankruptcy Code's goal of empowering the trustee to uncover insider fraud and recover misappropriated corporate assets. Bankr.Code, 11 U.S.C.A. §§ 547, 548, 704(4).

74 Cases that cite this headnote

[16] **Bankruptcy**
Representation of debtor, estate, or creditors

Fiduciary duty of a corporation's trustee in bankruptcy runs to shareholders as well as to creditors.

183 Cases that cite this headnote

[17] **Bankruptcy**
Priorities

In bankruptcy, interests of the corporate debtor's shareholders become subordinated to the interests of creditors.

7 Cases that cite this headnote

[18] **Bankruptcy**
Privilege

In cases in which it is clear that the corporate debtor's estate is not large enough to cover any shareholder claims, the trustee in bankruptcy's exercise of the corporation's attorney-client privilege will benefit only creditors, but there is nothing anomalous in this result; rather, it is in keeping with the hierarchy of interests created by the bankruptcy laws. Bankr.Code, 11 U.S.C.A. § 726(a).

49 Cases that cite this headnote

[19] **Bankruptcy**
Debtor in possession, in general

If a corporate debtor remains in possession, that is, if a trustee is not appointed, the debtor's directors bear essentially the same fiduciary obligation to creditors and shareholders as would the trustee for a debtor out of possession; indeed, the willingness of courts to leave debtors in possession is premised upon an assurance that the officers and managing employees can be depended upon to carry out the fiduciary responsibilities of a trustee.

117 Cases that cite this headnote

[20] **Bankruptcy**
Privilege

Giving the trustee in bankruptcy of a corporate debtor control over the corporate attorney-client privilege will not have an undesirable chilling effect on attorney-client communications and does not discriminate against insolvent corporations; the chilling effect is no greater than in the case of a solvent corporation and, by definition, corporations in bankruptcy are treated differently from solvent corporations.

18 Cases that cite this headnote

[21] **Bankruptcy**
Privilege

Trustee of a corporation in bankruptcy has the power to waive corporation's attorney-client privilege with respect to prebankruptcy communications. Bankr.Code, 11 U.S.C.A. § 542(e).

124 Cases that cite this headnote

**1988 *343 *Syllabus* *

Petitioner filed a complaint in Federal District Court alleging violations of the Commodity Exchange Act by Chicago Discount Commodity Brokers (CDCB), and respondent Frank McGhee, acting as sole director and officer of CDCB, entered into a consent decree that resulted in the appointment of a receiver who was ultimately appointed trustee in bankruptcy after he filed a voluntary petition in bankruptcy on behalf of CDCB. Respondent Weintraub, CDCB's former counsel, appeared for a deposition pursuant to a subpoena *duces tecum* served by petitioner as part of its investigation of CDCB, but refused to answer certain questions, asserting CDCB's attorney-client privilege. Petitioner then obtained a waiver of the privilege from the trustee as to any communications occurring on or before the date of his initial appointment as a receiver. The District Court upheld a Magistrate's order directing Weintraub to testify, but the Court of Appeals reversed, holding that a bankruptcy trustee does not have the power to waive a corporate debtor's attorney-client privilege with respect to communications that occurred before the filing of the bankruptcy petition.

Held: The trustee of a corporation in bankruptcy has the power to waive the corporation's attorney-client privilege with respect to prebankruptcy communications. Pp. 1990–1996.

(a) The attorney-client privilege attaches to corporations as well as to individuals, and with regard to solvent corporations the power to waive the privilege rests with the corporation's management and is normally exercised by its officers and directors. When control of the corporation passes to new management, the authority to assert and waive the privilege also passes, and the new managers may waive the privilege with respect to corporate communications made by former officers and directors. Pp. 1990–1991.

(b) The Bankruptcy Code does not explicitly address the question whether control of the privilege of a corporation in bankruptcy with respect to prebankruptcy communications passes to the bankruptcy trustee or, as respondents assert, remains with the debtor's directors. Respondents' contention that the issue is controlled by § 542(e) of the Code—which provides that "[s]ubject to any applicable privilege," the *344 court may order an attorney who holds recorded information relating to the debtor's property or financial affairs to disclose such information to the trustee—is not supported by the statutory language or the legislative history. Instead, the history makes clear that Congress intended the courts to deal with privilege questions. P. 1992.

(c) The Code gives the trustee wide-ranging management authority over the debtor, whereas the powers of the debtor's directors are severely limited. Thus the trustee plays the role most closely analogous to that of a solvent corporation's management, and the directors should not exercise the traditional management function of controlling the corporation's privilege unless a contrary arrangement would be inconsistent with policies of the bankruptcy laws. P. 1993.

(d) No federal interests would be impaired by the trustee's control of the corporation's attorney-client privilege with respect to prebankruptcy communications. On the other hand, vesting such power in the directors would frustrate the Code's goal of empowering the trustee to uncover ****1989** insider fraud and recover misappropriated corporate assets. Pp. 1993–1994.

(e) There is no merit to respondents' contention that the trustee should not obtain control over the privilege because, unlike the management of a solvent corporation, the trustee's primary loyalty goes not to shareholders but to creditors. When a trustee is appointed, the privilege must be exercised in accordance with the trustee's fiduciary duty to all interested parties. Even though in some cases the trustee's exercise of the privilege will benefit only creditors, such a result is in keeping with the hierarchy of interests created by the bankruptcy laws. Pp. 1994–1995.

(f) Nor is there any merit to other arguments of respondents, including the contentions that giving the trustee control over the privilege would have an undesirable chilling effect on attorney-client communications and would discriminate against insolvent corporations. The chilling effect is no greater here than in the case of a solvent corporation, and, by definition, corporations in bankruptcy are treated differently from solvent corporations. Pp. 1995–1996.

722 F.2d 338 (CA7 1984), reversed.

Attorneys and Law Firms

Bruce N. Kuhlik argued the cause *pro hac vice* for petitioner. With him on the briefs were *Solicitor General Lee,* ***345** *Deputy Solicitor General Bator, Kenneth M. Raisler, Whitney Adams,* and *Helen G. Blechman.*

David A. Epstein argued the cause for respondents. With him on the brief for respondents McGhee et al. was *Gary A. Weintraub, pro se.**

* *John K. Notz, Jr., pro se,* and *David F. Heroy* filed a brief for John K. Notz, Jr., Trustee, as *amicus curiae* urging reversal.

Opinion

Justice MARSHALL delivered the opinion of the Court.

The question here is whether the trustee of a corporation in bankruptcy has the power to waive the debtor corporation's attorney-client privilege with respect to communications that took place before the filing of the petition in bankruptcy.

I

The case arises out of a formal investigation by petitioner Commodity Futures Trading Commission to determine whether Chicago Discount Commodity Brokers (CDCB), or persons associated with that firm, violated the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.* CDCB was a discount commodity brokerage house registered with the Commission, pursuant to 7 U.S.C. § 6d(1), as a futures commission merchant. On October 27, 1980, the Commission filed a complaint against CDCB in the United States District Court for the Northern District of Illinois alleging violations of the Act. That same day, respondent Frank McGhee, acting as sole director and officer of CDCB, entered into a consent decree with the Commission, which provided for the appointment of a receiver and for the receiver to file a petition for liquidation under Chapter 7 of the Bankruptcy Reform Act of 1978 (Bankruptcy Code). The District Court appointed John K. Notz, Jr., as receiver.

Notz then filed a voluntary petition in bankruptcy on behalf of CDCB. He sought relief under Subchapter IV of Chapter 7 of the Bankruptcy Code, which provides for the ***346** liquidation of bankrupt commodity brokers. 11 U.S.C. §§ 761–766. The Bankruptcy Court appointed Notz as interim trustee and, later, as permanent trustee.

As part of its investigation of CDCB, the Commission served a subpoena *duces tecum* upon CDCB's former counsel, respondent Gary Weintraub. The Commission sought Weintraub's testimony about various CDCB matters, including suspected misappropriation of customer funds by CDCB's officers and employees, and other fraudulent activities. Weintraub appeared for his deposition and responded to numerous inquiries but refused to answer 23 questions, asserting CDCB's attorney-client privilege. The Commission then moved

to compel answers to those questions. It argued that Weintraub's assertion of the attorney-client privilege was inappropriate because the privilege could not be used to "thwart legitimate access to information sought in an administrative investigation." App. 44.

**1990 Even though the Commission argued in its motion that the matters on which Weintraub refused to testify were not protected by CDCB's attorney-client privilege, it also asked Notz to waive that privilege. In a letter to Notz, the Commission maintained that CDCB's former officers, directors, and employees no longer had the authority to assert the privilege. According to the Commission, that power was vested in Notz as the then-interim trustee. *Id.*, at 47–48. In response to the Commission's request, Notz waived "any interest I have in the attorney/client privilege possessed by that debtor for any communications or information occurring or arising on or before October 27, 1980"—the date of Notz' appointment as receiver. *Id.*, at 49.

On April 26, 1982, a United States Magistrate ordered Weintraub to testify. The Magistrate found that Weintraub had the power to assert CDCB's privilege. He added, however, that Notz was "successor in interest of all assets, rights and privileges of CDCB, including the attorney/client privilege at issue herein," and that Notz' waiver was therefore valid. App. to Pet. for Cert. 19a–20a. The District Court *347 upheld the Magistrate's order on June 9. *Id.*, at 18a. Thereafter, Frank McGhee and his brother, respondent Andrew McGhee, intervened and argued that Notz could not validly waive the privilege over their objection. Record, Doc. No. 49, p. 7. [1] The District Court rejected this argument and, on July 27, entered a new order requiring Weintraub to testify without asserting an attorney-client privilege on behalf of CDCB. App. to Pet. for Cert. 17a. [2]

The McGhees appealed from the District Court's order of July 27 and the Court of Appeals for the Seventh Circuit reversed. 722 F.2d 338 (1984). It held that a bankruptcy trustee does not have the power to waive a corporate debtor's attorney-client privilege with respect to communications that occurred before the filing of the bankruptcy petition. The court recognized that two other Circuits had addressed the question and had come to the opposite conclusion. See *In re O.P.M. Leasing Services, Inc.*, 670 F.2d 383 (CA2 1982); *Citibank, N.A. v. Andros*, 666 F.2d 1192 (CA8 1981). [3] We granted certiorari to resolve the conflict. 469 U.S. 929, 105 S.Ct. 321, 83 L.Ed.2d 259 (1984). We now reverse the Court of Appeals.

*348 II

[1] [2] It is by now well established, and undisputed by the parties to this case, that the attorney-client privilege attaches to corporations as well as to individuals. *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). Both for corporations and individuals, the attorney-client privilege serves the function of promoting full and frank communications between attorneys and their clients. It thereby encourages observance of the law and aids in the administration of justice. See, *e.g.*, *Upjohn Co. v. United States, supra*, at 389, 101 S.Ct., at 682; *Trammel v. United States*, 445 U.S. 40, 51, 100 S.Ct. 906, 912, 63 L.Ed.2d 186 (1980); *Fisher v.* **1991 *United States*, 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976).

[3] [4] The administration of the attorney-client privilege in the case of corporations, however, presents special problems. As an inanimate entity, a corporation must act through agents. A corporation cannot speak directly to its lawyers. Similarly, it cannot directly waive the privilege when disclosure is in its best interest. Each of these actions must necessarily be undertaken by individuals empowered to act on behalf of the corporation. In *Upjohn Co.*, we considered whether the privilege covers only communications between counsel and top management, and decided that, under certain circumstances, communications between counsel and lower-level employees are also covered. Here, we face the related question of which corporate actors are empowered to waive the corporation's privilege.

[5] [6] The parties in this case agree that, for solvent corporations, the power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors. [4] The managers, of *349 course, must exercise the privilege in a manner consistent with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals. See, *e.g.*, *Dodge v. Ford Motor Co.*, 204 Mich. 459, 507, 170 N.W. 668, 684 (1919).

[7] [8] [9] The parties also agree that when control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well. New managers installed as a result of a takeover, merger, loss of confidence by shareholders, or simply normal succession, may waive the attorney-client privilege with respect to communications made by former officers and directors. Displaced managers may not assert the privilege over the wishes of current managers, even as to statements that the former might have made to counsel concerning matters within the scope of their corporate duties. See Brief for Petitioner 11; Tr. of Oral Arg. 26. See generally *In re O.P.M. Leasing Services, Inc., supra,* at 386; *Citibank v. Andros, supra,* at 1195; *In re Grand Jury Investigation,* 599 F.2d 1224, 1236 (CA3 1979); *Diversified Industries, Inc. v. Meredith,* 572 F.2d 596, 611, n. 5 (CA8 1978) (en banc).[5]

The dispute in this case centers on the control of the attorney-client privilege of a corporation in bankruptcy. The Government maintains that the power to exercise that privilege with respect to prebankruptcy communications passes to the bankruptcy trustee. In contrast, respondents maintain that this power remains with the debtor's directors.

III

As might be expected given the conflict among the Courts of Appeals, the Bankruptcy Code does not explicitly address ***350** the question before us. Respondents assert that 11 U.S.C. § 542(e) is dispositive, but we find reliance on that provision misplaced. Section 542(e) states:

> "*Subject to any applicable privilege,* after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, to disclose such recorded ****1992** information to the trustee." (emphasis added).

According to respondents, the "subject to any applicable privilege" language means that the attorney cannot be compelled to turn over to the trustee materials within the corporation's attorney-client privilege. In addition, they claim, this language would be superfluous if the trustee had the power to waive the corporation's privilege.

The statutory language does not support respondents' contentions. First, the statute says nothing about a trustee's authority to waive the corporation's attorney-client privilege. To the extent that a trustee has that power, the statute poses no bar on his ability to obtain materials within that privilege. Indeed, a privilege that has been properly waived is not an "applicable" privilege for the purposes of § 542(e).

Moreover, rejecting respondents' reading does not render the statute a nullity, as privileges of parties other than the corporation would still be "applicable" as against the trustee. For example, consistent with the statute, an attorney could invoke the personal attorney-client privilege of an individual manager.

[10] [11] The legislative history also makes clear that Congress did not intend to give the debtor's directors the right to assert the corporation's attorney-client privilege against the trustee. Indeed, statements made by Members of Congress regarding the effect of § 542(e) "specifically deny any attempt to create an attorney-client privilege assertable on behalf of the debtor against the trustee." *In re* ***351** *O.P.M. Leasing Services, Inc.,* 13 B.R. 54, 70 (Bkrtcy. SDNY 1981) (Weinfeld, J.), aff'd, 670 F.2d 383 (CA2 1982); see also 4 Collier on Bankruptcy ¶ 542.06 (15th ed. 1985). Rather, Congress intended that the courts deal with this problem:

> "The extent to which the attorney client privilege is valid against the trustee is unclear under current law and is left to be determined by the courts on a case by case basis." 124 Cong.Rec. 32400 (1978) (remarks of Rep. Edwards); *id.,* at 33999 (remarks of Sen. DeConcini).

The "subject to any applicable privilege" language is thus merely an invitation for judicial determination of privilege questions.

[12] In addition, the legislative history establishes that § 542(e) was intended to restrict, not expand, the ability of accountants and attorneys to withhold information from the trustee. Both the House and the Senate Report state that § 542(e) "is a new provision that deprives accountants and attorneys of the leverage that they ha[d], ... under State law lien provisions, to receive payment in full ahead

of other creditors when the information they hold is necessary to the administration of the estate." S.Rep. No. 95–989, p. 84 (1978); H.R.Rep. No. 95–595, pp. 369–370 (1977), U.S.Code Cong. & Admin.News, 1978, pp. 5787, 5870, 6325–6326. It is therefore clear that § 542(e) was not intended to limit the trustee's ability to obtain corporate information.

IV

[13] In light of the lack of direct guidance from the Code, we turn to consider the roles played by the various actors of a corporation in bankruptcy to determine which is most analogous to the role played by the management of a solvent corporation. See *Butner v. United States,* 440 U.S. 48, 55, 99 S.Ct. 914, 918, 59 L.Ed.2d 136 (1979). Because the attorney-client privilege is controlled, outside of bankruptcy, by a corporation's management, the actor whose duties most closely resemble those of management ***352** should control the privilege in bankruptcy, unless such a result interferes with policies underlying the bankruptcy laws.

A

The powers and duties of a bankruptcy trustee are extensive. Upon the commencement of a case in bankruptcy, all corporate property passes to an estate represented by the trustee. 11 U.S.C. §§ 323, 541. The trustee is "accountable for all property received," §§ 704(2), 1106(a)(1), ****1993** and has the duty to maximize the value of the estate, see § 704(1); *In re Washington Group, Inc.,* 476 F.Supp. 246, 250 (MDNC 1979), aff'd *sub nom. Johnston v. Gilbert,* 636 F.2d 1213 (CA4 1980), cert. denied, 452 U.S. 940, 101 S.Ct. 3084, 69 L.Ed.2d 954 (1981). He is directed to investigate the debtor's financial affairs, §§ 704(4), 1106(a)(3), and is empowered to sue officers, directors, and other insiders to recover, on behalf of the estate, fraudulent or preferential transfers of the debtor's property, §§ 547(b)(4)(B), 548. Subject to court approval, he may use, sell, or lease property of the estate. § 363(b).

Moreover, in reorganization, the trustee has the power to "operate the debtor's business" unless the court orders otherwise. § 1108. Even in liquidation, the court "may authorize the trustee to operate the business" for a limited period of time. § 721. In the course of operating the debtor's business, the trustee "may enter into transactions, including the sale or lease of property of the estate" without court approval. § 363(c)(1).

[14] As even this brief and incomplete list should indicate, the Bankruptcy Code gives the trustee wide-ranging management authority over the debtor. See 2 Collier on Bankruptcy ¶ 323.01 (15th ed. 1985). In contrast, the powers of the debtor's directors are severely limited. Their role is to turn over the corporation's property to the trustee and to provide certain information to the trustee and to the creditors. §§ 521, 343. Congress contemplated that when a trustee is appointed, he assumes control of the business, and ***353** the debtor's directors are "completely ousted." See H.R.Rep. No. 95–595, pp. 220–221 (1977).[6]

In light of the Code's allocation of responsibilities, it is clear that the trustee plays the role most closely analogous to that of a solvent corporation's management. Given that the debtor's directors retain virtually no management powers, they should not exercise the traditional management function of controlling the corporation's attorney-client privilege, see *supra,* at 1991, unless a contrary arrangement would be inconsistent with policies of the bankruptcy laws.

B

[15] We find no federal interests that would be impaired by the trustee's control of the corporation's attorney-client privilege with respect to prebankruptcy communications. On the other hand, the rule suggested by respondents —that the debtor's directors have this power—would frustrate an important goal of the bankruptcy laws. In seeking to maximize the value of the estate, the trustee must investigate the conduct of prior management to uncover and assert causes of action against the debtor's officers and directors. See generally 11 U.S.C. §§ 704(4), 547, 548. It would often be extremely difficult to conduct this inquiry if the former management were allowed to control the corporation's attorney-client privilege and therefore to control access to the corporation's legal files. To the extent that management had wrongfully diverted or appropriated corporate assets, it could use the privilege as a shield against the trustee's efforts to identify those assets. The Code's goal of uncovering insider fraud would be substantially defeated if the debtor's directors were to

retain the one management power that might effectively thwart an investigation into their own ***354** conduct. See generally *In re Browy*, 527 F.2d 799, 802 (CA7 1976) (*per curiam*).

Respondents contend that the trustee can adequately investigate fraud without controlling the corporation's attorney-client privilege. They point out that the privilege does not shield the disclosure of communications relating to the planning or commission of ongoing fraud, crimes, and ordinary ****1994** torts, see, *e.g.*, *Clark v. United States*, 289 U.S. 1, 15, 53 S.Ct. 465, 469, 77 L.Ed. 993 (1933); *Garner v. Wolfinbarger*, 430 F.2d 1093, 1102–1103 (CA5 1970), cert. denied, 401 U.S. 974, 91 S.Ct. 1191, 28 L.Ed.2d 323 (1971). Brief for Respondents 11. The problem, however, is making the threshold showing of fraud necessary to defeat the privilege. See *Clark v. United States, supra*, 289 U.S., at 15, 53 S.Ct., at 469. Without control over the privilege, the trustee might not be able to discover hidden assets or looting schemes, and therefore might not be able to make the necessary showing.

In summary, we conclude that vesting in the trustee control of the corporation's attorney-client privilege most closely comports with the allocation of the waiver power to management outside of bankruptcy without in any way obstructing the careful design of the Bankruptcy Code.

V

Respondents do not seriously contest that the bankruptcy trustee exercises functions analogous to those exercised by management outside of bankruptcy, whereas the debtor's directors exercise virtually no management functions at all. Neither do respondents seriously dispute that vesting control over the attorney-client privilege in the trustee will facilitate the recovery of misappropriated corporate assets.

Respondents argue, however, that the trustee should not obtain control over the privilege because, unlike the management of a solvent corporation, the trustee's primary loyalty goes not to shareholders but to creditors, who elect him and who often will be the only beneficiaries of his efforts. See 11 U.S.C. §§ 702 (creditors elect trustee), 726(a) (shareholders ***355** are last to recover in bankruptcy). Thus, they contend, as a practical matter bankruptcy trustees represent only the creditors. Brief for Respondents 22.

[16] **[17]** **[18]** We are unpersuaded by this argument. First, the fiduciary duty of the trustee runs to shareholders as well as to creditors. See, *e.g.*, *In re Washington Group, Inc.*, 476 F.Supp., at 250; *In re Ducker*, 134 F. 43, 47 (CA6 1905).[7] Second, respondents do not explain why, out of all management powers, control over the attorney-client privilege should remain with those elected by the corporation's shareholders. Perhaps most importantly, respondents' position ignores the fact that bankruptcy causes fundamental changes in the nature of corporate relationships. One of the painful facts of bankruptcy is that the interests of shareholders become subordinated to the interests of creditors. In cases in which it is clear that the estate is not large enough to cover any shareholder claims, the trustee's exercise of the corporation's attorney-client privilege will benefit only creditors, but there is nothing anomalous in this result; rather, it is in keeping with the hierarchy of interests created by the bankruptcy laws. See generally 11 U.S.C. § 726(a).

[19] Respondents also ignore that if a debtor remains in possession—that is, if a trustee is not appointed—the debtor's directors bear essentially the same fiduciary obligation to creditors and shareholders as would the trustee for a debtor out of possession. *Wolf v. Weinstein*, 372 U.S. 633, 649–652, 83 S.Ct. 969, 979–981, 10 L.Ed.2d 33 (1963). Indeed, the willingness of courts to leave debtors in possession "is premised upon an assurance that the officers and managing employees can be depended upon to carry out the fiduciary responsibilities of a trustee." *Id.*, at 651, 83 S.Ct., at 980. Surely, then, the management of a debtor-in-possession ***356** would have to exercise control of the corporation's attorney-client privilege consistently with this obligation to treat all parties, not merely the shareholders, fairly. By the same token, when a trustee is appointed, the privilege must be ****1995** exercised in accordance with the trustee's fiduciary duty to all interested parties.

To accept respondents' position would lead to one of two outcomes: (1) a rule under which the management of a debtor-in-possession exercises control of the attorney-client privilege for the benefit only of shareholders but exercises all of its other functions for the benefit of both shareholders and creditors, or (2) a rule under which the attorney-client privilege is exercised for the benefit of

both creditors and shareholders when the debtor remains in possession, but is exercised for the benefit only of shareholders when a trustee is appointed. We find nothing in the bankruptcy laws that would suggest, much less compel, either of these implausible results.

VI

Respondents' other arguments are similarly unpersuasive. First, respondents maintain that the result we reach today would also apply to *individuals* in bankruptcy, a result that respondents find "unpalatable." Brief for Respondents 27. But our holding today has no bearing on the problem of individual bankruptcy, which we have no reason to address in this case. As we have stated, a corporation, as an inanimate entity, must act through agents. See *supra,* at 1991. When the corporation is solvent, the agent that controls the corporate attorney-client privilege is the corporation's management. Under our holding today, this power passes to the trustee because the trustee's functions are more closely analogous to those of management outside of bankruptcy than are the functions of the debtor's directors. An individual, in contrast, can act for himself; there is no "management" that controls a solvent individual's attorney-client privilege. If control over that privilege passes to a trustee, it must be ***357** under some theory different from the one that we embrace in this case.

[20] Second, respondents argue that giving the trustee control over the attorney-client privilege will have an undesirable chilling effect on attorney-client communications. According to respondents, corporate managers will be wary of speaking freely with corporate counsel if their communications might subsequently be disclosed due to bankruptcy. See Brief for Respondents 37–42; see also 722 F.2d, at 343. But the chilling effect is no greater here than in the case of a solvent corporation, where individual officers and directors always run the risk that successor management might waive the corporation's attorney-client privilege with respect to prior management's communications with counsel. See *supra,* at 1991.

Respondents also maintain that the result we reach discriminates against insolvent corporations. According to respondents, to prevent the debtor's directors from controlling the privilege amounts to "economic discrimination" given that directors, as representatives of the shareholders, control the privilege for solvent corporations. Brief for Respondents 42; see also 722 F.2d, at 342–343. Respondents' argument misses the point that, by definition, corporations in bankruptcy are treated differently from solvent corporations. "Insolvency is a most important and material fact, not only with individuals but with corporations, and with the latter as with the former the mere fact of its existence may change radically and materially its rights and obligations." *McDonald v. Williams,* 174 U.S. 397, 404, 19 S.Ct. 743, 745, 43 L.Ed. 1022 (1899). Respondents do not explain why we should be particularly concerned about differential treatment in this context.

Finally, respondents maintain that upholding trustee waivers would create a disincentive for debtors to invoke the protections of bankruptcy and provide an incentive for creditors to file for involuntary bankruptcy. According to respondents, "[i]njection of such considerations into bankruptcy ***358** would skew the application of the bankruptcy laws in a manner not contemplated by Congress." Brief for Respondents 43. The law creates numerous incentives, both for and against the filing ****1996** of bankruptcy petitions. Respondents do not explain why our holding creates incentives that are inconsistent with congressional intent, and we do not believe that it does.

VII

[21] For the foregoing reasons, we hold that the trustee of a corporation in bankruptcy has the power to waive the corporation's attorney-client privilege with respect to prebankruptcy communications. We therefore conclude that Notz, in his capacity as trustee, properly waived CDCB's privilege in this case. The judgment of the Court of Appeals for the Seventh Circuit is accordingly reversed.

It is so ordered.

Justice POWELL took no part in the consideration or decision of this case.

All Citations

471 U.S. 343, 105 S.Ct. 1986, 85 L.Ed.2d 372, 53 USLW 4505, 12 Collier Bankr.Cas.2d 651, 1 Fed.R.Serv.3d 417, 12 Bankr.Ct.Dec. 1247, Bankr. L. Rep. P 70,360, 17 Fed. R. Evid. Serv. 529

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 The Court of Appeals found that Andrew McGhee resigned his position as officer and director of CDCB on October 21, 1980. 722 F.2d 338, 339 (CA7 1984). Frank McGhee, however, remained as an officer and director. See n. 5, *infra.*

2 The June 9 order had not made clear that Weintraub was barred only from invoking the *corporation's* attorney-client privilege.

3 The Court of Appeals distinguished *O.P.M. Leasing,* where waiver of the privilege was opposed by the corporation's sole voting stockholder, on the ground that the corporation in *O.P.M. Leasing* had no board of directors in existence during the tenure of the trustee. Here, instead, Frank McGhee remained an officer and director of CDCB during Notz' trusteeship. 722 F.2d, at 341. The court acknowledged, however, a square conflict with *Citibank v. Andros.*

After the Court of Appeals' decision in this case, the Court of Appeals for the Ninth Circuit held that a bankruptcy examiner has the power to waive the corporation's attorney-client privilege over the objections of the debtor-in-possession. *In re Boileau,* 736 F.2d 503 (CA9 1984). That holding also conflicts with the holding of the Seventh Circuit in this case.

4 State corporation laws generally vest management authority in a corporation's board of directors. See, *e.g.,* Del.Code Ann. Tit. 8, § 141 (1983); N.Y.Bus.Corp.Law § 701 (McKinney Supp.1983–1984); Model Bus.Corp.Act § 35 (1979). The authority of officers derives legally from that of the board of directors. See generally Eisenberg, Legal Models of Management Structure in the Modern Corporation: Officers, Directors, and Accountants, 63 Calif.L.Rev. 375 (1975). The distinctions between the powers of officers and directors are not relevant to this case.

5 It follows that Andrew McGhee, who is now neither an officer nor a director, see n. 1, *supra,* retains no control over the corporation's privilege. The remainder of this opinion therefore focuses on whether Frank McGhee has such power.

6 While this reference is to the role of a trustee in reorganization, nothing in the Code or its legislative history suggests that the debtor's directors enjoy substantially greater powers in liquidation.

7 The propriety of the trustee's waiver of the attorney-client privilege in a particular case can, of course, be challenged in the bankruptcy court on the ground that it violates the trustee's fiduciary duties. Respondents, however, did not challenge the waiver on those grounds; rather, they asserted that the trustee never has the power to waive the privilege.

End of Document

04. AkzoNobel Chemicals, Sept. 14, 2010

Court of Justice of the European Union
PRESS RELEASE No No 90/10
Luxembourg, 14 September 2010

Press and Information

Judgment in Case C-550/07 P
Akzo Nobel Chemicals Ltd v Commission

In the field of competition law, internal company communications with in-house lawyers are not covered by legal professional privilege

By decision of 10 February 2003[1], the Commission ordered Akzo Nobel Chemicals and its subsidiary Akcros Chemicals to submit to an investigation aimed at seeking evidence of possible anti-competitive practices. The investigation was carried out by Commission officials assisted by representatives of the Office of Fair Trading ('OFT', the British competition authority), at the applicants' premises in the United Kingdom.

During the examination of the documents seized a dispute arose in relation, in particular, to copies of two e-mails exchanged between the managing director and Akzo Nobel's coordinator for competition law, an Advocaat of the Netherlands Bar and a member of Akzo Nobel's legal department employed by that company. After analysing those documents, the Commission took the view that they were not covered by legal professional privilege.

By decision of 8 May 2003[2], the Commission rejected the claim made by those two companies that the documents at issue should be covered by legal professional privilege.

Akzo Nobel and Akcros brought actions challenging those two decisions before the General Court, which were dismissed by its judgment of 17 September 2007[3]. They subsequently appealed against that judgment to the Court of Justice.

In support of their appeal, Akzo Nobel and Akcros claim essentially that the General Court wrongly refused to grant legal professional privilege to the two e-mails exchanged with their in-house lawyer.

The Court had the opportunity to give a ruling on the extent of legal professional privilege in *AM & S Europe* v *Commission*[4], holding that it is subject to two cumulative conditions. First, the exchange with the lawyer must be connected to 'the client's rights of defence' and, second, that the exchange must emanate from 'independent lawyers', that is to say 'lawyers who are not bound to the client by a relationship of employment'.

As regards the second condition, the Court, in its judgment today, observes that the requirement that the lawyer must be independent is based on a conception of the lawyer's role as collaborating in the administration of justice and as being required to provide, in full independence and in the overriding interests of that cause, such legal assistance as the client needs. It follows that the requirement of independence means the absence of any employment relationship between the lawyer and his client, so that legal professional privilege does not cover exchanges within a company or group with in-house lawyers.

The Court considers that an in-house lawyer, despite his enrolment with a Bar or Law Society and the fact that he is subject to the professional ethical obligations, does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his client. Notwithstanding the professional ethical obligations applicable in the present case, an in-

[1] Commission Decision C (2003) 559/4 of 10 February 2003
[2] Commission Decision C (2003) 1533 of 8 May 2003
[3] Case T-125/03 *Akzo Nobel Chemicals and Akcros* v *Commission*, see also Press Release 62/07
[4] Case 155/79 *AM & S* v *Commission*

house lawyer cannot, whatever guarantees he has in the exercise of his profession, be treated in the same way as an external lawyer, because he occupies the position of an employee which, by its very nature, does not allow him to ignore the commercial strategies pursued by his employer, and thereby affects his ability to exercise professional independence. Furthermore, an in-house lawyer may be required to carry out other tasks, namely, as in the present case, the task of competition law coordinator, which may have an effect on the commercial policy of the undertaking. Such functions cannot but reinforce the close ties between the lawyer and his employer.

In those circumstances, the Court holds, as a result of the in-house lawyer's economic dependence and the close ties with his employer, that he does not enjoy a level of professional independence comparable to that of an external lawyer. It follows that the General Court did not commit an error of law with respect to the second condition for legal professional privilege laid down in the judgment in *AM& S Europe* v *Commission*.

Moreover, the Court considers that that interpretation does not violate the principle of equal treatment in so far as the in-house lawyer is in fundamentally different position from external lawyers.

Furthermore, the Court, responding to the argument put forward by Akzo Nobel and Ackros that national laws have evolved in the field of competition law, considers that no predominant trend towards protection under legal professional privilege of correspondence within a company or group with in-house lawyers may be discerned in the legal systems of the Member States. Accordingly, the Court considers that the current legal situation in the Member States does not justify consideration of a change in the case law towards granting in-house lawyers the benefit of legal professional privilege. Similarly, the evolution of the legal system of the European Union and the amendment of the rules of procedure[5] for competition law are also unable to justify a change in the case-law established by the judgment in *AM& S Europe* v *Commission*.

Akzo Nobel and Akcros also argued that the interpretation by the General Court lowers the level of protection of the rights of defence of undertakings. However, the Court considers that any individual who seeks advice from a lawyer must accept the restrictions and conditions applicable to the exercise of that profession. The rules on legal professional privilege form part of those restrictions and conditions.

Finally, as regards the breach of the principle of legal certainty relied on by Akzo Nobel and Akcros, the Court considers that it does not require identical criteria to be applied as regards legal professional privilege. Consequently, the fact that in the course of an investigation by the Commission legal professional privilege is limited to exchanges with external lawyers in no way undermines that principle.

Therefore, **the Court dismisses the appeal brought by Akzo Nobel and Akcros.**

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[5] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1)

05. The Yates Memo

"Individual Accountability for Corporate Wrongdoing,"

Sally Yates, U.S. Deputy Attorney General (Sept. 9, 2015)

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

September 9, 2015

MEMORANDUM FOR THE ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION
THE ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION
THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION
THE ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION
THE ASSISTANT ATTORNEY GENERAL, NATIONAL SECURITY DIVISION
THE ASSISTANT ATTORNEY GENERAL, TAX DIVISION
THE DIRECTOR, FEDERAL BUREAU OF INVESTIGATION
THE DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES
ALL UNITED STATES ATTORNEYS

FROM: Sally Quillian Yates
Deputy Attorney General

SUBJECT: Individual Accountability for Corporate Wrongdoing

Fighting corporate fraud and other misconduct is a top priority of the Department of Justice. Our nation's economy depends on effective enforcement of the civil and criminal laws that protect our financial system and, by extension, all our citizens. These are principles that the Department lives and breathes—as evidenced by the many attorneys, agents, and support staff who have worked tirelessly on corporate investigations, particularly in the aftermath of the financial crisis.

One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system.

There are, however, many substantial challenges unique to pursuing individuals for corporate misdeeds. In large corporations, where responsibility can be diffuse and decisions are made at various levels, it can be difficult to determine if someone possessed the knowledge and criminal intent necessary to establish their guilt beyond a reasonable doubt. This is particularly true when determining the culpability of high-level executives, who may be insulated from the day-to-day activity in which the misconduct occurs. As a result, investigators often must reconstruct what happened based on a painstaking review of corporate documents, which can number in the millions, and which may be difficult to collect due to legal restrictions.

These challenges make it all the more important that the Department fully leverage its resources to identify culpable individuals at all levels in corporate cases. To address these challenges, the Department convened a working group of senior attorneys from Department components and the United States Attorney community with significant experience in this area. The working group examined how the Department approaches corporate investigations, and identified areas in which it can amend its policies and practices in order to most effectively pursue the individuals responsible for corporate wrongs. This memo is a product of the working group's discussions.

The measures described in this memo are steps that should be taken in any investigation of corporate misconduct. Some of these measures are new, while others reflect best practices that are already employed by many federal prosecutors. Fundamentally, this memo is designed to ensure that all attorneys across the Department are consistent in our best efforts to hold to account the individuals responsible for illegal corporate conduct.

The guidance in this memo will also apply to civil corporate matters. In addition to recovering assets, civil enforcement actions serve to redress misconduct and deter future wrongdoing. Thus, civil attorneys investigating corporate wrongdoing should maintain a focus on the responsible individuals, recognizing that holding them to account is an important part of protecting the public fisc in the long term.

The guidance in this memo reflects six key steps to strengthen our pursuit of individual corporate wrongdoing, some of which reflect policy shifts and each of which is described in greater detail below: (1) in order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct; (2) criminal and civil corporate investigations should focus on individuals from the inception of the investigation; (3) criminal and civil attorneys handling corporate investigations should be in routine communication with one another; (4) absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation; (5) Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should

memorialize any declinations as to individuals in such cases; and (6) civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.[1]

I have directed that certain criminal and civil provisions in the United States Attorney's Manual, more specifically the Principles of Federal Prosecution of Business Organizations (USAM 9-28.000 *et seq.*) and the commercial litigation provisions in Title 4 (USAM 4-4.000 *et seq.*), be revised to reflect these changes. The guidance in this memo will apply to all future investigations of corporate wrongdoing. It will also apply to those matters pending as of the date of this memo, to the extent it is practicable to do so.

1. To be eligible for <u>any</u> cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct.

In order for a company to receive <u>any</u> consideration for cooperation under the Principles of Federal Prosecution of Business Organizations, the company must completely disclose to the Department all relevant facts about individual misconduct. Companies cannot pick and choose what facts to disclose. That is, to be eligible for any credit for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct. If a company seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about individual wrongdoers, its cooperation will not be considered a mitigating factor pursuant to USAM 9-28.700 *et seq.*[2] Once a company meets the threshold requirement of providing all relevant facts with respect to individuals, it will be eligible for consideration for cooperation credit. The extent of that cooperation credit will depend on all the various factors that have traditionally applied in making this assessment (*e.g.*, the timeliness of the cooperation, the diligence, thoroughness, and speed of the internal investigation, the proactive nature of the cooperation, etc.).

This condition of cooperation applies equally to corporations seeking to cooperate in civil matters; a company under civil investigation must provide to the Department all relevant facts about individual misconduct in order to receive any consideration in the negotiation. For

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[1] The measures laid out in this memo are intended solely to guide attorneys for the government in accordance with their statutory responsibilities and federal law. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States.

[2] Nor, if a company is prosecuted, will it support a cooperation-related reduction at sentencing. *See* U.S.S.G. USSG § 8C2.5(g), Application Note 13 ("A prime test of whether the organization has disclosed all pertinent information" necessary to receive a cooperation-related reduction in its offense level calculation "is whether the information is sufficient ... to identify ... the individual(s) responsible for the criminal conduct").

example, the Department's position on "full cooperation" under the False Claims Act, 31 U.S.C. § 3729(a)(2), will be that, at a minimum, all relevant facts about responsible individuals must be provided.

The requirement that companies cooperate completely as to individuals, within the bounds of the law and legal privileges, *see* USAM 9-28.700 to 9-28.760, does not mean that Department attorneys should wait for the company to deliver the information about individual wrongdoers and then merely accept what companies provide. To the contrary, Department attorneys should be proactively investigating individuals at every step of the process – before, during, and after any corporate cooperation. Department attorneys should vigorously review any information provided by companies and compare it to the results of their own investigation, in order to best ensure that the information provided is indeed complete and does not seek to minimize the behavior or role of any individual or group of individuals.

Department attorneys should strive to obtain from the company as much information as possible about responsible individuals before resolving the corporate case. But there may be instances where the company's continued cooperation with respect to individuals will be necessary post-resolution. In these circumstances, the plea or settlement agreement should include a provision that requires the company to provide information about all culpable individuals and that is explicit enough so that a failure to provide the information results in specific consequences, such as stipulated penalties and/or a material breach.

2. Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.

Both criminal and civil attorneys should focus on individual wrongdoing from the very beginning of any investigation of corporate misconduct. By focusing on building cases against individual wrongdoers from the inception of an investigation, we accomplish multiple goals. First, we maximize our ability to ferret out the full extent of corporate misconduct. Because a corporation only acts through individuals, investigating the conduct of individuals is the most efficient and effective way to determine the facts and extent of any corporate misconduct. Second, by focusing our investigation on individuals, we can increase the likelihood that individuals with knowledge of the corporate misconduct will cooperate with the investigation and provide information against individuals higher up the corporate hierarchy. Third, by focusing on individuals from the very beginning of an investigation, we maximize the chances that the final resolution of an investigation uncovering the misconduct will include civil or criminal charges against not just the corporation but against culpable individuals as well.

3. Criminal and civil attorneys handling corporate investigations should be in routine communication with one another.

Early and regular communication between civil attorneys and criminal prosecutors handling corporate investigations can be crucial to our ability to effectively pursue individuals in

these matters. Consultation between the Department's civil and criminal attorneys, together with agency attorneys, permits consideration of the full range of the government's potential remedies (including incarceration, fines, penalties, damages, restitution to victims, asset seizure, civil and criminal forfeiture, and exclusion, suspension and debarment) and promotes the most thorough and appropriate resolution in every case. That is why the Department has long recognized the importance of parallel development of civil and criminal proceedings. *See* USAM 1-12.000.

Criminal attorneys handling corporate investigations should notify civil attorneys as early as permissible of conduct that might give rise to potential individual civil liability, even if criminal liability continues to be sought. Further, if there is a decision not to pursue a criminal action against an individual – due to questions of intent or burden of proof, for example – criminal attorneys should confer with their civil counterparts so that they may make an assessment under applicable civil statutes and consistent with this guidance. Likewise, if civil attorneys believe that an individual identified in the course of their corporate investigation should be subject to a criminal inquiry, that matter should promptly be referred to criminal prosecutors, regardless of the current status of the civil corporate investigation.

Department attorneys should be alert for circumstances where concurrent criminal and civil investigations of individual misconduct should be pursued. Coordination in this regard should happen early, even if it is not certain that a civil or criminal disposition will be the end result for the individuals or the company.

4. Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.

There may be instances where the Department reaches a resolution with the company before resolving matters with responsible individuals. In these circumstances, Department attorneys should take care to preserve the ability to pursue these individuals. Because of the importance of holding responsible individuals to account, absent extraordinary circumstances or approved departmental policy such as the Antitrust Division's Corporate Leniency Policy, Department lawyers should not agree to a corporate resolution that includes an agreement to dismiss charges against, or provide immunity for, individual officers or employees. The same principle holds true in civil corporate matters; absent extraordinary circumstances, the United States should not release claims related to the liability of individuals based on corporate settlement releases. Any such release of criminal or civil liability due to extraordinary circumstances must be personally approved in writing by the relevant Assistant Attorney General or United States Attorney.

5. **Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires and declinations as to individuals in such cases must be memorialized.**

If the investigation of individual misconduct has not concluded by the time authorization is sought to resolve the case against the corporation, the prosecution or corporate authorization memorandum should include a discussion of the potentially liable individuals, a description of the current status of the investigation regarding their conduct and the investigative work that remains to be done, and an investigative plan to bring the matter to resolution prior to the end of any statute of limitations period. If a decision is made at the conclusion of the investigation not to bring civil claims or criminal charges against the individuals who committed the misconduct, the reasons for that determination must be memorialized and approved by the United States Attorney or Assistant Attorney General whose office handled the investigation, or their designees.

Delays in the corporate investigation should not affect the Department's ability to pursue potentially culpable individuals. While every effort should be made to resolve a corporate matter within the statutorily allotted time, and tolling agreements should be the rare exception, in situations where it is anticipated that a tolling agreement is nevertheless unavoidable and necessary, all efforts should be made either to resolve the matter against culpable individuals before the limitations period expires or to preserve the ability to charge individuals by tolling the limitations period by agreement or court order.

6. **Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.**

The Department's civil enforcement efforts are designed not only to return government money to the public fisc, but also to hold the wrongdoers accountable and to deter future wrongdoing. These twin aims – of recovering as much money as possible, on the one hand, and of accountability for and deterrence of individual misconduct, on the other – are equally important. In certain circumstances, though, these dual goals can be in apparent tension with one another, for example, when it comes to the question of whether to pursue civil actions against individual corporate wrongdoers who may not have the necessary financial resources to pay a significant judgment.

Pursuit of civil actions against culpable individuals should not be governed solely by those individuals' ability to pay. In other words, the fact that an individual may not have sufficient resources to satisfy a significant judgment should not control the decision on whether to bring suit. Rather, in deciding whether to file a civil action against an individual, Department attorneys should consider factors such as whether the person's misconduct was serious, whether

it is actionable, whether the admissible evidence will probably be sufficient to obtain and sustain a judgment, and whether pursuing the action reflects an important federal interest. Just as our prosecutors do when making charging decisions, civil attorneys should make individualized assessments in deciding whether to bring a case, taking into account numerous factors, such as the individual's misconduct and past history and the circumstances relating to the commission of the misconduct, the needs of the communities we serve, and federal resources and priorities.

Although in the short term certain cases against individuals may not provide as robust a monetary return on the Department's investment, pursuing individual actions in civil corporate matters will result in significant long-term deterrence. Only by seeking to hold individuals accountable in view of all of the factors above can the Department ensure that it is doing everything in its power to minimize corporate fraud, and, over the course of time, minimize losses to the public fisc through fraud.

Conclusion

The Department makes these changes recognizing the challenges they may present. But we are making these changes because we believe they will maximize our ability to deter misconduct and to hold those who engage in it accountable.

In the months ahead, the Department will be working with components to turn these policies into everyday practice. On September 16, 2015, for example, the Department will be hosting a training conference in Washington, D.C., on this subject, and I look forward to further addressing the topic with some of you then.

06. Dentons Yates Memo e-alert

"The Yates Memo and Prosecution of Corporate Individuals: Whose Team Does Your General Counsel Play for Now?, " Glenn Colton, Stephen Hill, Thomas Kelly, Lisa Krigsten, George Newhouse, (Sept. 29, 2015)

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The Yates Memo and prosecution of corporate individuals: Whose team does your general counsel play for now?

September 29, 2015

The US Department of Justice's "new" guidelines for the prosecution of individual defendants in corporate prosecutions, set out recently in a memorandum by Deputy Attorney General Sally Q. Yates, are not so much a new approach as they are a renewed commitment that addresses issues that have dogged the Department of Justice (DOJ) for years. New or not, the burdens the guidelines create for general counsel are extraordinary.

In the wake of several widely publicized post-collapse corporate prosecutions that left individuals unprosecuted, the DOJ has made changes to the *Principles of Federal Prosecution*, key DOJ policy and directives that provide federal prosecutors with guidelines for both the investigation and prosecution of corporate offenders, and the persons who are ultimately responsible for corporate conduct. The "new" guidelines require corporations to investigate, determine and identify responsible individuals in order to receive any cooperation credit.[1] They also direct that DOJ's civil and criminal lawyers work together early and often, and end the practice of individual "passes" from civil or criminal liability when resolving a matter with a corporation. For general counsel this presents a number of issues, including the Memo's effect on privilege and internal investigations, the importance of an internal communications protocol that recognizes general counsel's heightened role and the value of having a step-by-step plan in place *before* word of an internal or government investigation comes across your desk.

The Yates Memo, released on September 9, 2015, identifies four key areas in "strengthening [DOJ's] pursuit of individual corporate wrongdoing." Counsel wishing to mitigate criminal liability for a client must plan with the following in mind: (1) to obtain "any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct"—the corporation must be prepared to "name names." (2) Criminal and civil investigations must focus on individuals "from the inception of the investigation." (3) "Absent extraordinary circumstances" the DOJ will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation—no more free passes in connection with deferred prosecution agreements (DPAs) or non-prosecution agreements (NPAs), and (4) DOJ prosecutors are directed not to settle with the corporation "without a clear plan to resolve related individual cases."

Elaborating in a speech at New York University Law School the day after the memo was released, Yates noted that corporations can no longer "plead ignorance" and that "if they don't know who is responsible, they will need to find out." To get any cooperation credit, Yates said corporations "will need to investigate and identify the responsible parties." Added to the directive to "focus" on responsible corporate executives from the beginning, this affirmative requirement—to investigate, identify and disclose the identity of corporate wrongdoers, and to turn the information over to prosecutors —represents a new requirement imposed by the DOJ.

Given this course, a general counsel's role has become much more central to the early determination of whether the issues presented raise the specter of criminal or civil liability. With the limited information available at the outset of an investigation, the GC must balance his or her obligation to communicate with leadership against the obligation, as the company lawyer, to gather evidence of individual misconduct for disclosure to the government. This raises questions of whether and what the organization's lawyer tells the CEO and other officers, the company's risk manager and others during those critical first moments.

Several key questions immediately come to mind: How does a GC deal with

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employees who decline to be interviewed as part of an internal investigation, or advise the GC that they first wish to seek counsel, invoking the company's indemnification policy? And what about a situation in which legal advice provided by a GC is relevant to establishing intent or good faith?

Perhaps foremost among the issues for the general counsel is how he or she responds to the investigation in a way that promotes his or her client company's interests while still fulfilling the role of day-to-day advisor to that company and its leaders—some of whom may be the focus of the investigation.

Potential scenarios

The directives of the Yates Memo may present new challenges in a number of scenarios:

One: The controller of a corporation regularly and informally consults general counsel seeking legal opinions on issues of public disclosure, internal control considerations and legal requirements for accounting policies and procedures. This includes a recent question about the chief financial officer's suggestion to delay the receipt of certain shipped inventory until the end of the quarter. When the company receives a subpoena for records, including for records of inventory on hand, the chief financial officer, the controller, the chief executive officer and the board chair all ask the general counsel for his or her take on what to do.

Two: A company's policies dictate that all employees must cooperate with internal investigations, including submitting to interviews. When a former real estate broker for the company is contacted by the FBI, an internal investigation is initiated into certain real estate purchases by the company. The general counsel's approach in the past was to gather all those affected by the reach of this investigation to coordinate a response. When notified, the CEO and the vice president for real estate each ask the general counsel: "Do I need a lawyer?"

Civil considerations

In her NYU speech, Yates termed the change in criminal cooperation policy a "substantial shift from prior practice" and evidence that "the rules have just changed." Notably, however, the Yates Memo distinctly expands the expectations placed on a company regarding cooperation by reaching well into civil litigation as well, which often runs side-by-side with criminal matters. The Yates Memo directs that "a company under civil investigation must provide to the Department all relevant facts about individual misconduct in order to receive any consideration in the negotiation." The memo specifies but doesn't limit this to False Claims Act matters, and supplements two other directives: that civil and criminal lawyers should "be in routine communication with one another," and that civil investigations should "focus on individuals and whether to bring suit against them based on considerations beyond ability to pay." Yates' instructions apply to the very common approach taken by the DOJ of initially opening investigations as criminal *and* civil matters.

Next steps

The policy reflected by the Yates Memo and by Yates' elaboration highlight the need for general counsel to have a well-thought-out response and communication plan before an investigative issue arises. For one thing, it is paramount to have the capacity to affect a truly independent internal investigation (conducted by outside counsel) with the possibility that the full results of the investigation, including otherwise protected work product materials, will be turned over to the government. This independence is not easy in the practical sense because general counsel needs to be able to continue to be available to advise in unrelated matters.

In the wake of the rollout of the Yates Memo, there will be a premium on prosecution of corporate leaders, and much more vigorous oversight of corporate investigations. Precisely how the government proposes to

monitor the breadth and extent of the corporate internal investigations remains to be seen. The prosecutors who bring these cases will be held to account for their charging decisions and pressured in every corporate prosecution to include individual defendants. Corporate counsel should now assume that civil matters at DOJ have an active parallel criminal component and act accordingly, given the mandates to the department's civil lawyers.

This "balancing" means that general counsel should think through and design a proactive plan and communications protocol well before an investigation is underway, keeping in mind that, if the corporation wants any consideration in the charging equation, it must "find out" by "investigat[ing] and identif[ying] the responsible parties, then provide all non-privileged evidence implicating those individuals." Such a plan should, at a minimum, consider the following: (1) Are the company's internal privileged communications adequately protected from unintentional waiver? (2) Does the company have a sufficiently robust internal investigations protocol to meet the need to cooperate with federal authorities?, and (3) what does the company tell an executive or other employee who asks "do I need a lawyer" during an interview or request for information? These issues, discussed with client representatives before there is an open investigation implicating certain individuals, will likely lead to more buy-in and a successful response.

This plan and the issues it addresses should be closely linked to the company's internal investigation and policies around indemnification. They report a good approach for general counsel to address the challenges they now face in light of the Yates' Memorandum.

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[1] The policy speaks in absolutes here: in order to get "any" consideration, the company must provide "complete" disclosure of "all" individuals involved in or responsible for the misconduct, regardless of position, and provide the DOJ "all facts" (not "relevant" facts) relating to the misconduct.

07. *In re Gen. Motors LLC Ignition Switch Litigation*, 80 F. Supp. 3d 521 (S.D.N.Y. 2015)

80 F.Supp.3d 521
United States District Court,
S.D. New York.

In re GENERAL MOTORS LLC IGNITION SWITCH LITIGATION.
This Document Relates To All Actions.

No. 14–MD–2543 (JMF).
|
Signed Jan. 15, 2015.

Synopsis
Background: Plaintiffs in multi-district litigation against an automobile manufacturer, relating to a defective ignition switch, moved to compel production of documents underlying an internal investigation into the defect conducted by an outside law firm.

Holdings: The District Court, Jesse M. Furman, J., held that:

[1] the attorney-client privilege applied to the outside law firm's communications with current and former employees, agents, and in-house counsel;

[2] documents prepared by the outside law firm while conducting interviews were protected from disclosure under the attorney work product doctrine; and

[3] the manufacturer did not waive attorney-client privilege or attorney work product protection by releasing a resulting report to the government.

Motion denied.

West Headnotes (11)

[1] **Privileged Communications and Confidentiality**
Elements in general; definition

311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk102Elements in general; definition

The attorney-client privilege protects communications: (1) between a client and his or her attorney (2) that are intended to be, and in fact were, kept confidential (3) for the purpose of obtaining or providing legal assistance.

2 Cases that cite this headnote

[2] **Privileged Communications and Confidentiality**
Corporations, partnerships, associations, and other entities

311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk120Parties and Interests Represented by Attorney
311Hk123Corporations, partnerships, associations, and other entities

The attorney-client privilege applies to communications between corporate counsel and a corporation's employees, made at the direction of corporate superiors in order to secure legal advice from counsel.

2 Cases that cite this headnote

[3] **Privileged Communications and Confidentiality**
Factual information; independent knowledge; observations and mental impressions

311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk143Factual information; independent knowledge; observations and mental impressions

The attorney-client privilege protects communications rather than information.

2 Cases that cite this headnote

[4] **Privileged Communications and Confidentiality**
Factual information; independent knowledge; observations and mental impressions

311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk143Factual information; independent knowledge; observations and mental impressions

The attorney-client privilege does not impede disclosure of information except to the extent that the disclosure would reveal confidential communications.

1 Cases that cite this headnote

[5] **Privileged Communications and Confidentiality**
Confidential character of communications or advice

311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk156Confidential character of communications or advice

The fact that certain *information* in otherwise protected documents might ultimately be disclosed or that certain *information* might later be disclosed to others does not, by itself, create the factual inference that the *communications* were not intended to be confidential at the time they were made, for the purposes of the attorney-client privilege.

Cases that cite this headnote

[6] **Privileged Communications and Confidentiality**
Elements in general; definition

311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk102Elements in general; definition

So long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, the attorney-client privilege applies, even if there were also other purposes for the investigation.

2 Cases that cite this headnote

[7] **Privileged Communications and Confidentiality**
Corporations, partnerships, associations, and other entities
Privileged Communications and Confidentiality
Subject Matter; Particular Cases

311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk120Parties and Interests Represented by Attorney
311Hk123Corporations, partnerships, associations, and other entities
311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk144Subject Matter; Particular Cases
311Hk145In general

The attorney-client privilege applied to an outside law firm's communications with current and former employees, agents, and in-house counsel, as part of investigating and preparing a report into an automobile manufacturer's defective ignition switch and delays in recalling affected vehicles, even though the resulting report was publicly released, where the communications were conducted as part of the manufacturer's request for legal advice in light of government investigation and threat of civil litigation, the interviewees were told that the purpose of the interviews was to assist in providing legal advice, the communications were treated as confidential, and a primary purpose of the communications was to assist the outside council in providing legal advice to the manufacturer.

1 Cases that cite this headnote

[8] **Federal Civil Procedure**
Work Product Privilege; Trial Preparation Materials

170AFederal Civil Procedure
170AXDepositions and Discovery
170AX(E)Discovery and Production of Documents and Other Tangible Things
170AX(E)3Particular Subject Matters
170Ak1604Work Product Privilege; Trial Preparation Materials
170Ak1604(1)In general

To demonstrate that material is protected by the attorney work product doctrine, a party need only show that, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.

1 Cases that cite this headnote

[9] **Federal Civil Procedure**
Work Product Privilege; Trial Preparation Materials

170AFederal Civil Procedure
170AXDepositions and Discovery
170AX(E)Discovery and Production of Documents and Other Tangible Things
170AX(E)3Particular Subject Matters
170Ak1604Work Product Privilege; Trial Preparation Materials
170Ak1604(1)In general

Work product protection does not apply to documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation.

1 Cases that cite this headnote

[10] **Federal Civil Procedure**
Work Product Privilege; Trial Preparation Materials

170AFederal Civil Procedure
170AXDepositions and Discovery
170AX(E)Discovery and Production of Documents and Other Tangible Things
170AX(E)3Particular Subject Matters
170Ak1604Work Product Privilege; Trial Preparation Materials
170Ak1604(1)In general

An outside law firm's interviews with current and former employees, agents, and in-house counsel of an automobile manufacturer, and resulting documents were prepared in anticipation of litigation, and thus were protected from disclosure under the attorney work product doctrine, in the absence of any showing that plaintiffs in multidistrict litigation relating to defective ignition switches could not prepare their case by other means, where all interviewees were informed that the purpose of the interviews was to gather information to assist the attorneys in providing legal advice, the interviews were conducted while the Department of Justice was investigating the company, and the plaintiffs were free to depose the witnesses who were interviewed. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

1 Cases that cite this headnote

[11] **Federal Civil Procedure**
Waiver
Privileged Communications and Confidentiality
Waiver of privilege

170AFederal Civil Procedure
170AXDepositions and Discovery
170AX(E)Discovery and Production of Documents and Other Tangible Things
170AX(E)3Particular Subject Matters
170Ak1604Work Product Privilege; Trial Preparation Materials
170Ak1604(2)Waiver
311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk168Waiver of privilege

An automobile manufacturer did not waive attorney-client privilege or attorney work product protection in communications and documents compiled as part of an outside law firm's investigation and preparation of a report into defective ignition switch and delays in recalling affected vehicles by disclosing the report to Congress, the Department of Justice, and other federal agencies, where the

manufacturer had not offensively used the report in the multidistrict litigation or made a selective or misleading presentation that was unfair to adversaries, and the manufacturer had produced, or would soon produce, millions of pages of documents, including some that would otherwise be privileged. Fed.Rules Evid.Rule 502(a), 28 U.S.C.A.

3 Cases that cite this headnote

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OPINION AND ORDER

JESSE M. FURMAN, District Judge:

Less than one year ago, General Motors LLC ("New GM") announced the first of what would be become many recalls of its vehicles based on an ignition switch defect. Shortly after the first recall, New GM retained the law firm Jenner & Block LLP ("Jenner") and its chairperson, Anton Valukas, to conduct an internal investigation into the defect and the delays in recalling the affected vehicles. As part of their investigation, Valukas and his colleagues reviewed a vast number of documents and interviewed over 200 New GM employees and former employees, among others. The result was a written report (the "Valukas Report") that New GM submitted to Congress, the Department of Justice ("DOJ"), and the National Highway Traffic Safety Administration ("NHTSA"), among others.

Plaintiffs in this multi-district litigation proceeding ("MDL") bring claims relating to the subject matter of the Valukas Report, namely the ignition switch defect. As part of discovery, New GM has disclosed the Valukas Report itself, and has agreed to disclose on a rolling basis every New GM document cited in the Report, including otherwise privileged documents (pursuant to a Federal Rule of Evidence 502(d) order). But it refuses to disclose other materials underlying the Valukas investigation, particularly notes and memoranda relating to the witness interviews conducted by the Jenner lawyers. The principal question here is whether those materials are protected from disclosure by either or both the attorney-client privilege or the attorney work product doctrine.

For the reasons that follow, the Court agrees with New GM that the materials at issue are protected by both the attorney-client privilege and the attorney work product

doctrine and that New GM has not waived either form of protection as to the materials at issue. Accordingly, New GM need not produce them in discovery at this time.

*524 BACKGROUND

As noted, this MDL relates to defects in certain General Motors vehicles and associated product recalls, general familiarity with which is assumed. The following facts are taken from the parties' briefs (14–MD–2543 Docket Nos. 437, 438, 465, 466) and are included by way of background to the privilege issues addressed in this Opinion and Order.

In February 2014, New GM announced the first recall of GM-brand vehicles based on an ignition switch defect. (Def. General Motors LLC's Br. Regarding Privileged Interview Notes & Mem. (Docket No. 437) ("New GM's Opening Br.") 1, 3). Following the announcement of the "highly publicized" recalls, DOJ launched a criminal investigation into New GM. (*Id.*). In light of the DOJ investigation—and the spate of civil litigation anticipated by New GM—the company retained Jenner and its chairperson, Anton Valukas. (New GM's Opening Br., Ex. 1 (Decl. of Anton Valukas) ("Valukas Decl.") ¶¶ 1, 2). According to Valukas and Michael P. Millikin, the General Counsel of New GM, Jenner was retained "to represent New GM's interests and to provide legal advice to new GM in a variety of matters relating to the recalls, including the DOJ investigation and other anticipated government investigations and civil litigation." (*Id.* ¶ 2; *see also* New GM's Opening Br., Ex. 2 (Decl. Michael P. Millikin) ("Millikin Decl.") ¶¶ 4–5). "As part of [New GM's] request for legal advice regarding the pending government investigation," New GM directed Valukas to "investigate the circumstances that led up to the recall of the Cobalt and other cars due to the flawed ignition switch"—specifically, "to determine why it took so long to recall the Cobalt and other vehicles." (Valukas Decl. ¶ 2; *see also* Millikin Decl. ¶ 5; Pls.' Br. Concerning Produc. Material Related Valukas Report (Docket No. 438) ("Pls.' Opening Br.") 5 (internal quotation marks omitted); New GM's Opening Br. 4 (internal quotation marks omitted)).

The investigation that followed was swift but wide-ranging. In the span of only seventy days, the Jenner lawyers collected over 41 million documents and conducted over 350 interviews with 230 witnesses, including over 200 current and former GM employees, several employees of GM's insurance claims administrator, and several of New GM's outside counsel. (Pls.' Opening Br., Ex. A (Report to Bd. of Directors of Gen. Motors Co. Regarding Ignition Switch Recalls ("Valukas Report")) 14; Valukas Decl. ¶ 3). According to Valukas, the interviews were conducted confidentially, with the intention of preserving the attorney-client privilege between New GM and its counsel; all witnesses were informed at the outset of each interview that the purpose of the interview was to assist in the provision of legal advice to New GM and that the interview was privileged and should be kept confidential. (Valukas Decl. ¶ 4). No transcript or recording was made of the interviews. (*Id.* ¶ 5). Instead, the Jenner lawyers produced three types of writings during and after the interviews: attorney notes taken during the interviews; summaries created after each interview; and formal attorney memoranda created after the interviews (collectively, the "Interview Materials"). (New GM's Opening Br. 5).

On May 29, 2014, Valukas presented the fruits of Jenner's labors—a 315–page document that came to be known as the "Valukas Report"—to the New GM Board of Directors. (Pls.' Opening Br. 5; *see generally* Valukas Report).[1] The Valukas Report, which includes citations to many (but *525 not all) of the witness interviews conducted by the Jenner lawyers, is prominently marked (on the cover and each page thereafter) "Privileged and Confidential: Protected by Attorney–Client Privilege and As Attorney Work Product." (Pls.' Opening Br. 5; New GM's Opening Br. 6). New GM, however, provided a copy of the report to Congress, DOJ, and NHTSA in connection with their ongoing investigations into the defects and related recalls. (New GM's Opening Br. 6). Thereafter, NHTSA published a copy of the report on its website with personal identifying information redacted. (*Id.; see also* Def. General Motors LLC's Resp. Pls.' Br. Concerning Produc. Material Related Valukas Report (Docket No. 465) ("New GM's Resp. Br.") 4 n. 4). Months later, New GM placed the Report into the MDL Document Depository, making it available to Plaintiffs in the MDL. (New GM's Opening Br. 6).

On October 15, 2014, Plaintiffs in *Melton v. General Motors, LLC et al.*, No. 14–A–1197–4 (Ga. Cobb Cnty. Ct.) ("*Melton II*"), a related state court action against New GM, filed a motion to compel New GM to produce various documents relating to the Valukas Report. (New GM's Oct. 24, 2014 Ltr. (14–MD–2543 Docket No. 363), Ex. 2). Shortly thereafter, New GM filed a letter, arguing, *inter alia,* that this Court—rather than the *Melton II* Court—should decide most of the issues raised by the motion to compel. (New GM's Oct. 30, 2014 Ltr. (14–MD–2543 Docket No. 369) 3). After further discussion, this Court and the *Melton II* Court agreed with the parties' proposal to meet and confer in an effort to

narrow the issues in dispute, and ordered the parties to submit a joint letter by November 12, 2014, indicating what issues remained to be decided and "proposing an expedited briefing schedule to address both the substantive merits of any remaining disputes and whether and how the two courts should coordinate rulings on those disputes." (14–MD–2543 Order No. 21 (Docket No. 390) (emphasis omitted)). The parties' meet-and-confer process did narrow the issues in dispute: New GM agreed to produce many documents previously identified as privileged, including some documents previously produced to the federal government (*see* Nov. 12, 2014 Joint Ltr. (Docket No. 397) 1)—an agreement that was memorialized in a Federal Rule of Evidence 502(d) order adopted by the Court on November 14, 2014. (*See* 14–MD–2543 Order No. 23 (Docket No. 404) 3). But New GM refused to produce other documents relating to the Valukas Report demanded by Plaintiffs, including, most notably, the Interview Materials. (Nov. 12, 2014 Joint Ltr. 3).

Per this Court's Order (Docket No. 406), the parties then submitted joint opening and responsive briefs on the question of whether those materials are protected by the attorney-client privilege or the attorney work product doctrine and whether that question should be decided by this Court or the *Melton II* Court. (14–MD–2543 Docket Nos. 437, 438, 465, 466). In their opening brief, Plaintiffs indicate that they are seeking to compel production of three categories of information: (1) "An index evidencing all documents or information provided to Anton Valukas and/or Jenner & Block with respect to investigation into the GM ignition switch recalls"; (2) "Copies of all hard drives of documents that were gathered in connection with the investigation of GM and the preparation of the Valukas Report encompassing the 23 TB of data and 41 million documents referenced in the Valukas Report"; and (3) "A copy of all notes, transcripts, and tapes (audio or video) related to any person interviewed during the course of the Valukas investigation and preparation of the Valukas Report, including any of those not cited in the final Valukas Report." (Pls.' Opening Br. 13). Both sides agree, however, that the question of whether the relevant ***526** materials are subject to disclosure should be decided by this Court rather than the *Melton II* Court. (Pls.' Opening Br. 13–14; New GM's Opening Br. 8–9).

DISCUSSION

As a threshold matter, the Court agrees with the parties that the question of whether the materials at issue are protected by the attorney-client privilege or the attorney work product doctrine should be decided in this forum. First, a decision by this Court is consistent with the Court's role as "the lead case for discovery ... in Coordinated Actions," including *Melton II*, a role that the Court has played in an effort to promote efficiency and ensure consistency in ignition switch litigation across the country. (14–MD–2543 Order No. 15 (Docket No. 315) ("Joint Coordination Order") 3). Given the size and nature of this Court's docket, not to mention its national jurisdiction, it is in a better position than any other tribunal to decide issues that are likely to arise in, or apply to, large numbers of other ignition switch cases. Second, as discussed below, because New GM initially provided the Valukas Report "to a federal office or agency," and subsequently produced the Report in this "federal proceeding," Rule 502 of the Federal Rules of Evidence governs—and limits—the scope of any waiver of any such privilege. Fed.R.Evid. 502(a). Moreover, Rule 502(d) provides that this Court's ruling on the question of waiver is binding on other courts throughout the country. In short, a decision on the questions presented by this Court in the first instance will help prevent inconsistent rulings in related actions as Valukas Report-related privilege issues arise (as they are bound to do).[2]

Turning then to the substantive questions, New GM argues that the Interview Materials are protected by both the attorney-client privilege and the attorney work product doctrine. Plaintiffs dispute both claims and contend that, even if the Interview Materials are protected, New GM has waived those protections. The Court will address each issue in turn.

A. The Attorney–Client Privilege

[1] [2] New GM contends first that the Interview Materials "reflect confidential communications between New GM's outside counsel and its current or former employees, agents, and counsel," and are thus protected by the attorney-client privilege. (New GM's Opening Br. 9). In the Second Circuit, "[t]he attorney-client privilege protects communications (1) between a client and his or her attorney (2) that are intended to be, and in fact were, kept confidential (3) for the purpose of obtaining or providing legal assistance." *Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. DOJ*, 697 F.3d 184, 207 (2d Cir.2012) (internal quotation marks omitted).[3] ***527** It is well established that the privilege applies to communications between corporate counsel and a corporation's employees, made "at the direction of corporate superiors in order to secure legal advice from counsel." *Upjohn Co. v. United States*, 449 U.S. 383, 394, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). And although the Supreme Court and Second Circuit have not addressed the

issue, *see id.* at 395 n. 3, 101 S.Ct. 677 (declining to address the issue), district courts in this Circuit have consistently held that the privilege also extends to "conversations between corporate counsel and *former* employees of the corporation, so long as the discussion related to the former employee's conduct and knowledge gained during employment." *In re Refco Inc. Sec. Litig.*, Nos. 07–MD–1902 (JSR) et al., 2012 WL 678139, at *2 (S.D.N.Y. Feb. 28, 2012) (emphasis added) (citing cases).

Upjohn is the foundational case on attorney-client privilege in the corporate environment. There, the Supreme Court held that the privilege protected interview notes and memoranda prepared by a corporation's in-house counsel during an internal investigation of illegal payments by employees. The Court noted that, in this context, "the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Upjohn*, 449 U.S. at 390, 101 S.Ct. 677. That is the case, the Court explained, because the "first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant." *Id.* at 390–91, 101 S.Ct. 677. Furthermore, failing to consistently and predictably protect communications between corporate counsel and lower-level employees would "threaten[ ] to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law," because "[i]n light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations ... constantly go to lawyers to find out how to obey the law." *Id.* at 392, 101 S.Ct. 677 (internal quotation marks omitted). Applying those principles, the Court concluded that the documents at issue were privileged because they were collected by in-house counsel as part of "a factual investigation to determine the nature and extent of the questionable payments and to be in a position to give legal advice to the company with respect to the payments," and the interviewed employees were "sufficiently aware" of the legal purpose of the interviews and the confidentiality attached to their communications. *Id.* at 394–95, 101 S.Ct. 677 (emphasis omitted).

Upjohn applies squarely to the materials at issue in this case, at least to the extent that they reflect witnesses' communications rather than the thoughts or impressions of lawyers (a subject that is discussed further below). Here, as in *Upjohn*, the internal investigation and accompanying interviews were conducted "as part of [the company's] request for legal advice" in light of possible misconduct and accompanying governmental investigations and civil litigation. (Valukas Decl. ¶ 2). Here, as in *Upjohn*, the employees interviewed were aware (and, in fact, explicitly told) that the purpose of the interviews was to collect information to assist in providing legal advice to the ***528** company, and that the matters discussed were therefore confidential. (*Id.* ¶ 4). Here, as in *Upjohn*, the documents reflecting communications between the company's lawyers and its employees during the interview process have not been provided to third parties; instead, they have been shared, if at all, only with King & Spalding (a law firm that has also been representing New GM in connection with the recalls) and with the holder of the privilege, New GM itself. (*Id.* ¶¶ 3, 6–8). And although the investigation here was conducted by outside counsel rather than in-house counsel, that difference from *Upjohn* strengthens rather than weakens New GM's claim to the privilege. *See, e.g., ABB Kent–Taylor, Inc. v. Stallings and Co., Inc.*, 172 F.R.D. 53, 55 (W.D.N.Y.1996) (noting that "[p]rivilege issues with respect to communications between in-house corporate counsel and the corporate client have proven to generate thorny discovery and disclosure problems" because "[i]n-house counsel often serve their corporate employer in mixed business-legal roles").

In arguing otherwise, Plaintiffs make two principal arguments. First, citing the testimony of New GM's Chief Executive Officer Mary Barra before Congress, in which she promised to share the Valukas Report and "everything and anything that is related to safety," Plaintiffs assert "[t]here was no expectation that the Valukas Report or the investigation would be confidential." (Pls.' Opening Br. 2, 14–15).[4] Second, Plaintiffs contend that the privilege does not apply to the Interview Materials because the communications they reflect were not made for the purpose of obtaining or providing legal advice. (Pls.' Opening Br. 15–16). Noting that "[m]ost of the Report contains factual findings and then ends with a series of recommendations relating to business processes controls, communications, policies, and training," Plaintiffs argue that the Valukas Report "itself did not reflect the provision of legal advice." (*Id.* at 15–16). It follows, they contend, that "drafts of the report and memoranda of the lawyers' interviews with witnesses were not prepared 'primarily' or 'predominantly' for the purpose of providing legal advice." (*Id.* at 15–16). More specifically, Plaintiffs assert that the investigation was conducted—and the Valukas Report was prepared—for the purpose of making business recommendations, not legal recommendations, and thus that communications made during the course of the investigation do not meet the "primary purpose" test for application of the privilege. (Pls.' Resp. Br. Concerning Produc. Material Related Valukas Report (Docket No. 466) ("Pls.' Resp. Br.") 4).

[3] [4] [5] Those arguments are unavailing. Plaintiffs' first argument—that New GM did not intend to keep the Interview Materials confidential—is based on a flawed inference: that because New GM promised to (and did) disclose the *facts* shared in the Valukas Report, it follows that the company did not intend to keep the *communications* reflected in the Interview Materials confidential. It is well established, however, that the attorney-client privilege "protects communications rather than information." *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1037 (2d Cir.1984). Thus, "the privilege does not impede disclosure of information except to the extent ***529** that that disclosure would reveal confidential communications." *Id.* And "the fact that certain *information* in [otherwise protected] documents might ultimately be disclosed" or "that certain *information* might later be disclosed to others" does not, by itself, "create the factual inference that the *communications* were not intended to be confidential at the time they were made." *Id.* (emphases added). Were it otherwise, "any attorney-client communications relating to the preparation of publicly filed legal documents—such as court pleadings—would be unprotected," which is plainly not the law. *In re Grand Jury Subpoena*, 341 F.3d 331, 336 (4th Cir.2003); *see also In re Feldberg*, 862 F.2d 622, 629 (7th Cir.1988) (noting that "[r]are is the case in which attorney-client conversations do not lead to some public disclosure" and that, just because a trial is public or a lawyer writes a brief to be filed with the court, it does not follow that communications "antecedent" to the trial and "drafts of the brief" are unprivileged); *Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d at 1037 (holding that the privilege can apply to "drafts of communications the final version of which might eventually be sent to other persons, and as distributed would not be privileged").

The touchstone of the analysis, therefore, is not whether New GM intended to keep confidential the results of its investigation, but rather whether it intended to keep confidential the communications reflected in the Interview Materials. Applying that standard here, New GM has established a valid claim to the privilege. Barra may have promised transparency in matters relating to safety (*see* Pls.' Opening Br. 14–15), but she did not promise to disclose the communications reflected in the Interview Materials. And the participants in the interviews themselves understood that their communications were intended to be kept confidential. As Valukas explains in a sworn declaration, consistent with *Upjohn* and its progeny, "at the outset of each interview the interviewing attorney informed the witness that the purpose of the interview was to gather information to assist in providing legal advice to New GM, that the interview was accordingly privileged, that this privilege belonged to New GM, and that the witness should keep confidential the matters discussed in the interview." (Valukas Decl. ¶ 4). And consistent with those warnings and assurances, Jenner and New GM have never shared the Interview Materials with any government agency or third party. (*Id.* ¶¶ 5–8).[5]

[6] Plaintiffs' second argument—that the communications reflected in the Interview Materials were not made for the purpose of obtaining or providing legal assistance—is also unpersuasive. Plaintiffs are certainly correct that the privilege attaches only if "the predominant purpose of the communication is to render or solicit legal advice." *In re County of Erie*, 473 F.3d 413, 420 (2d Cir.2007). Further, it is plain, as Plaintiffs argue, that New GM's purposes in retaining Jenner and producing the Valukas Report were not exclusively legal—that the company sought to identify ***530** and correct the problems that resulted in the delayed recalls and to address a public relations fiasco by reassuring investors and the public that it takes safety seriously. The primary purpose test, however, does not require a showing that obtaining or providing legal advice was the *sole* purpose of an internal investigation or that the communications at issue "would not have been made 'but for' the fact that legal advice was sought." *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 759 (D.C.Cir.2014). Instead, as the D.C. Circuit has expressly held, "the primary purpose test, sensibly and properly applied, cannot and does not draw a rigid distinction between a legal purpose on the one hand and a business purpose on the other." *Id.* at 759. "So long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, the attorney-client privilege applies, even if there were also other purposes for the investigation ...." *Id.* at 758–59.

To be sure, the D.C. Circuit's decision in *Kellogg Brown & Root* is not binding on this Court. Nevertheless, its analysis of the "primary purpose" test as applied to internal investigations in the corporate setting is consistent with the Second Circuit's analysis in *County of Erie*, where the Court explained (in addressing the privilege as applied to advice by a government lawyer) that "[t]he modern lawyer almost invariably advises his client upon not only what is permissible but also what is desirable ... [T]he privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice." 473 F.3d at 420 (internal quotation marks omitted); *see also id.* at 421 ("The predominant purpose of a particular document—legal advice, or not—may also be informed by the overall needs and objectives that

animate the client's request for advice."). More broadly, the D.C. Circuit's holding is consistent with—if not compelled by—the Supreme Court's logic in *Upjohn.* Rare is the case that a troubled corporation will initiate an internal investigation solely for legal, rather than business, purposes; indeed, the very prospect of legal action against a company necessarily implicates larger concerns about the company's internal procedures and controls, not to mention its bottom line. Accordingly, an attorney-client privilege that fails to account for the multiple and often-overlapping purposes of internal investigations would "threaten[ ] to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." *Upjohn,* 449 U.S. at 393, 101 S.Ct. 677.

Applying those standards here, the Court finds that New GM has met its burden of demonstrating that the provision of legal advice was a "primary purpose" of Jenner's investigation and the communications reflected in the Interview Materials. In the face of an already-launched criminal investigation by the DOJ, and the inevitability of civil litigation, New GM "retained Jenner to represent New GM's interests and to provide legal advice to new GM in a variety of matters relating to the recalls," including the DOJ investigation. (Valukas Decl. ¶ 2). "[I]n order to facilitate [that] provision of legal advice," Jenner and Valukas conducted the interviews in question. (*Id.* ¶ 3). And as New GM's submissions make plain, the interviews have in fact been used in connection with Jenner's representation of New GM with respect to the DOJ investigation. (*See, e.g., id.* ¶ 9 (noting that Jenner lawyers "orally proffered" to representatives of the U.S. Attorney's Office for the Southern District of New York "their hypothetical understandings, based on the interviews, of what certain witnesses would likely say about the facts relating to the ignition switch recalls")). Accordingly, regardless of whether New GM had other purposes in retaining Jenner, and regardless of whether the Valukas ***531** Report *itself* contained legal as opposed to business advice—a question this Court need not, and does not, reach—the underlying investigation, and the interviews conducted as part of it, had a "primary purpose" of enabling Valukas and Jenner to provide New GM with legal advice.

This Court's decision in *Allied Irish Banks,* upon which Plaintiffs principally rely (Pls.' Opening Br. 15–17; Pls.' Resp. Br. 5), does not call for a different result. In that case, the Court held (applying New York law) that the attorney-client privilege did not protect materials underlying a report prepared following an internal investigation. *See* 240 F.R.D. at 103–05. But that holding was based on facts unlike those here. There, the company had hired a non-lawyer—the principal of a consulting firm, touted by the bank as an "eminent person with standing and expertise in the financial services industry"—to produce the report, which the company promptly released publicly. *Id.* at 100–01. The terms of the consultant's engagement had been limited to business-related matters and had said nothing about legal advice. *See id.* And while the consultant had, in turn, engaged a law firm to "assist" in his investigation, *id.; see also id.* at 105, neither the company nor the law firm "provided any evidence regarding the manner in which [the law firm's] purported legal advice was provided to [the company] ... or on what dates," *id.* at 101. In fact, "[t]he only document attributable in any form to [the law firm] that was also presented to [the company]" was the final report itself, "which indisputably did not provide legal advice." *Id.* at 104. In this case, by contrast, New GM explicitly engaged Jenner, a law firm, to provide legal advice, and—whether or not such advice is reflected in the Valukas Report—there is no dispute that Jenner has in fact provided legal advice to the company as a result of its investigation. *See also, e.g., Orbit One Commc'ns, Inc. v. Numerex Corp.,* 255 F.R.D. 98, 104 (S.D.N.Y.2008) (noting that determination of "the precise limits of the attorney-client privilege in the corporate context" requires a "fact-intensive" analysis).

[7] In short, as a threshold matter, New GM has shown that the attorney-client privilege applies to the portions of the Interview Materials reflecting communications between current and former New GM employees and agents and outside counsel.

B. The Attorney Work Product Doctrine

As noted, New GM argues that the Interview Materials are also protected by the attorney work product doctrine. (New GM's Opening Br. 11–12; New GM's Resp. Br. 13–16). Protection of attorney work product is based on the notion that "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *Hickman v. Taylor,* 329 U.S. 495, 510–11, 67 S.Ct. 385, 91 L.Ed. 451 (1947). As the Supreme Court acknowledged in *Hickman,* "[t]his work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways." *Id.* at 511, 67 S.Ct. 385. *Hickman* has since been codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure,

which provides that "[o]rdinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative." Fed.R.Civ.P. 26(b)(3).

*532 [8] [9] As the Second Circuit has noted, "[n]othing" in Rule 26(b)(3) "states or suggests that documents prepared 'in anticipation of litigation' with the purpose of assisting in the making of a business decision do not fall within its scope." *United States v. Adlman*, 134 F.3d 1194, 1198–99 (2d Cir.1998). Indeed, "a requirement that documents be produced primarily or exclusively to assist in litigation in order to be protected is at odds with the text and the policies of the Rule. Nowhere does Rule 26(b)(3) state that a document must have been prepared to *aid* in the conduct of litigation in order to constitute work product, much less *primarily* or *exclusively* to aid in litigation. Preparing a document 'in anticipation of litigation' is sufficient." *Id.* at 1198. Accordingly, to demonstrate that material is protected by the attorney work product doctrine, a party need only show that, "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation." *Schaeffler v. United States*, 22 F.Supp.3d 319, 335 (S.D.N.Y.2014) (internal quotation marks omitted). Work product protection does not apply to "documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation." *Id.* (internal quotation marks omitted).

[10] Applying those standards here, Rule 26(b)(3) provides an independent basis for New GM to withhold the Interview Materials. The materials at issue were produced in a situation far from the "ordinary course of business"; the interviews were conducted—and the Interview Materials were prepared—in light of the pending DOJ investigation and the anticipation of civil litigation. (Valukas Decl. ¶¶ 2–3; Millikin Decl. ¶¶ 4–5). Further, in light of the nature of the documents at issue and the factual situation in this case, it can "fairly be said" that the Interview Materials would not have been created in "essentially similar form" had New GM not been faced with the inevitability of such litigation. *See, e.g., In re Woolworth Corp. Sec. Class Action Litig.*, No. 94–CV–2217 (RO), 1996 WL 306576, at *3 (S.D.N.Y. June 7, 1996) (noting that when civil and criminal litigation are virtually certain, "[a]pplying a distinction between 'anticipation of litigation' and 'business purposes' is ... artificial, unrealistic, and the line between is ... essentially blurred to oblivion"). Indeed, the interviews themselves were shaped by the specter of litigation: All witnesses were informed "that the purpose of the interview[s] was to gather information to assist in providing legal advice to New GM," and the interviews were conducted with an eye towards the goal of "facilitat[ing] [Jenner's] provision of legal advice to New GM." (Valukas Decl. ¶¶ 3–4). Interview notes and memoranda produced in the course of similar internal investigations have long been considered classic attorney work product. *See, e.g., William A. Gross Constr., Assoc., Inc. v. Am. Mfrs. Mut. Ins. Co.*, 262 F.R.D. 354, 362 (S.D.N.Y.2009); *In re Cardinal Health, Inc. Sec. Litig.*, No. C2–04–575 (RPP), 2007 WL 495150, at *5 (S.D.N.Y. Jan. 26, 2007). There is no basis to reach a different conclusion here.

That does not end the analysis, however, as the protections afforded by the attorney work product doctrine are not absolute. Instead, a party may obtain "fact" work product if it "shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." Fed.R.Civ.P. 26(b)(3)(ii).[6] Plaintiffs *533 here cannot make that showing as to the Interview Materials as a whole, given the vast amount of materials that New GM has produced or will be producing and given the fact that Plaintiffs are free to depose the witnesses whom the Jenner attorneys interviewed as part of the Valukas investigation. *See Hickman*, 329 U.S. at 513, 67 S.Ct. 385 (noting that "direct interviews with the witnesses themselves all serve to reveal the facts in [the attorney's] possession to the fullest possible extent consistent with public policy"); *see also, e.g., Gucci Am., Inc. v. Guess?, Inc.*, 271 F.R.D. 58, 80 (S.D.N.Y.2010) ("No substantial need exists where a party can obtain the information it seeks through discovery devices such as interrogatories or deposition testimony."). Accordingly, Plaintiffs' request for the Interview Materials is denied on the independent ground that it constitutes attorney work product. That denial, however, is without prejudice to any future application (after conferring with counsel for New GM) for particular materials in the event that a witness who was interviewed by the Valukas team proves to be unavailable for deposition as a result of death, invocation of the Fifth Amendment privilege against self-incrimination, or otherwise. And to facilitate any such application, New GM is ordered to disclose, within two weeks, the names of all witnesses who were interviewed by the Valukas team but not mentioned by name in the Valukas Report itself. (*See* Dec. 15, 2014 Hr'g Tr. at 8:2–10:21).

C. Waiver

[11] Finally, the Court turns to the question of whether New GM waived the protections of either the

attorney-client privilege or the attorney work product doctrine—as to which New GM also bears the burden of proof. *See, e.g., United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL–CIO,* 119 F.3d 210, 214 (2d Cir.1997); *Denney v. Jenkens & Gilchrist,* 362 F.Supp.2d 407, 412 (S.D.N.Y.2004). Rule 502 of the Federal Rules of Evidence, titled "Attorney–Client Privilege and Work Product; Limitations on Waiver," provides that "when [a] disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding *only if*: (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; *and* (3) they ought in fairness to be considered together." Fed.R.Evid. 502(a) (emphases added). As the Advisory Committee Notes state, the Rule—enacted in 2008—"provides that a voluntary disclosure in a federal proceeding or to a federal office or agency ... generally results in a waiver *only* of the communication or information disclosed." Fed.R.Evid. 502, Committee Notes (emphasis added). In particular, such disclosure results in a subject matter waiver of undisclosed materials only in those "unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary." *Id.*

Significantly, although the parties discuss the common law of waiver in their memoranda of law (*see* New GM's Opening Br. 15–16; Pls.' Opening Br. 17–20), both sides agree that the waiver analysis is ***534** controlled by Rule 502. (Pls.' Opening Br. 17–20; Pls.' Resp. Br. 7–9; *see* Dec. 15, 2014 Hr'g Transcript at 14:16–15:12). After all, New GM provided the Valukas Report to Congress, DOJ, and NHTSA—"federal office[s] or agenc[ies]"—and has since disclosed the Report in this MDL—a "federal proceeding." Applying Rule 502, there is no basis to conclude that New GM waived either attorney-client privilege or the attorney work product doctrine with respect to documents that New GM has withheld—namely, the Interview Materials. Specifically, as New GM has shown, the company has—as of today's date—"neither offensively used the Valukas Report in litigation nor made a selective or misleading presentation that is unfair to adversaries in this litigation, or any other." (New GM's Resp. Br. 11; *see also* New GM's Opening Br. 7 & n. 3). Additionally, New GM has produced, or soon will produce, millions of pages of documents, including many that would otherwise be privileged (pursuant to the Court's Rule 502(d) Order). (14–MD–2543 Docket No. 404). Put simply, this case does not present the unusual and rare circumstances in which fairness requires a judicial finding of waiver with respect to related, protected information.

D. Plaintiffs' Other Requests

Separate and apart from the Interview Materials, Plaintiffs seeks both "[a]n index evidencing all documents or information provided to Anton Valukas and/or Jenner & Block with respect to investigation into the GM ignition switch recalls" and "[c]opies of all hard drives of documents that were gathered in connection with the investigation of GM and the preparation of the Valukas Report encompassing the 23 TB of data and 41 million documents referenced in the Valukas Report." (Pls.' Opening Br. 13). Substantially for the reasons argued by New GM in its responsive memorandum of law (New GM's Resp. Br. 16–17), the Court denies those requests. Plaintiffs have not argued—nor, likely, could they—that the production of those materials is "reasonably calculated to lead to the discovery of admissible evidence." Fed.R.Civ.P. 26(b)(1). Moreover, in light of the extensive—indeed, vast—universe of documents that New GM has disclosed or will be disclosing in the coming months, the discovery sought by Plaintiffs is "unreasonably cumulative or duplicative." Fed.R.Civ.P. 26(b)(2)(C)(i). Accordingly, Plaintiffs' requests for those additional materials are DENIED.

CONCLUSION

For the foregoing reasons, the Court agrees with New GM that the Interview Materials are protected by both the attorney-client privilege and the attorney work product doctrine. The Court acknowledges that that ruling deprives Plaintiffs of material that might be helpful in the preparation of their cases. In reality, however, it "puts [Plaintiffs] in no worse position than if the communications had never taken place," *Upjohn,* 449 U.S. at 395, 101 S.Ct. 677, as Plaintiffs themselves are free to question the witnesses who were interviewed by the Valukas team. Moreover, in the memorable words of Justice Robert Jackson, "[d]iscovery was hardly intended to enable a learned profession to perform its functions ... on wits borrowed from the adversary." *Hickman,* 329 U.S. at 516, 67 S.Ct. 385 (Jackson, J., concurring). And, in the final analysis, the cost of withholding the materials is outweighed by the benefits to society of "encourag[ing] 'full and frank communication between attorneys and their clients and thereby promot[ing] broader public interests in the observance of law and the administration

of justice.' " *535 *Swidler & Berlin v. United States*, 524 U.S. 399, 403, 118 S.Ct. 2081, 141 L.Ed.2d 379 (1998) (quoting *Upjohn*, 449 U.S. at 389, 101 S.Ct. 677).

Accordingly, and for the reasons explained above, Plaintiffs' application to compel disclosure of the Interview Materials and other items is DENIED, except that New GM is ordered to disclose, **within two weeks,** the names of all witnesses who were interviewed by Valukas and his colleagues but not mentioned by name in the Valukas Report itself.

SO ORDERED.

All Citations

80 F.Supp.3d 521, 90 Fed.R.Serv.3d 1084

Footnotes

1 Jenner submitted amended versions of the Valukas Report to the New GM Board on June 1, 2014, and June 4, 2014. (New GM's Opening Br. 6 n. 2). As used in this Opinion and Order, the "Valukas Report" refers to the final version.

2 As reflected in the Joint Coordination Order, this Court's proper role does not extend to deciding issues that are specific to any individual related case or cases. Accordingly, the Court intimates no view on the motion to compel in *Melton II* to the extent it raises issues specific to that case, such as whether New GM or its attorneys committed fraud during discovery in *Melton I*. To the extent that case-specific issues are raised in *Melton II* or any other related case, the Court leaves it to the court presiding over the case to decide the issue in the first instance.

3 Insofar as many of the cases in this MDL are subject to this Court's diversity jurisdiction, it is by no means clear that federal law should govern analysis of the attorney-client privilege. *See, e.g., Dixon v. 80 Pine St. Corp.*, 516 F.2d 1278, 1280 (2d Cir.1975) ("It is not contested that, in a diversity case, the issue of privilege is to be governed by the substantive law of the forum state ...."). In their memoranda, however, the parties rely solely on federal law and fail to address the issue of choice of law. Given that, the Court finds that the parties have implicitly consented to application of federal privilege law and that that implied consent "is sufficient to establish choice of law" on the question. *Krumme v. WestPoint Stevens Inc.*, 238 F.3d 133, 138 (2d Cir.2000) (internal quotation marks omitted); *see also Allied Irish Banks v. Bank of Am., N.A.*, 240 F.R.D. 96 (S.D.N.Y.2007) (finding implied consent to apply New York privilege law where the parties did not address the choice of law and cited New York cases).

4 Relatedly, Plaintiffs contend that they are entitled to the Interview Materials because the Valukas Report was, in fact, "not kept confidential." (Pls.' Opening Br. 2). That contention is analyzed further below, in connection with Plaintiffs' broader argument that New GM waived any attorney-client privilege through its disclosures to Congress, NHTSA, and DOJ.

5 Based on the interviews, and in order to cooperate with the DOJ investigation, Jenner attorneys "made oral hypothetical proffers" of "what certain witnesses might say if the DOJ were to speak with them," a tactic New GM represents is "in accord with typical practice in DOJ investigations conducted in the Southern District of New York." (New GM Opening Br. 6). Plaintiffs make no argument that those oral proffers—which "were not complete or verbatim recitations of what the witnesses said or of the [Interview Materials]" (Valukas Decl. ¶ 9)—or the intention to make those oral proffers, vitiated the attorney-client privilege.

6 By contrast, "opinion" work product is subject to heightened protection; it is not subject to disclosure absent, "at a minimum ... a highly persuasive showing of need." *In re Grand Jury Proceedings*, 219 F.3d 175, 192 (2d Cir.2000) (internal quotation marks omitted). Although New GM argues that some of the Interview Materials contain opinion work product (New GM's Opening Br. 18–19), the Court need not reach that question at this juncture.

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08. *Gilman v. Marsh & McLennan Companies, Inc.*, 826 F.3d 69 (2d Cir. 2016)

826 F.3d 69
United States Court of Appeals,
Second Circuit.

William W. Gilman, Edward J. McNenney, Jr., Plaintiffs–Appellants,
v.
Marsh & McLennan Companies, Inc., Marsh Inc., Marsh USA Inc., Marsh Global Broking Inc., Michael Cherkasky, Defendants–Appellees.

Docket No. 15-0603-cv(L)
|
August Term, 2015
|
Argued: January 13, 2016
|
Decided: June 16, 2016

Synopsis

Background: Former employees brought action against their former employer, an insurance brokerage, for violations of Employee Retirement Income Security Act (ERISA), breach of contract, and breach of the implied covenant of good faith and fair dealing, based on employer's refusal to pay employees unvested, deferred compensation or severance when it terminated them. The United States District Court for the Southern District of New York, Oetken, J., 868 F.Supp.2d 118, granted summary judgment to employer. Employees appealed.

Holdings: The Court of Appeals, Dennis Jacobs, Circuit Judge, held that:

[1] brokerage's orders that employees sit for interviews regarding their participation in criminal bid-rigging scheme was reasonable, and thus employees' refusal to comply gave brokerage cause to terminate them;

[2] employees were terminated for cause, not as result of reduction-in-force, restructuring, or retirement, and thus they were not entitled to payment pursuant to terms of stock award and severance plans; and

[3] brokerage's demands that employees sit for interviews regarding their participation in scheme was not state action that infringed their Fifth Amendment right against self-incrimination.

Affirmed.

West Headnotes (8)

[1] **Federal Courts**
Summary judgment

Federal Courts
Summary judgment

Court of Appeals reviews district court's grant of summary judgment de novo, construes the evidence in the light most favorable to the non-moving party, and draws all reasonable inferences in its favor.

Cases that cite this headnote

[2] **Labor and Employment**
Disobedience or insubordination

Under Delaware law, "cause" for termination of an employee includes the refusal to obey a direct, unequivocal, reasonable order of the employer.

Cases that cite this headnote

[3] **Labor and Employment**
Disobedience or insubordination

Under Delaware law, insurance brokerage's orders that employees sit for interviews regarding their participation in criminal bid-rigging scheme was reasonable, and thus employees' refusal to comply gave brokerage cause to terminate them; employees had been named as co-conspirators in scheme for their conduct as brokerage's employees, it was obvious that state attorney general intended to prosecute them criminally, and brokerage was not only entitled to question employees about potential on-the-job criminal conduct, but had duty to its shareholders to do so, further, in absence of exculpatory explanation, it needed to assume bid-rigging

allegations were true and it was vicariously liable for employees' criminal conduct.

Cases that cite this headnote

[4] **Labor and Employment**
Conduct or misconduct in general

Under Delaware law, when an employer, because of an employee's wrongful conduct, can no longer place the necessary faith and trust in an employee, the employer is entitled to dismiss such employee without penalty.

Cases that cite this headnote

[5] **Labor and Employment**
Severance pay

Under Delaware law, insurance brokerage's employees were not terminated as result of reduction-in-force, restructuring, or retirement, but rather they were terminated for cause, for their failure to comply with brokerage's orders that they sit for interviews regarding their participation in criminal bid-rigging scheme, and thus employees were not entitled to payment pursuant to terms of stock award and severance plans; it was objectively plain that employees' refusal to be interviewed would result in termination, there was no evidence they were fired as part of a reduction-in-force or restructuring, and employee's filing of retirement papers in direct response to brokerage's interview demand could not preempt known, imminent, for-cause termination.

Cases that cite this headnote

[6] **Contracts**
Construction as a whole

Under Delaware law, court reads a contract as a whole and will give each provision and term effect, so as not to render any part of the contract meaningless or illusory.

Cases that cite this headnote

[7] **Contracts**
Terms implied as part of contract

Delaware law implies a covenant of good faith and fair dealing in every contract, which requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain.

Cases that cite this headnote

[8] **Witnesses**
Form and Purpose of Inquiry

Insurance brokerage's demands that employees sit for interviews regarding their participation in alleged criminal bid-rigging scheme was not state action that infringed their Fifth Amendment right against self-incrimination, and thus brokerage's demands did not preclude employees' termination for cause with attendant loss of deferred compensation and severance pay; brokerage was cooperating with state attorney general's investigation, but it had good institutional reasons for requiring employees to sit for interviews or else lose their jobs: its stock price was sinking and its clients, directors, and investors were demanding answers, and there was no evidence attorney general forced brokerage to demand interviews or intervened in brokerage's decisionmaking. U.S. Const. Amend. 5.

Cases that cite this headnote

Attorneys and Law Firms

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James O. Heyworth (Andrew W. Stern, on the brief), Sidley Austin LLP, New York, NY, for Defendant-Appellee Cherkasky.

Before: KEARSE, WINTER, and JACOBS, Circuit Judges.

Opinion

DENNIS JACOBS, Circuit Judge:

Faced with the prospect of criminal indictment premised on the actions of two employees, a company demanded that those employees explain themselves under the threat of termination. They refused, were fired, and in this suit seek to recover employment benefits they lost by termination. They appeal from the judgment of the United States District Court for the Southern District of New York (Oetken, J.), dismissing their complaint on summary judgment. We agree with the district court that the defendant company—Marsh (i.e., Marsh & McLennan Cos., Marsh Inc., Marsh USA Inc., and Marsh Global Broking Inc.)—had cause to fire William Gilman and Edward McNenney, Jr., for refusal to comply with its reasonable order. Accordingly, we affirm. [1]

BACKGROUND

In April 2004, the New York Attorney General (the "AG") began investigating "contingent commission" arrangements by which insurance brokers were thought to be steering clients to particular insurance carriers. Marsh, as one of the brokers under investigation, retained outside counsel, Davis Polk & Wardwell LLP, to conduct an internal investigation of the AG's allegations. The internal investigation included interviews with Gilman and McNenney in the spring and summer of 2004.

The focus of the AG investigation shifted, in September 2004, to an alleged bid-rigging scheme involving Marsh and several insurance carriers. On October 13, 2004, two individuals at American International Group, Inc. ("AIG") pleaded guilty to felony complaints charging them with participation in a bid-rigging scheme with Marsh. In the allocution of one of the AIG employees, Gilman and McNenney were identified as co-conspirators. The next day, the AG filed a civil complaint against Marsh for alleged fraudulent business practices and antitrust violations.

The fallout from the civil complaint was swift and severe. Marsh's stock price plunged, a raft of private civil suits were filed, and Marsh's directors, clients, and shareholders demanded answers to the bid-rigging allegations. Marsh responded by expanding the ongoing internal investigation; on October 19, 2004, Marsh suspended Gilman and McNenney (with pay). More or less at the same time, Marsh's counsel asked Gilman and McNenney to sit for interviews and warned that failure to comply would result in termination. Gilman was asked to interview with a lawyer from Davis Polk as soon as possible. McNenney alleges that he was asked to submit to an interview with a lawyer from the AG and that he was told to do so without presence of counsel. (Marsh vigorously denies that McNenney was asked to interview with the AG, let alone to do so without counsel.)

On October 25, 2004, the CEO of Marsh's parent company resigned and was replaced by Michael Cherkasky. The same day, Cherkasky met with Eliot Spitzer, then-Attorney General of New York, to discuss the investigation. Gilman and McNenney contend that the upshot of the meeting was that the AG would forgo criminal prosecution of Marsh itself in exchange for its cooperation with the AG's investigation, including waivers of attorney-client privilege and work-product immunity for information developed in the (expanding) internal investigation. That day, an AG press release announced that a civil proceeding would suffice to punish and reform Marsh, and that criminal prosecutions arising out of the alleged bid-rigging scheme would be limited to individuals. This press release was widely understood to mean the AG would indict Gilman and McNenney—as it eventually did.

By the time of the October 25 meeting and agreement between Cherkasky and Spitzer, neither Gilman nor McNenney had complied with Marsh's counsel's requests that they sit for interviews. On October 27, 2004, McNenney's attorney conveyed McNenney's refusal to Davis Polk; Marsh fired him the next day. On October 28, 2004, Gilman's attorney scheduled an interview for his client on November 2. But on November 1, 2004, Gilman submitted paperwork purporting to effectuate an early retirement; later that day, his attorney conveyed Gilman's

refusal to be interviewed. Marsh fired Gilman the next day, and did not accept Gilman's purported retirement.

As Marsh employees, Gilman and McNenney were eligible for some valuable employment benefits. Under Marsh's Stock Award Plans, they received grants of stock options, stock bonus units, and/or deferred stock units, some of which they could have been entitled to upon termination if (for example) they had retired or were fired without cause. If, however, they were terminated "for cause," any unvested stock benefits were forfeited. Under Marsh's ERISA-governed Severance Pay Plan, Gilman and McNenney were entitled to severance if, inter alia, they remained in good standing with Marsh on their last day of work and if their employment terminated (i) because they lacked job skills, or (ii) in connection with a restructuring, or (iii) because Marsh had eliminated their position. An otherwise-eligible employee whose employment was terminated "for cause" was not entitled to severance. Marsh took the position that it fired Gilman and McNenney "for cause," and denied them unvested, deferred compensation as well as severance.

As relevant here, Gilman and McNenney sued Marsh to obtain the lost employment benefits, alleging violations of ERISA, breach of contract, and breach of the implied covenant of good faith and fair dealing. The district court granted summary judgment in favor of Marsh, concluding that the interview requests were reasonable, that Gilman's and McNenney's refusal to sit for interviews gave Marsh cause for termination, that Marsh did in fact fire them for cause (and did not breach the implied covenant), and that Gilman's purported retirement was ineffective. Gilman and McNenney appeal.

DISCUSSION

We review the grant of summary judgment de novo, construe the evidence in the light most favorable to the non-moving party, and draw all reasonable inferences in its favor. Noll v. Int'l Bus. Mach. Corp., 787 F.3d 89, 93–94 (2d Cir. 2015).

The first question is whether the demand that Gilman and McNenney submit to interviews was reasonable as a matter of law. If so, Marsh had cause to fire them and deny them employment benefits. If not, Gilman's and McNenney's claims against Marsh for benefits should have withstood summary judgment. We conclude that the interview demands were reasonable as a matter of law because at the time they were made, Gilman and McNenney were Marsh employees who had been implicated in an alleged criminal conspiracy for acts that were within the scope of employment and that imperiled the company. The second question is whether there is a triable issue of fact as to whether Marsh fired them for cause. We conclude that there is not and reject the argument that Gilman and McNenney were let go routinely as part of a reduction in force and the argument that Gilman could not be fired because he had preemptively resigned. Finally, we reject Gilman's and McNenney's contention that, in light of Marsh's cooperation with the AG, Marsh's requirement that they answer potentially incriminating questions amounted to state action, and was thus unreasonable. Accordingly, Marsh had cause to fire them, as it did, and Gilman and McNenney are entitled to none of the employment benefits they seek.

I

[2] **[3]** Under Delaware law, which governs Marsh's employment contracts with Gilman and McNenney, "cause" for termination includes the refusal to "obey a direct, unequivocal, reasonable order of the employer." Unemployment Ins. Appeal Bd. v. Martin, 431 A.2d 1265, 1268 (Del. 1981). Gilman and McNenney do not dispute that Marsh's orders that they sit for interviews were direct and unequivocal. So the decisive issue is whether the orders were reasonable.

[4] When Gilman and McNenney were named as co-conspirators in a criminal bid-rigging scheme for their conduct *as Marsh employees*, it was obvious (as Gilman and McNenney themselves affirmatively argue) that the AG intended to prosecute them criminally. At that time, Marsh had sufficient basis to act on the allegations, made under oath in open court, and would have had cause to terminate Gilman and McNenney, regardless of the ultimate resolution of the allegations. See Smallwood v. Allied Waste N. Am., Inc., 2010 WL 5556177, at *2 (Del. Super. Ct. Dec. 30, 2010) (holding that an employer had "just cause" to fire an employee for allegedly criminal conduct notwithstanding the employee's eventual acquittal on criminal charges). "When an employer, because of an employee's wrongful conduct, can no longer

place the necessary faith and trust in an employee, [the employer] is entitled to dismiss such employee without penalty." Barisa v. Charitable Research Found., Inc., 287 A.2d 679, 682 (Del. Super. Ct. 1972); cf. Moeller v. Wilmington Sav. Fund Soc., 723 A.2d 1177, 1179 (Del. 1999) (concluding that, for purposes of claiming unemployment benefits, an employer would have "just cause" to terminate employees if they had engaged in illegal or criminal conduct). If Marsh had indeed fired them then, it would have been for cause, and Gilman and McNenney would for that reason have been ineligible for the employment benefits they currently seek. It is difficult to see how their claims for benefits improved because Marsh instead gave them the chance to explain themselves, and they refused to comply.

Marsh was presumptively entitled to seek information from its own employees about suspicions of on-the-job criminal conduct. Marsh could take measures to protect its standing with investors, clients, employees, and regulators. Marsh also had a duty to its shareholders to investigate any potentially criminal conduct by its employees that could harm the company. See, e.g., In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 968–70 (Del. Ch. 1996). And as corporate officers, Gilman and McNenney had a duty to Marsh to disclose information they had about the AG's allegations. See, e.g., Beard Research, Inc. v. Kates, 8 A.3d 573, 601 (Del. Ch. 2010).

Marsh's demands placed Gilman and McNenney in the tough position of choosing between employment and incrimination (assuming of course the truth of the allegations). But though Gilman and McNenney "may have possessed the personal rights to [not sit for interviews], that does not immunize [them] from all collateral consequences that come from [those] act[s]," including leaving Marsh "with no practical option other than to remove [them]." Hollinger Int'l, Inc. v. Black, 844 A.2d 1022, 1077 (Del. Ch. 2004). "[T]here would be a complete breakdown in the regulation of many areas of business if employers did not carry most of the load of keeping their employees in line and have the sanction of discharge for refusal to answer what is essential to that end." United States v. Solomon, 509 F.2d 863, 870 (2d Cir. 1975). Marsh had to use the "sanction of discharge for refusal to answer," id. because in the absence of an exculpatory explanation, Marsh needed to assume the worst: that the bid-rigging allegations were true and that Marsh was vicariously liable for their criminal conduct.

Gilman and McNenney argue that the October interview requests were unreasonable because Marsh had already interviewed them earlier in the year. This is nonsense. In the spring and summer of 2004, the AG was investigating potential civil infractions involving insurance brokers steering clients to certain insurance carriers. Come September, however, the AG shifted focus to a criminal bid-rigging scheme. Then, in mid-October, Gilman and McNenney were named as co-conspirators in the criminal conspiracy and the AG filed a civil complaint against Marsh in which Gilman and McNenney were named. Circumstances had altered and stakes were raised. There is no reason to believe the October interviews would have been duplicative of the earlier interviews; and even if all Marsh sought was updated reassurance, the demand for interviews would have been reasonable. No doctrine limits a company's inquiries as to allegations of employee misconduct.

Gilman and McNenney also argue that the interviews were intended to produce incriminating evidence that Marsh could turn over to the AG to assist in the looming prosecution of Gilman and McNenney, and that Marsh did that as quid pro quo to save itself from criminal prosecution by the AG. But this argument ignores the incontestable fact that Marsh's interview requests *predated* Cherkasky's October 25 meeting with Spitzer in which (Gilman and McNenney contend) the AG agreed not to prosecute Marsh, and Marsh agreed to waive attorney-client privilege and work-product immunity.

Given the circumstances, Marsh's demand that Gilman and McNenney explain themselves in an interview under the penalty of termination was unassailable, even routine. It did what any other company would do, and (arguably) what any company should do. Marsh's interview demands were reasonable and it had cause to fire Gilman and McNenney for refusing to comply.

II

[5] There is no genuine issue of material fact that Marsh fired Gilman and McNenney for their refusal to cooperate. It was objectively plain (and no witness has denied being aware) that the failure of Gilman or McNenney to comply with the interview requests would result in termination. Therefore, it was no surprise that

each was fired the day after Marsh was notified of his refusal. Gilman and McNenney nevertheless posit that they may have been fired as part of a reduction-in-force or restructuring, which (if so) would entitle them to severance. Gilman and McNenney fail to proffer evidence in support, and certainly create no triable issue of fact on this question.

[6] Gilman also argues that he successfully pulled off what disgruntled employees eventually tell their employers: "You can't fire me; I quit." However, Delaware courts "read a contract as a whole and ... will give each provision and term effect, so as not to render any part of the contract ... meaningless or illusory." Osborn ex rel. Osborn v. Kemp, 991 A.2d 1153, 1159 (Del. 2010) (internal quotation marks omitted). The definitions of "cause" in the Stock Award and Severance Plans would be rendered "meaningless or illusory" if an employee could preempt a known, imminent, for-cause termination with a voluntary retirement, and thereby reap all of the benefits of being a faithful employee. [2]

There is no genuine dispute that Gilman filed his retirement papers in direct response to Marsh's (reasonable) interview request, or that Gilman would be fired immediately if he did not comply with Marsh's (reasonable) interview request. Marsh's internal investigators tried for weeks to schedule Gilman for an interview; they were finally able to pin him down for November 2; and just the day before, Gilman faxed retirement paperwork to Marsh. Coincidence is not that convenient.

[7] For the same reasons, Gilman's and McNenney's argument that Marsh breached its duty of good faith and fair dealing also fails. Delaware law implies a "covenant of good faith and fair dealing" in every contract, which "requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain." Dunlap v. State Farm Fire & Cas. Co., 878 A.2d 434, 441–42 (Del. 2005) (internal quotation marks omitted). But the conduct complained of here—Marsh's interview requests and subsequent termination of their employment—was neither arbitrary, nor, as just discussed, unreasonable.

III

[8] Gilman and McNenney argue that Marsh's interview demands constitute state action that infringed their right against self-incrimination. This is "the legal equivalent of the 'Hail Mary pass' in football." In re Lionel Corp., 722 F.2d 1063, 1072 (2d Cir. 1983) (Winter, J., dissenting). They advance the following argument: if Marsh's request that Gilman and McNenney sit for interviews under the penalty of termination is deemed state action (because of Marsh's cooperation with the AG), and if that demand and threat violated their Fifth Amendment right, then Marsh's request was unreasonable as a matter of law, and their refusal to comply with the interview demands cannot support their loss of benefits.

The claim that Marsh was a state actor leans heavily on United States v. Stein, 541 F.3d 130 (2d Cir. 2008); but Stein cannot support that weight. In Stein, federal prosecutors were investigating potential criminal conduct by employees of the accounting firm KPMG. Under a longstanding policy, the firm was bound to pay the legal defense bills of its employees, and it was willingly doing so. During its discussions with prosecutors, KPMG got the unsubtle message that, if it wished to avoid its own indictment, it would have to adopt a new Fees Policy and stop paying for its employees' defense. We upheld the district court's finding of fact that this change was "a direct consequence of the government's overwhelming influence," id. at 136, which would not have happened "but for" the prosecutors' conduct, id. at 144. In effect and in fact, the prosecution arranged to strip criminal defendants of their chosen counsel by stopping at the source the defense fees to which defendants were entitled by contract from an employer willing to pay. The government's influence in Stein was "overwhelming" in several respects: KPMG's "survival depended on its role in a joint project with the government to advance government prosecutions," id. at 147; "the government forced KPMG to adopt its constricted Fees Policy," id. at 148; the government "intervened in KPMG's decisionmaking," id.; the prosecutors "steered KPMG toward their preferred fee advancement policy and then supervised its application in individual cases," id.; and "absent the prosecutors' involvement ... KPMG would not have changed its longstanding fee advancement policy," id. at 150. Since the government steered KPMG to adopt a policy it otherwise would not have adopted, and

then supervised KPMG's implementation of that policy, KPMG's conduct was found to constitute state action.

Stein has no bearing on this case. Marsh had good institutional reasons for requiring Gilman and McNenney to sit for interviews or else lose their jobs: the company's stock price was sinking and its clients, directors, investors, and regulators were demanding answers about the allegations. There is no evidence that the AG "forced" Marsh to demand interviews, "intervened" in Marsh's decisionmaking, "steered" Marsh to request interviews, or "supervised" the interview requests. Nor is there evidence that the nature and scope of the pending interviews were framed by the government, or changed after Cherkasky's October 25 meeting with Spitzer. The expansion of Marsh's internal investigation was precipitated by allegations advanced by the government, but it is not a measure it would have forgone "but for" the AG's influence.

Even if, as McNenney contends, Davis Polk sought to interview him without counsel and with the AG present, that request occurred well before October 25, and McNenney adduced no evidence that Marsh's request for an interview arose out of pressure or coercion from the AG. And Marsh, which already had cause to fire McNenney, could presumably put additional conditions on its interview request anyway, as it still gave McNenney fundamentally the same choice to explain himself or be fired.

Gilman and McNenney invite us to consider that the occasion for the corporate investigation was a criminal initiative by government, and that a likely use of the internal investigation was that Marsh would offer up its findings (together with the employees' testimony) in the nature of a sacrifice to an angry prosecutor. No doubt, Marsh was compelled by circumstances to conduct an investigation (with expectation that any privileges attached to it would be waived) and that one mighty circumstance was a possible prosecution of the firm. But in the ordinary course, allegations of serious wrongdoing would provoke such an investigation, whether or not the allegations were made by prosecutors and whether or not the company itself was at risk of prosecution. The interests of prudent directors alone would justify or compel such a measure. Stein is properly distinguished because (among other things) KPMG had no institutional interest in stripping its employees of their chosen defense counsel and KPMG was forced to abandon a longstanding policy that it had decided to continue; it was therefore found that government compulsion was the "but for" reason for the new Fees Policy.

This is not a Stein case. This case is more nearly an analog of D.L. Cromwell Investments, Inc., v. NASD Regulation, Inc., 279 F.3d 155 (2d Cir. 2002), in which the government and a private actor, NASD, simultaneously investigated certain stockbrokers for suspected criminal activity. The stockbrokers argued that the Fifth Amendment protected them from complying with NASD's demand for on-the-record interviews (made on the pain of expulsion from their profession) because NASD had become a state actor. As Stein recognized, the holding of D.L. Cromwell is that there was no state action because NASD "had independent regulatory interests and motives for making [its] inquiries and for cooperating with [a] parallel investigation[ ] being conducted by the government." Stein, 541 F.3d at 150. That is, "[NASD] would have requested interviews regardless of governmental pressure." Id. We arrived at this conclusion notwithstanding "informal and formal sharing of documents and information between the government and the NASD" and "the fact that the NASD interview demands followed shortly after [the stockbrokers] contested grand jury subpoenas." Id.

Gilman and McNenney urge that we adopt, in effect, this categorical rule: acts that are taken by a private company in response to government action, and that have as one goal obtaining better treatment from the government, amount to state action. But a company is not prohibited from cooperating, and typically has supremely reasonable, independent interests for conducting an internal investigation and for cooperating with a governmental investigation, even when employees suspected of crime end up jettisoned. A rule that deems all such companies to be government actors would be incompatible with corporate governance and modern regulation. See Solomon, 509 F.2d at 870.

CONCLUSION

For the foregoing reasons, we affirm.

All Citations

826 F.3d 69, 41 IER Cases 795

Footnotes

1 We also affirm the district court's dismissal of Gilman and McNenney's claims for (i) abuse of process against Marsh and the CEO of Marsh, Michael Cherkasky, and (ii) misconduct against Cherkasky as an attorney, in a summary order filed simultaneously with this Opinion.

2 The Severance Plan defines "cause" as including "insubordination," "willful misconduct," "failure to comply with [Marsh] policies or guidelines," and "commission of an act rising to the level of a crime." The Stock Award Plans governing stock bonus units and deferred stock units define "cause" as including "willful misconduct in the performance of the employee's duties," "continued failure after notice, or refusal, to perform the duties of the employee," "breach of fiduciary duty or breach of trust," and "any other action likely to bring substantial discredit to [Marsh]." To the extent this footnote (or any other record citation in this opinion) is drawn from the sealed appendix, the sealed material that is referenced is hereby deemed unsealed.

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09. *Newman v. Highland Sch. Dist. No. 203*, 381 P.3d 1188 (Wash. 2016)

381 P.3d 1188
Supreme Court of Washington,
EN BANC.

Matthew A. Newman, Randy Newman and Marla Newman, Respondents,
v.
Highland School District No. 203, Petitioner.

NO. 90194–5
|
Argued Nov. 17, 2015
|
Filed Oct. 20, 2016

Synopsis

Background: Parents and student-athlete filed negligence complaint against school district after student suffered a permanent brain injury at a football game, one day after he allegedly sustained a head injury at practice. Parents sought discovery of communications between coaches and school district during the time coaches were unrepresented by counsel for school district. School district sought a protective order. The Superior Court, Yakima County, Blaine G. Gibson, J., denied the motion. School district appealed.

Holdings: The Supreme Court, Stephens, J., held that:

[1] as a matter of first impression, attorney-client privilege did not extend to postemployment communications between corporate counsel for school district and former employees, and

[2] parents and student were not entitled to an award of attorney fees.

Affirmed.

Wiggins, J., filed dissenting opinion in which Gordon McCloud and Owens, JJ., and Madsen, C.J., joined.

West Headnotes (11)

[1] **Privileged Communications and Confidentiality**
Government and government employees and officers

311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk120Parties and Interests Represented by Attorney
311Hk126Government and government employees and officers

Attorney-client privilege did not extend to postemployment communications between corporate counsel for school district and former employees, and thus, school district was not entitled to a protective order to shield communications between counsel and former employees in connection with negligence action filed by parents and student-athlete against school district after student suffered a brain injury during a football game; former employees no longer owed duties of loyalty, obedience, and confidentiality to employer. Wash. Rev. Code Ann. § 5.60.060(2)(a).

Cases that cite this headnote

[2] **Privileged Communications and Confidentiality**
Presumptions and burden of proof

311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk171Evidence
311Hk173Presumptions and burden of proof

A party claiming that otherwise discoverable information is exempt from discovery on grounds of the attorney-client privilege carries the burden of establishing entitlement to the privilege. Wash. Rev. Code Ann. § 5.60.060(2)(a).

Cases that cite this headnote

[3] **Privileged Communications and Confidentiality**

Attorney-Client Privilege
Privileged Communications and Confidentiality
Elements in general; definition

311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk100In general
311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk102Elements in general; definition

Attorney-client privilege does not automatically shield any conversation with any attorney; to qualify for the privilege, communications must have been made in confidence and in the context of an attorney-client relationship. Wash. Rev. Code Ann. § 5.60.060(2)(a).

Cases that cite this headnote

[4] **Privileged Communications and Confidentiality**
Elements in general; definition

311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk102Elements in general; definition

Attorney-client privilege is a narrow privilege and protects only communications and advice between attorney and client. Wash. Rev. Code Ann. § 5.60.060(2)(a).

Cases that cite this headnote

[5] **Privileged Communications and Confidentiality**
Corporations, partnerships, associations, and other entities

311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk120Parties and Interests Represented by Attorney
311Hk123Corporations, partnerships, associations, and other entities

Attorney-client privilege extends to corporate clients and may encompass some communications with lower level employees. Wash. Rev. Code Ann. § 5.60.060(2)(a).

Cases that cite this headnote

[6] **Privileged Communications and Confidentiality**
Purpose of privilege
Privileged Communications and Confidentiality
Factual information; independent knowledge; observations and mental impressions

311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk106Purpose of privilege
311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk143Factual information; independent knowledge; observations and mental impressions

Attorney-client privilege does not shield facts from discovery, even if transmitted in communications between attorney and client; rather, only privileged communications themselves are protected to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. Wash. Rev. Code Ann. § 5.60.060(2)(a).

Cases that cite this headnote

[7] **Privileged Communications and Confidentiality**
Purpose of privilege

311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk106Purpose of privilege

Attorney-client privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client. Wash. Rev. Code Ann. § 5.60.060(2)(a).

Cases that cite this headnote

[8] **Privileged Communications and Confidentiality**
Absolute or qualified privilege

311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk108Absolute or qualified privilege

Because attorney-client privilege sometimes results in exclusion of evidence which is otherwise relevant and material, contrary to the philosophy that justice can be achieved only with the fullest disclosure of facts, privilege cannot be treated as absolute; rather, it must be strictly limited to the purpose for which it exists. Wash. Rev. Code Ann. § 5.60.060(2)(a).

Cases that cite this headnote

[9] **Privileged Communications and Confidentiality**
Corporations, partnerships, associations, and other entities

311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk120Parties and Interests Represented by Attorney
311Hk123Corporations, partnerships, associations, and other entities

Corporate attorney-client privilege may arise when the constituents of an organizational client communicate with the organization's lawyer in that person's organizational capacity. Wash. Rev. Code Ann. § 5.60.060(2)(a).

Cases that cite this headnote

[10] **Privileged Communications and Confidentiality**
Corporations, partnerships, associations, and other entities

311HPrivileged Communications and Confidentiality
311HIIIAttorney-Client Privilege
311Hk120Parties and Interests Represented by Attorney
311Hk123Corporations, partnerships, associations, and other entities

Interests served by attorney-client privilege are sufficiently protected by recognizing that communications between corporate counsel and employees during the period of employment continue to be privileged after the agency relationship ends. Wash. Rev. Code Ann. § 5.60.060(2)(a).

Cases that cite this headnote

[11] **Costs**
Attorney fees on appeal or error

102Costs
102XOn Appeal or Error
102k252Attorney fees on appeal or error

Parents and student-athlete were not entitled to an award of attorney fees on appeal from order denying school district's motion for a protective order to shield communications between counsel for school district and former employees under attorney-client privilege in negligence action; school district's response to parents' discovery request was reasonable as issue of whether attorney-client privilege extended to former employees was a novel legal issue. Wash. Rev. Code Ann. § 5.60.060(2)(a); Wash. Super. Ct. Civ. R. 37(a)(4).

Cases that cite this headnote

***1189** Appeal from Yakima County Superior Court, 12–2–03162–1, Honorable Blaine G. Gibson.

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Opinion

STEPHENS, J.

**1 ¶1 Highland High School quarterback Matthew Newman suffered a permanent brain injury at a football game in 2009, one day after he allegedly sustained a head injury at football practice. Three years later, Newman *1190 and his parents (collectively Newman) sued Highland School District No. 203 (Highland) for negligence. Before trial, Highland's counsel interviewed several former coaches and appeared on their behalf at their depositions. Newman moved to disqualify Highland's counsel, asserting a conflict of interest. The superior court denied the motion but ruled that Highland's counsel "may not represent non-employee witness[es] in the future." Clerk's Papers (CP) at 636. Newman then sought discovery concerning communications between Highland and the former coaches during time periods when the former coaches were unrepresented by Highland's counsel. Highland responded with a motion for a protective order, arguing its attorney-client privilege shielded counsel's communications with the former coaches. The trial court denied the motion, and Highland appealed.

¶2 At issue is whether postemployment communications between former employees and corporate counsel should be treated the same as communications with current employees for purposes of applying the corporate attorney-client privilege. Although we follow a flexible approach to application of the attorney-client privilege in the corporate context, we hold that the privilege does not broadly shield counsel's postemployment communications with former employees. The superior court properly denied Highland's motion for a protective order. We affirm the lower court and lift the temporary stay of discovery.

FACTS AND PROCEDURAL HISTORY

¶3 Matthew Newman suffered a permanent brain injury during a football game on September 18, 2009. Newman sued Highland for negligence in violation of the Lystedt law, RCW 28A.600.190, which requires the removal of a student athlete from competition or practice if he or she is suspected of having a concussion. Newman alleges that Matthew suffered a head injury at football practice the day before the September 18 game, and that Highland coaches permitted him to play in the game even though he exhibited symptoms of a concussion.

¶4 In preparing for trial, Newman's counsel deposed the entire football coaching staff employed at the time of Newman's injury, including coaches who were no longer employed by Highland. At the depositions, Highland's counsel indicated that he had interviewed the former coaches before their individual depositions, and was appearing on their behalf for purposes of their depositions.

¶5 Newman moved to disqualify Highland's counsel from representing the former coaches, claiming a conflict of interest under Rule of Professional Conduct (RPC) 1.7. The superior court denied the motion but ruled that Highland's counsel "may not represent non-employee witness[es] in the future." CP at 636.

¶6 Newman then sought discovery concerning communications between Highland's counsel and its former coaches. Highland moved for a protective order to

shield those communications, asserting attorney-client privilege. The superior court denied the protective order and directed Highland to respond to Newman's discovery requests. The superior court ordered Highland's counsel to disclose "exactly when defense counsel represented each former employee," and barred defense counsel from asserting the attorney-client privilege with respect to communications outside the deposition representation. CP at 70.[1]

**2 ¶7 Highland sought discretionary review of the superior court's discovery order, which the Court of Appeals denied. This court subsequently granted discretionary review and *1191 entered a temporary stay of discovery. *Newman v. Highland Sch. Dist. No. 203*, 180 Wash.2d 1031, 332 P.3d 985 (2014).

ANALYSIS

1. The Corporate Attorney–Client Privilege Does Not Shield Communications between Corporate Counsel and Former Employees

[1]¶8 Whether the attorney-client privilege extends to postemployment communications between corporate counsel and former employees is an issue of first impression in Washington. The leading United States Supreme Court case addressing corporate attorney-client privilege, *Upjohn Co. v. United States*, expressly did not answer this question. 449 U.S. 383, 394 n.3, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). Highland argues the flexible approach to protecting privileged communications recognized in *Upjohn* supports extending the privilege to postemployment communications with former employees. Am. Pet'r's Br. at 23. We disagree. Because we conclude *Upjohn* does not justify applying the attorney-client privilege outside the employer-employee relationship, the trial court properly denied Highland a protective order to shield from discovery communications with former coaches who are otherwise fact witnesses in this litigation. We affirm the trial court's decision to deny Highland's motion for protective order, and lift the temporary stay of discovery.

[2]¶9 We begin by recognizing that, in our open civil justice system, parties may obtain discovery regarding any unprivileged matter that is relevant to the subject matter of the pending action. CR 26(b)(1). " '[T]he privilege remains an exception to the general duty to disclose.' " *Peralta v. Cendant Corp.*, 190 F.R.D. 38, 41 (D. Conn. 1999) (alteration in original) (quoting 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 554 (McNaughton rev. ed. 1961)). A party claiming that otherwise discoverable information is exempt from discovery on grounds of the attorney-client privilege carries the burden of establishing entitlement to the privilege. *See Dietz v. John Doe*, 131 Wash.2d 835, 844, 935 P.2d 611 (1997).

[3] [4] [5]¶10 Washington's attorney-client privilege provides that "[a]n attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment." RCW 5.60.060(2)(a). But the attorney-client privilege does not automatically shield any conversation with any attorney. *See, e.g., Morgan v. City of Federal Way*, 166 Wash.2d 747, 755–56, 213 P.3d 596 (2009). To qualify for the privilege, communications must have been made in confidence and in the context of an attorney-client relationship. *See id.* at 755–57, 213 P.3d 596. It is "a narrow privilege and protects only 'communications and advice between attorney and client.' " *Hangartner v. City of Seattle*, 151 Wash.2d 439, 452, 90 P.3d 26 (2004) (quoting *Kammerer v. W. Gear Corp.*, 96 Wash.2d 416, 421, 635 P.2d 708 (1981)). The privilege extends to corporate clients and may encompass some communications with lower level employees, as both the United States Supreme Court and this court have recognized. *Upjohn*, 449 U.S. at 396, 101 S.Ct. 677; *Wright v. Grp. Health Hosp.*, 103 Wash.2d 192, 195–96, 691 P.2d 564 (1984); *Youngs v. PeaceHealth*, 179 Wash.2d 645, 650–51, 316 P.3d 1035 (2014).

**3 [6] [7] [8]¶11 The attorney-client privilege does not shield facts from discovery, even if transmitted in communications between attorney and client. *Youngs*, 179 Wash.2d at 653, 316 P.3d 1035 ("Facts are proper subjects of investigation and discovery, even if they are also the subject of privileged communications."). Rather, only privileged communications themselves are protected in order "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn*, 449 U.S. at 389, 101 S.Ct. 677. The attorney-client privilege "recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client." *Id.* However, because "the privilege sometimes results in the exclusion of evidence which is otherwise relevant and material, contrary to the philosophy that justice can be achieved only with the fullest disclosure of the facts, the privilege cannot be treated as absolute; rather, it must be *1192 strictly limited to the purpose for which it exists." *Pappas v. Holloway*, 114 Wash.2d 198, 203–04, 787 P.2d 30

(1990) (citing *Dike v. Dike*, 75 Wash.2d 1, 11, 448 P.2d 490 (1968)).

¶12 In enunciating a flexible test for determining the scope of the attorney-client privilege in the corporate setting, *Upjohn* expanded the definition of "client" to sometimes include nonmanagerial employees. 449 U.S. at 394–95, 101 S.Ct. 677; *see also Youngs*, 179 Wash.2d at 661, 316 P.3d 1035. The *Upjohn* Court considered several factors, including whether the communications at issue (1) were made at the direction of corporate superiors, (2) were made by corporate employees, (3) were made to corporate counsel acting as such, (4) concerned matters within the scope of the employee's duties, (5) revealed factual information " 'not available from upper-echelon management,' " (6) revealed factual information necessary " 'to supply a basis for legal advice,' " and whether the communicating employee was sufficiently aware that (7) he was being interviewed for legal purposes, and (8) the information would be kept confidential. *Youngs*, 179 Wash.2d at 664 n.7, 316 P.3d 1035 (quoting *Upjohn*, 449 U.S. at 394, 101 S.Ct. 677).

¶13 In denying Highland's motion for a protective order, the superior court incorrectly stated that this court has never adopted *Upjohn*. In both *Wright* and *Youngs*, this court embraced *Upjohn*'s flexible approach to applying the attorney-client privilege in the corporate client context. *Wright*, 103 Wash.2d at 195–96, 691 P.2d 564; *Youngs*, 179 Wash.2d at 645, 316 P.3d 1035. However, until today we have never considered whether *Upjohn* supports expanding the scope of the privilege to include counsel's communications with *former* nonmanagerial employees. In *Youngs*, this court relied on *Upjohn* to recognize that corporate litigants have the right to engage in confidential fact-finding and to communicate directions to employees whose conduct may embroil the corporation in disputes. *Youngs*, 179 Wash.2d at 651–52, 316 P.3d 1035. The court in *Youngs* relied on the values underlying the attorney-client privilege to create an exception to the general prohibition on defense counsel's ex-parte contact with the plaintiff's treating physician, applicable when the physician is employed by the defendant. *Id.* at 662, 316 P.3d 1035 (creating exception based on attorney-client privilege to rule established in *Loudon v. Mhyre*, 110 Wash.2d 675, 756 P.2d 138 (1988)). But *Youngs* did not answer whether the attorney-client privilege should extend beyond termination of the employment relationship.

¶14 Today, we reject Highland's argument that *Upjohn* and *Youngs* support a further extension of the corporate attorney-client privilege to postemployment communications with former employees. The flexible approach articulated in *Upjohn* presupposed attorney-client communications taking place within the corporate employment relationship. *Upjohn*, 449 U.S. at 389, 101 S.Ct. 677 (the purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients"); *see also Youngs*, 179 Wash.2d at 661, 316 P.3d 1035 (noting corporate employees may sometimes be corporate clients). We decline to expand the privilege to communications outside the employer-employee relationship because former employees categorically differ from current employees with respect to the concerns identified in *Upjohn* and *Youngs*.

**4 [9]¶15 A school district, like any organization, can act only through its constituents and agents. *See* RPC 1.13 cmt. 1. Corporate attorney-client privilege may arise when "the constituents of an organizational client communicate[ ] with the organization's lawyer in that person's organizational capacity." *Id.* at cmt. 2; *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73(2) (AM. LAW INST. 2000). An organizational client, including a governmental agency, can require its own employees to disclose facts material to their duties (with some limits not relevant here) to its counsel for investigatory or litigation purposes. *See* RESTATEMENT (THIRD) OF AGENCY § 8.11 (AM. LAW INST. 2006).

¶16 But everything changes when employment ends. When the employer-employee relationship terminates, this generally terminates the agency relationship.[2] As a result, *1193 the former employee can no longer bind the corporation and no longer owes duties of loyalty, obedience, and confidentiality to the corporation. *See id.* & cmt. d. Without an ongoing obligation between the former employee and employer that gives rise to a principal-agent relationship, a former employee is no different from other third-party fact witnesses to a lawsuit, who may be freely interviewed by either party. *See Infosystems, Inc. v. Ceridian Corp.*, 197 F.R.D. 303, 305 (E.D. Mich. 2000) (" 'It is virtually impossible to distinguish the position of a former employee from any other third party who might have pertinent information about one or more corporate parties to a lawsuit.' " (quoting *Clark Equip. Co. v. Lift Parts Mfg. Co.*, 1985 WL 2917, at *5 (N.D. Ill. Oct. 1, 1985) (court order))).

¶17 Highland's argument for extending the attorney-client privilege to its communications with the former coaches emphasizes that these former employees may possess vital information about matters in litigation, and that their conduct while employed may expose the corporation to vicarious liability. These concerns are not unimportant,

but they do not justify expanding the attorney-client privilege beyond its purpose. The underlying purpose of the corporate attorney-client privilege is to foster full and frank communications between counsel and the client (i.e., the corporation), not its former employees. *State v. Chervenell*, 99 Wash.2d 309, 316, 662 P.2d 836 (1983). This purpose is preserved by limiting the scope of the privilege to the duration of the employer-employee relationship. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73(2).[3] Upon termination of the employment relationship, the interests of employer and former employee may diverge. But the attorney-client privilege belongs solely to the corporation, and it may be waived or asserted solely by the corporation, even to the detriment of the employee.

**5 [10]¶18 Refusing to extend the corporate attorney-client privilege articulated in *Upjohn* beyond the employer-employee relationship preserves a predictable legal framework. *Upjohn* recognized the value of predictability when determining the applicability of the attorney-client privilege:

> [I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.

449 U.S. at 393, 101 S.Ct. 677. We find this considerations particularly relevant here, where the question before us is at what point in the employer-employee relationship the attorney-client privilege ceases to attach. All agree that it cannot extend forever and that it cannot encompass every communication between corporate counsel and former employees. But it is difficult to find any principled line of demarcation that extends beyond the end of the employment relationship. We conclude that the interests served by the privilege are sufficiently protected by recognizing that communications between corporate *1194 counsel and employees during the period of employment continue to be privileged after the agency relationship ends. *See supra* note 1.

¶19 We recognized that some courts have extended the corporate attorney-client privilege to former employees because of the corporation's perceived need to know what its former employees know. *See In re Allen*, 106 F.3d 582, 605–06 (4th Cir. 1997) (collecting cases). We find this justification unpersuasive. A defendant might easily perceive itself as needing to know many things known by potential witnesses, and might strongly prefer not to share its conversations with those witnesses with the other side. So might a plaintiff. So might a government. That alone should not be enough to justify frustrating "the truthseeking mission of the legal process" by extending the old privilege. *United States v. Tedder*, 801 F.2d 1437, 1441 (4th Cir. 1986) (citing *United States v. (Under Seal)*, 748 F.2d 871, 875 (4th Cir. 1984)).

¶20 The superior court properly rejected Highland's argument that former employees should be treated the same as current employees. The court appropriately allowed Highland to assert its attorney-client privilege over communications with the former coaches only during the time Highland's counsel purportedly represented them at their depositions. We therefore affirm the superior court's decision to deny Highland's motion for a protective order and lift the temporary stay of discovery issued by our commissioner.

2. Attorney Fees on Appeal

[11]¶21 We deny Newman's request for attorney fees on appeal. Newman requests fees under CR 26(c) and CR 37(a)(4) for successfully challenging Highland's claim of attorney-client privilege. Br. of Resp'ts at 33. We deny Newman's request because Highland's opposition to discovery was reasonable given that the question of whether the corporate attorney-client privilege extends to former employees was a novel legal question of first impression in Washington. CR 37(a)(4) (mandatory award of expenses and attorney fees for successfully challenging a motion becomes discretionary if "the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust"). For these same reasons, we also exercise our discretion to deny Newman's request for fees pursuant to chapter 7.21 RCW (2001).[4]

CONCLUSION

**6 ¶22 We affirm and lift the temporary stay of discovery. The superior court properly denied Highland's motion for a protective order shielding from discovery its postemployment communications with former employees.

WE CONCUR:

Johnson, J.

Fairhurst, J.

González, J.

Yu, J.

WIGGINS, J. (dissenting)

¶23 I agree with the majority that any communications that fall within the attorney-client privilege during employment remain protected by the privilege after employment is terminated. I also agree with the majority this court has adopted the reasoning of *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). However, I disagree with the majority's decision to adopt a bright-line rule that will cut off the corporate attorney-client privilege at the termination of employment, and will exclude from its scope all postemployment communications with former employees, even when those employees have relevant personal knowledge regarding the subject matter of the legal inquiry and even though had they remained employed, such communications with counsel would have been privileged under ***1195** *Upjohn*. This temporal limitation is at odds with the functional analysis underlying the decision in *Upjohn* and ignores the important purposes and goals that the attorney-client privilege serves.

¶24 Instead, I would conclude the scope of the attorney-client privilege and the decision as to whether to extend its protections to former employees is based on the flexible approach articulated in *Upjohn*. Under this flexible analysis, I would hold that postemployment communications consisting of a factual inquiry into the former employee's conduct and knowledge during his or her employment, made in furtherance of the corporation's legal services, are privileged. Accordingly, I respectfully dissent.

ANALYSIS

I. The Majority's Position Is at Odds with *Upjohn's* Functional Analysis

¶25 As the majority correctly acknowledges, this court has embraced the flexible approach in *Upjohn* for determining the scope of the attorney-client privilege in the corporate context. Majority at 1192; *see also Youngs v. PeaceHealth*, 179 Wash.2d 645, 653, 316 P.3d 1035 (2014). *Upjohn* is the leading case on the scope of corporate attorney-client privilege. In *Upjohn*, the Supreme Court was presented with the question of whether the attorney-client privilege in the corporate context could ever apply to communications between corporate counsel and lower-level corporate employees.

¶26 At the time the Supreme Court decided *Upjohn*, two competing tests had emerged in the lower courts regarding the scope of the corporate attorney-client privilege. *Upjohn*, 449 U.S. at 386, 101 S.Ct. 677. One such test, adopted by the lower court in *Upjohn*, was the "control group test," which would have limited the corporate attorney-client privilege to the " 'control group' " of the corporation, namely "those officers, usually top management, who play a substantial role in deciding and directing the corporation's response to the legal advice given." *United States v. Upjohn Co.*, 600 F.2d 1223, 1224, 1226 (6th Cir. 1979), *rev'd*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584. The control group test was based on the rationale that only those individuals who acted like a traditional "client" would receive the protection of the privilege, and as the lower court in *Upjohn* stated, it adopted the control group because the corporate client was an inanimate entity and "only the senior management, guiding and integrating the several operations, ... can be said to possess an identity analogous to the corporation as a whole." *Id.* at 1226.

****7** ¶27 On appeal, the Supreme Court unanimously rejected the narrow control group test. *Upjohn*, 449 U.S. at 390, 101 S.Ct. 677. Instead of looking to the identity of the individual corporate actors to see whether they possessed a sufficient identity of relationship to the corporation so as to qualify as a client—as the lower court had done—the Court looked to the nature of the communications to see whether the purposes underlying the attorney-client privilege would be furthered by its extension to the communications at issue. *Id.* at 391–92, 101 S.Ct. 677. The Supreme Court identified several purposes underlying the privilege, including that the privilege encourages full and frank communication between attorneys and their clients, and enables clients to take full advantage of the legal system. *Id.* at 389, 391, 101 S.Ct. 677. The privilege is based on a recognition "that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Id.* at 389, 101 S.Ct. 677. The control group test was inadequate because it failed to recognize that the privilege "exists to

protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Id.* at 390, 101 S.Ct. 677.

¶28 The *Upjohn* Court declined to establish a bright-line rule regarding the scope of the attorney-client privilege in the corporate setting. *Id.* at 396–97, 101 S.Ct. 677. Instead, the Court provided a functional framework for analyzing the scope of the attorney-client privilege on a case-by-case basis. *Id.* This functional analysis focused on the communications at issue and the perceived purposes underlying the privilege. *Id.* at 394–95, 101 S.Ct. 677. "In large part, the Court's inquiry resolves into a single question: Would application of the privilege under the circumstances ***1196** of this particular case foster the flow of information to corporate counsel regarding issues about which corporations seek legal advice?" John E. Sexton, *A Post–*Upjohn *Consideration of the Corporate Attorney–Client Privilege*, 57 N.Y.U. L. REV. 443, 459 (1982).

¶29 In *Upjohn*, the Court found it relevant that the communications were made by corporate employees to corporate counsel at the direction of corporate superiors, and that the communications concerned factual information that fell within the scope of the employee's duties that was " 'not available from upper-echelon management' " and that was necessary " 'to supply a basis for legal advice.' " *Youngs*, 179 Wash.2d at 664 n.7, 316 P.3d 1035 (quoting *Upjohn*, 449 U.S. at 394, 101 S.Ct. 677). The Court also noted that the communicating employee was aware that the interview was conducted for legal purposes and that the information would be kept confidential. *Id.* In light of these characteristics, the *Upjohn* Court held that these communications were privileged because doing so was consistent with the underlying purpose of the attorney-client privilege to allow for full and frank fact-finding. *Upjohn*, 449 U.S. at 395, 101 S.Ct. 677.

¶30 We previously praised the *Upjohn* Court's analysis and its focus on furthering the "laudable goals of the attorney-client privilege." *Wright v. Grp. Health Hosp.*, 103 Wash.2d 192, 202, 691 P.2d 564 (1984). In our recent decision in *Youngs*, we acknowledged in our discussion of the attorney-client privilege that *Upjohn* "defines the scope of the corporate attorney-client privilege," 179 Wash.2d at 651, 316 P.3d 1035, and we expressly relied on *Upjohn*'s reasoning after observing that Washington courts had endorsed *Upjohn's* " 'flexible ... test' " for more than 30 years, *id.* at 662, 316 P.3d 1035 (alteration in original) (quoting *Wright*, 103 Wash.2d at 202, 691 P.2d 564).

¶31 The majority in this case now eschews *Upjohn* 's functional analysis for a bright-line rule, cutting off the privilege at the termination of employment. *See* majority at 1193–94. The majority argues that *Upjohn* supports this bright-line rule because the Court presupposed that the communications occurred within the corporate employee relationship, *Id.* at 1192. Nothing in the *Upjohn* decision supports the majority's bald assertion that the decision "presupposed attorney-client communications taking place within the corporate employment relationship" before the privilege would attach. *Id.* In fact, 7 of the 86 employees interviewed by corporate counsel in *Upjohn* had left employment prior to being interviewed. *Upjohn*, 449 U.S. at 394 n.3, 101 S.Ct. 677. The Court expressly declined to decide the issue whether former employees were included in the privilege, instead providing the functional framework for lower courts to utilize in answering that precise question.[1] *See id.*

****8** ¶32 Moreover, the majority's focus on the formalities of the relationship between the employee and the corporation as the standard for the attorney-client privilege misses the point of the *Upjohn* Court's functional framework. The *Upjohn* Court rejected the control group test, and the focus that test placed on the level of control and responsibilities of the specific employee, to instead adopt a framework that looked at the communications themselves and the benefits and goals of the privilege. "A primary reason that the *Upjohn* Court rejected the control group test was that in the Court's eyes the restriction placed upon the relationship of the information-giver to the corporation undermined the purposes of the corporate attorney-client privilege." Sexton, *supra*, at 497. "[A]n approach that focuses solely upon the status of the communicator fails to adequately meet the objectives sought to be served by the attorney-client privilege." *Samaritan Found. v. Goodfarb*, 176 Ariz. 497, 501, 862 P.2d 870 (1993). By looking only at the identity of the former employee, the majority sidesteps around the important functional analysis contemplated by *Upjohn*.

***1197** II. The Functional *Upjohn* Analysis Supports Extending the Attorney–Client Privilege to Communications with Former Employees for Purposes of Factual Investigation

¶33 At issue in this case is not, as the majority puts it, "whether postemployment communications between former employees and corporate counsel should be treated *the same as* communications with current employees," majority at 1190 (emphasis added), but rather whether the

corporate attorney-client privilege provides any protection for the communications between the former coaches and the counsel for the school district and the scope of any such protection. Though neither *Upjohn* nor *Youngs* had cause to consider whether and to what degree the privilege extends to former employees, the principles underlying these and other decisions support extending the privilege to former employees in certain circumstances based on the flexible analysis of *Upjohn.*

¶34 While it is well established that the attorney-client privilege attaches to corporations, the application of the privilege to corporations presents unique and special problems. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348, 105 S.Ct. 1986, 1991, 85 L.Ed.2d 372 (1985). Unlike an individual client, who is traditionally both the provider of information and the person who will act on a lawyer's advice, these roles of providing information and acting are often separated within a corporation. *Upjohn*, 449 U.S. at 391, 101 S.Ct. 677. As an inanimate entity, a corporation can act only through its agents and thus cannot itself speak directly to its lawyers. *Commodity Futures Trading Comm'n*, 471 U.S. at 348, 105 S.Ct. 1986. And as the Court recognized in *Upjohn*, it will often be the lower-level employees who possess the information needed by corporate counsel in order to adequately advise the client. *Upjohn*, 449 U.S. at 391, 101 S.Ct. 677. Moreover, lower-level employees can and do, by their individual actions as agents of the corporation, embroil a corporate client in legal difficulties. *Id.* Thus, in at least some cases, the only way corporate counsel will be able to determine what the actions of its client (the corporation) were in order to provide relevant legal advice would be to speak with those lower-level employees that have knowledge of the relevant events and activities of the corporation.

¶35 Former employees, just like current employees, may possess relevant information pertaining to events occurring during their employment "needed by corporate counsel to advise the client with respect to actual or potential difficulties." *In re Coordinated Pretrial Proceedings in Petrol Prods. Antitrust Litig.*, 658 F.2d 1355, 1361 n.7 (9th Cir. 1981). Relevant knowledge obtained by an employee during his or her period of employment does not lose relevance simply because employment has ended. When former employees have relevant knowledge about incidents that occurred while they were employed, the extension of the attorney-client privilege to cover postemployment communications may further support the privilege's fact-finding purpose. *See id.*; *In re Allen*, 106 F.3d 582, 606 (4th Cir. 1997). "[A] formalistic distinction based solely on the timing of the interview [between corporate counsel and the knowledgeable employee] cannot make a difference if the goals of the privilege as outlined in *Upjohn* are to be achieved." Sexton, *supra,* at 499.

**9 ¶36 The majority dismisses this "need to know" rationale as unpersuasive and as an unjustified extension of the purpose of the privilege. Majority at 1193, 1194. But the majority overlooks that this stated purpose—facilitating the flow of relevant and necessary information from lower-level employees to counsel—was a key function of the privilege identified by the Court in *Upjohn* and a critical reason that Court extended the privilege to lower-level employees in the first place. *See Upjohn*, 449 U.S. at 391, 101 S.Ct. 677.

¶37 Other courts have relied on *Upjohn*'s reasoning, and its acknowledgment that one purpose of the privilege is to facilitate the gathering of relevant facts by counsel, to justify extending the scope of the attorney-client privilege to cover at least some communications with former employees. *See, e.g., In re Coordinated Pretrial Proceedings*, 658 F.2d at 1361 n.7 ("Former employees, as well as current employees, may possess the relevant information needed by corporate counsel to advise the client with respect to actual ***1198** or potential difficulties."); *Admiral Ins. Co. v. U.S. Dist. Court*, 881 F.2d 1486, 1493 (9th Cir. 1989) ("[T]he *Upjohn* rationale necessarily extended the privilege to former corporate employees...."); *In re Allen*, 106 F.3d at 606 ("[W]e hold that the analysis applied by the Supreme Court in *Upjohn* to determine which employees fall within the scope of the privilege applies equally to former employees."); *Peralta v. Cendant Corp.*, 190 F.R.D. 38, 41 (D. Conn. 1999).

¶38 However, I acknowledge that *Upjohn* 's policies and purposes do not require us to consider former employees exactly as we consider current employees. Former employees present their own unique considerations: they probably do not communicate with corporate counsel "at the direction of corporate superiors," *Upjohn*, 449 U.S. at 394, 101 S.Ct. 677, and they do not hold an agency relationship with the corporate client such that their present or future actions could bind the corporation.

¶39 I am persuaded that the appropriate line is expressed in this simple test: Did the communications with the former employee, whenever they occurred, "relate to the former employee's conduct and knowledge, or communication with defendant's counsel, during his or her employment?" *Peralta*, 190 F.R.D. at 41. If so, the communications are privileged, consistent with *Upjohn. Id.* The *Peralta* court that adopted this test noted it was rejecting a wholesale application of the specific *factors* identified in *Upjohn* because former employees, unlike

current employees, were not directed to speak with corporate counsel at the direction of management. *Id.* But the court relied on the rationale of *Upjohn*, which is to say the court looked to the purpose of the attorney-client privilege and whether that privilege was served by applying it to postemployment communications with a former employee—it held that the privilege applied to the extent the communications concerned the underlying facts in the case. *See id.*

¶40 The majority justifies departing from *Upjohn* on the basis that former employees "categorically differ" from current lower-level employees, such that the privilege should extend to their communications with corporate counsel. Majority at 1192. The majority focuses on agency principles and the policy announced in the *Restatement (Third) of the Law Governing Lawyers* § 73 (Am. Law Inst. 2000). *Id.* I reject these positions as incorrectly framed statements of the law, and because they are inconsistent with the functional framework of *Upjohn*.

**10 ¶41 The majority gives much weight to the fact that during employment, an employer can force an employee to disclose information to the corporation, but after employment, any such duty expires. Majority at 1192–93. In addition, the majority notes that current employees owe duties of loyalty and obedience to the corporation, which also expire at termination. *Id.* (citing *Restatement (Third) of Agency* § 8.11 (Am. Law Inst. 2006)). Without this continuing duty to the corporation, the majority argues that a former employee becomes a simple third-party fact witness to whom the attorney-client privilege should not attach. *Id.*

¶42 The majority's premise is mistaken. *Upjohn* based its analysis of the attorney-client privilege on the idea that the attorney-client privilege, if applied to lower-level employees, would allow corporate counsel to obtain necessary and relevant information regarding the client, and with that information the attorney could inform the corporation's managers and officers of the corporation's legal duties and obligations. *Upjohn*, 449 U.S. at 392, 101 S.Ct. 677. The value the Court placed on the privilege to in effect promote the free and frank exchange of information presupposes that application of the privilege would foster communications that, but for the privilege, would never have occurred. *See* Sexton, *supra*, at 491; *Upjohn*, 449 U.S. at 389, 101 S.Ct. 677 (noting that a goal of the privilege is to promote "full and frank communication"). Moreover, notably missing from the Supreme Court's analysis in *Upjohn* is any discussion of the roles that a duty of loyalty or obedience plays with respect to the attorney-client privilege. The privilege itself is not grounded in concepts of a duty on behalf of the client to disclose information to its attorney, just as its extension to lower-level employees is not based on their duty to provide information to the corporation.

*1199 ¶43 Concepts of agency are undoubtedly relevant to the corporate attorney-client privilege, just not as the majority applies them. The rationale behind extending the privilege beyond the control group of the corporation is that lower-level employees, by virtue of their agency relationship with the corporation, have the authority to bind the corporation and control its actions in ways that can lead to legal consequences for the corporation. *See Upjohn*, 449 U.S. at 391, 101 S.Ct. 677; *see also Commodity Futures Trading Comm'n*, 471 U.S. at 348, 105 S.Ct. 1986 (noting that a corporation is an inanimate entity that can act only through its agents). It is for this reason that corporate counsel should be able to speak frankly with those employees and agents who have knowledge of the events that relate to the subject of the lawyer's legal services, regardless of those employees' subsequent personal employment decisions. Extending the privilege to cover communications with former employees who were knowledgeable agents of the corporation with respect to the time period and subjects discussed in the communications ensures that this remains a privilege with the corporation and distinguishes these employees from third-party witnesses. Sexton, *supra*, at 497.

¶44 Temporal concepts associated with the duration of agency, as they relate to the timing a communication is made to counsel, should not be dispositive of the privilege, as they bear little relationship to the goals of the privilege identified by the Supreme Court. It is for this reason that I would also reject the position articulated in the *Restatement (Third) of the Law Governing Lawyers* § 73(2) and comment e that the privilege be limited to those with a present and ongoing agency relationship with the corporation. Such a position is incompatible with the *Upjohn* Court's focus on the nature of the communications, rather than on the formalities of the relationship to the corporation. Furthermore, as the *Restatement* itself acknowledges, its position with respect to former employees is inconsistent with other courts that have considered the issue. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 cmt. e (acknowledging that of the few decisions on point, several courts disagree with the *Restatement*'s position regarding former employees).

III. Extending the Privilege to Former Employees Will Not Burden the Legal Process

**11 ¶45 The majority implies that extending the privilege to former employees would lack predictability and would frustrate the truth seeking mission of the legal process. Majority at 1193, 1194. While these concerns are not insignificant, I do not believe they justify the majority's harsh, bright-line rule.

¶46 First, we have continuously held that the attorney-client privilege extends only to communications and does not protect the underlying facts. *Youngs*, 179 Wash.2d at 653, 316 P.3d 1035; *Wright*, 103 Wash.2d at 195, 691 P.2d 564. Highland has always allowed, and concedes, that Newman may continue to conduct ex parte interviews with the former coaches for the purposes of learning any facts of the incident known to the coaches. *See* Pet'r's Reply Br. at 14.

¶47 The attorney-client privilege exists because we recognize that the relationship between attorney and client is important and worth protecting, even at the expense of some measure of truth seeking. *Lowy v. PeaceHealth*, 174 Wash.2d 769, 785, 280 P.3d 1078 (2012) ("[T]he attorney-client ... privilege[ ] [is] ... founded on the premise that communication in th[is] relationship[ ] is so important that the law is willing to sacrifice its pursuit for the truth, the whole truth, and nothing but the truth."). Where we have defined the scope or extended the attorney-client privilege, we have done so in recognition of the important purposes the privilege seeks to protect. *See, e.g., Youngs*, 179 Wash.2d at 650, 316 P.3d 1035; *Dietz v. John Doe*, 131 Wash.2d 835, 849, 935 P.2d 611 (1997). And we have sought to equitably balance the values underlying the privilege against concerns over burdening discovery. *See, e.g., Dietz*, 131 Wash.2d at 849, 935 P.2d 611. In *Dietz*, we addressed the question of whether the attorney-client privilege extends to protect the disclosure of a client's identity, when doing so may implicate the client in potential wrongdoing. *Id.* at 839, 935 P.2d 611. We noted that in such a case, application *1200 of the attorney-client privilege would stand at odds with principles of open discovery and "a general duty to give what testimony one is capable of giving." *Id.* at 843, 935 P.2d 611 (internal quotation marks omitted) (quoting *Jaffee v. Redmond*, 518 U.S. 1, 9, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996)).

¶48 While we extended the privilege in *Dietz*, we recognized our need to keep that particular extension narrow. *Id.* at 849, 935 P.2d 611. "The privilege is *imperative* to preserve the sanctity of communications between clients and attorneys." *Id.* at 851, 935 P.2d 611 (emphasis added). Moreover, the truth seeking concerns expressed by the majority are less serious here than in *Dietz* because application of the privilege wilt not prohibit discovery of relevant facts; Newman remains able to interview the former coaches. By contrast, in *Dietz* the privilege presented a complete obstacle to learning the identity of a potentially at-fault party. *See Dietz*, 131 Wash.2d at 848–49, 935 P.2d 611. The policies underlying the privilege support its extension in this case, and truth seeking principles do not justify a different conclusion.

¶49 Second, like the majority, I too recognize the value of predictability with respect to the boundaries of the attorney-client privilege. Because attorneys and clients must be able to predict with at least some certainty where their discussions will be protected, "[a]n uncertain privilege ... is little better than no privilege at all." *Upjohn*, 449 U.S. at 393, 101 S.Ct. 677. But such concerns do not require that we sever our analysis from the guiding principles of *Upjohn*; rather, we must use those principles to set clear standards for parties and courts to follow.

**12 ¶50 The distinction I would draw today should not be difficult for the parties to apply if the relevant purpose of the privilege—promoting necessary factual investigation—is kept clear. *Accord Peralta*, 190 F.R.D. at 41. It will be incumbent on counsel to exercise caution when communicating with their client's former employees in order to ensure communications stay within these parameters. Should disputes arise as to whether a specific communication is privileged, they should be submitted to the trial court for a determination as to whether the purposes identified today would be furthered by its application.

IV. Application to the Facts of This Case

¶51 In this case, the trial court ordered Highland School District No. 203 to respond to discovery requests concerning the "disclosure of communications between defense counsel and former employees made after the employment ended and not during the time defense counsel claims to have represented the former employees for purposes of their depositions." Clerk's Papers at 68–70. The trial court ordered this disclosure after erroneously concluding that we have not adopted *Upjohn*[2] and on the determination that the attorney-client privilege does not apply to any postemployment communications with former employees. *Id.* at 69–70,

¶52 Matthew Newman has brought claims against the school district based on the Lystedt act, under which coaches who know or suspect an athlete is suffering from a concussion must remove the athlete from play until the

athlete receives proper medical clearance. *See* RCW 28A.600.190; Pet'r's Am. Br. at 4–6; Br. of Resp'ts 6–7. Thus, Highland's liability in this case is contingent on the actions and knowledge of its football coaches who were employed during the time Newman played football for Highland School District and were present when Newman allegedly suffered a concussion and/or injury, regardless of whether those coaches remain employed by the district today. *See* CP at 96–104 (Compl.).

¶53 The former coaches at issue were employed by Highland during the relevant time period when Newman was injured. *See, e.g.*, CP at 1267. They possessed knowledge of matters "within the scope of their duties" as football coaches for the school district, such as the training they received and their interactions with and observations of Newman before and during his injury. *See, e.g.*, CP at 230–32, 1267, 1587–89. Communications with Highland's counsel that concerned the former ***1201** coaches' knowledge and conduct during their employment and the events surrounding Newman's injury would be necessary to supply a basis for legal advice to the school district as to liability.

¶54 In light of these facts, the purposes underlying the privilege support its extension to communications with former coaches regarding their conduct and knowledge during employment. This extension would promote frank and open fact-finding, and enable the attorney to uncover the facts necessary to render legal advice to the client. *Cf. In re Allen*, 106 F.3d at 606. To the extent communication between the former coaches and Highland's attorneys concerns a factual inquiry into the former coaches' conduct and knowledge during his or her employment, I would hold that any such communications are privileged and Highland need not answer questions regarding these communications. I would conclude that postemployment communications between the former employer's counsel and a former employee that constitute a relevant factual inquiry into their conduct and knowledge during employment would be privileged, consistent with *Upjohn*. Thus, I would hold that the trial court's order compelling discovery is based on an incorrect interpretation of the law and should be reversed.

****13** ¶55 This conclusion, however, does not completely resolve the current dispute between the parties about the postemployment communications with former coaches. Newman contends that the communications at issue concern more than just fact-finding. Br. of Resp'ts at 25–30. Newman argues that the predeposition communications with former coaches should not be privileged because the purpose of these predeposition, postemployment communications was not fact-finding, but rather to " 'woodshed[ ]' " the witness and influence the witness's testimony.[3] Br. of Resp'ts at 25–27, 30.

¶56 Some of this controversy stems from the unusual circumstance that Highland's attorneys formally appeared for and represented the former coaches for purposes of their depositions.[4] The trial court allowed this representation,[5] and Newman did not challenge this order on appeal. Thus, Newman seeks, and the trial court order compelled, discovery of communications made only "when defense counsel did not represent the former employees for the purposes of the depositions." CP at 68–70. The communications to prepare the former coaches for a deposition do not appear to fall within the court's order to compel, as the actual representation of the former coaches may potentially include these predeposition meetings between defense counsel and the former coaches. *See, e.g.*, CP at 226–27 (Dep. of Dustin Shafer) (noting that a discussion with defense counsel regarding formal representation for purposes of Shafer's deposition occurred at a meeting with counsel one week prior to his deposition).

¶57 However, the record is unclear as to when the school district's defense counsel represented the former coaches. Without knowing the scope of the communications at issue, whether they were limited to a factual inquiry into the former employee's conduct and knowledge during his or her employment, and whether or not such communications occurred during the period of formal representation, it is impossible to tell whether the communications at issue meet the test I suggest today.

***1202** ¶58 Accordingly, I would vacate the trial court's order to compel. On remand, the plaintiff would not be entitled to the broad discovery of communications with former coaches during the time the coaches were represented, as he has requested. CP at 37–43. And if such broad requests are made, defendant may raise the privilege again to the extent such communications fell within the scope of the direct representation, or to the extent such communications were made as a factual inquiry concerning the former employee's conduct and knowledge during his or her employment, relevant to the underlying case. Consequently, discovery should and would be tailored to specific questioning regarding communications falling outside the bounds of normal factual inquiry and thus is outside the scope of the attorney-client privilege with former employees.

V. Contempt Sanctions and Attorney Fees

****14** ¶59 I would also vacate the trial court's order

imposing contempt sanctions of $2,500 per day on Highland until discovery is provided. We previously placed a broad order staying all matters before the trial court related to the discovery of allegedly privileged communications, which put a stay on the contempt sanctions order. Because I would reverse the trial court's order compelling production, I would also vacate the order imposing sanctions on Highland.

¶60 I also join in the majority's denial of Newman's request for attorney fees.

CONCLUSION

¶61 I would hold that the attorney-client privilege attaches to postemployment communications concerning a relevant factual inquiry into the former employee's conduct and knowledge during his or her employment. The former coaches in this case had relevant information within the scope of their employment, and to the extent these communications concerned their knowledge and conduct during employment with Highland, such communications would be privileged. I would vacate both the trial court's order to compel and contempt order, lift the stay of discovery, and remand for further proceedings consistent with this opinion.

¶62 I dissent.

Gordon McCloud, J.

Owens, J.

Madsen, C.J.

All Citations

381 P.3d 1188, 2016 WL 6126472

Footnotes

1 Newman did not appeal the trial court's order denying disqualification of Highland's counsel from representing the former coaches at their depositions, and does not challenge the assertion of attorney-client privilege during this period. Nor do the parties dispute that communications with counsel during the coaches' employment are protected by the attorney-client privilege. This notion of a "durable privilege" is well recognized and does not appear to be at issue here because the relevant communications occurred after the coaches left Highland's employment. *See In re Coordinated Pretrial Proceedings in Petrol. Prods. Litig.*, 658 F.2d 1355, 1361 n.7 (9th Cir. 1981) (recognizing that attorney-client privileged conversations "remain privileged after the employee leaves"); *see also Peralta v. Cendant Corp.*, 190 F.R.D. 38, 41 (D. Conn. 1999) (concluding any privileged information obtained during employment remains privileged upon termination of employment).

2 Some courts have recognized that the attorney-client privilege could extend to former employees in those situations in which a continuing agency duty exists. *See Peralta*, 190 F.R.D. at 41 n.1 (stating "[a]ccording to the Restatement (Third) of the Law Governing Lawyers, [§ 73 cmt. e,] the attorney-client privilege would not normally attach to communications between former employees and counsel for the former employer" in the absence of "a continuing duty to the corporation" based on agency principles); *Infosystems, Inc. v. Ceridian Corp.*, 197 F.R.D. 303, 306 (E.D. Mich. 2000) (recognizing "there may be situations where the former employee retains a present connection or agency relationship with the client corporation" that would justify application of the privilege).

3 The *Restatement* recognizes that in general privileged communications are temporally limited to the duration of a principal-agent relationship:

> [A] person making a privileged communication to a lawyer for an organization must then be acting as agent of the principal-organization. The objective of the organizational privilege is to encourage the organization to have its agents communicate with its lawyer ... [.] Generally, that premise implies that persons be agents of the organization at the time of communicating.

RESTATEMENT (THIRD) OF THE LAWYERS GOVERNING LAWYERS § 73 cmt. e. The *Restatement* comment acknowledges the privilege may extend to postemployment communications in limited circumstances, based on the agency principles discussed in note 2 of this opinion. *Id.*

4 This discretionary review does not include any issue concerning the trial court's order imposing contempt sanctions against Highland, or limit the trial court's ability to revisit that order in light of our decision. *See Washburn v. Beatt Equip. Co.*, 120 Wash.2d 246, 300, 840 P.2d 860 (1992) ("Absent a proper certification, an order which adjudicates

fewer than all claims or the rights and liabilities of fewer than all parties is subject to revision at any time before entry of final judgment as to all claims and the rights and liabilities of all parties.").

1 In a concurring opinion in *Upjohn*, Chief Justice Burger approved of the factors considered by the majority to conclude that the communications were privileged, but would have gone further to hold that the privilege would also protect communications with a former employee regarding conduct "within the scope of employment." *Upjohn*, 449 U.S. at 403, 101 S.Ct. 677 (Burger, C.J., concurring in part and concurring in the judgment).

2 The trial court issued its order on January 28, 2014, just five days after our decision in *Youngs*, 179 Wash.2d 645, 316 P.3d 1035. CP at 70.

3 The record and briefing indicate that each party has accused the other of witness tampering in this case. *See, e.g.*, Br. of Resp'ts at 30; CP at 830.

4 When asked by the trial court what it meant to represent for purposes of the deposition, the attorney representing Highland stated, "It means that I can interview them, talk to them about the facts, what they recall, give them ideas as to what I think subject matters will come up so they're somewhat prepared as to the questions." Verbatim Report of Proceedings (VRP) at 44 (Sept. 27, 2013).

5 This issue came before the trial court on a motion to disqualify defense counsel filed by Newman. *Id.* at 42. The trial court expressed concerns about defense counsel's representation of these former employees and the potential conflicts this posed. VRP at 117. The trial court concluded this was "a very poor decision" but that it was not necessarily an ethics violation. *Id.* The trial court ordered Highland's counsel not to engage in any further representation of former coaches for depositions. CP at 68–70. The parties have not challenged this ruling in the present appeal, and the merits of this ruling are not properly before the court.

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