Harry Potter and the Questionably Represented Persons

N.H. Rule of Professional Conduct 4.2 and Its Applications

Table 4

1/8/2020

RULES OF EVIDENCE

ARTICLE V. PRIVILEGES

Rule 502. Lawyer-Client Privilege

(a) *Definitions.* As used in this rule:

(1) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

(2) A "representative of a client" is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client.

(3) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.

(4) A "representative of the lawyer" is one employed by the lawyer to assist the lawyer in the rendition of professional legal services.

(5) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) *General Rule of Privilege.* A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between the client or his or her representative and the client's lawyer or the lawyer's representative, (2) between the client's lawyer and the lawyer's representative, (3) by the client or the client's representative or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

(c) *Who May Claim the Privilege.* The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have

authority to claim the privilege but only on behalf of the client.

(d) *Exceptions.* There is no privilege under this rule:

(1) *Furtherance of Crime or Fraud.* If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit in the future what the client knew or reasonably should have known to be a crime or fraud;

(2) *Claimants Through Same Deceased Client.* As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) *Breach of Duty by a Lawyer or Client.* As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer;

(4) *Document Attested by a Lawyer.* As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness;

(5) *Joint Clients.* As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

2016 NHRE Update Committee Note

No change was made to New Hampshire Rule of Evidence 502 by supreme court order dated April 20, 2017, effective July 1, 2017. None of the privilege rules were adopted from the Federal Rules of Evidence so they were not part of the Update Committee's targeted review. Some of the rules of privilege are adopted from the Uniform Rules of Evidence and some of them summarize New Hampshire statutes on privilege that were in existence at the time the New Hampshire Rules of Evidence were adopted. The Uniform Rules of Evidence were modified in 2005. The Update Committee did not make recommendations to amend these rules based upon Uniform Rule modifications.

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Rule 4.2. Communication With Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. An otherwise unrepresented party to whom limited representation is being provided or has been provided in accordance with Rule 1.2(f)(1) is considered

to be unrepresented for purposes of this Rule, except to the extent the limited representation lawyer provides other counsel written notice of a time period within which other counsel shall communicate only with the limited representation lawyer.

Ethics Committee Comment

The ABA Comments have noted that when an organization – a corporation, governmental body, or other entity – is the represented person, certain organizational personnel will be "off-limits" under Rule 4.2. This issue has frequently been the subject of litigation. The ABA Comments adopt what is known as the managing-speaking test. Several other tests have been used, known as the control group test, the blanket ban, the alter ego test and the balancing test. The New Hampshire Supreme Court has not ruled on this matter.

While not controlling on the question of permissible *ex parte* contact with employees of a corporate opponent, it is worth noting that New Hampshire has adopted the control-group test for purposes of applying the attorney-client privilege in the corporate setting. *See* N.H. R. Evid. 502(a)(2)[1]; *Klonoski v. Mahlab*, 1996 U.S. Dist. LEXIS 20360 n.2, *rev'd. on other grounds* 156 F.3d 225 (1st Cir. 1998).

2004 ABA Model Rule Comment
RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each

[1] This statement is more categorical than one the Members of Inns of Court Table 4 would have made. There is no dispositive N.H. Supreme Court case holding the control group test applicable in the attorney-client privilege context.

other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Rule 4.3. Dealing With Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

2004 ABA Model Rule Comment
RULE 4.3 DEALING WITH UNREPRESENTED PERSON

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

ADVOCATE

Rule 3.4. Fairness to Opposing Party and Counsel

A lawyer shall not:

. . . (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

2004 ABA Model Rule Comment
RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

. . . [4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

CLIENT-LAWYER RELATIONSHIP

Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to paragraphs (c), (d), and (e), a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent In providing limited representation, the lawyer's responsibilities to the client, the court and third parties remain as defined by these Rules as viewed in the context of the limited scope of the representation itself; and court rules when applicable.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, except as stated in paragraph (e), but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) A lawyer may counsel or assist a client regarding conduct expressly permitted by state or local law that conflicts with federal law, provided that the lawyer counsels the client about the potential legal consequence of the client's proposed course of conduct under applicable federal law.

(f) It is not inconsistent with the lawyer's duty to seek the lawful objectives of a client through reasonably available means, for the lawyer to accede to reasonable requests of opposing counsel that do not prejudice the rights of the client, avoid the use of offensive or dilatory tactics, or treat opposing counsel or an opposing party with civility.

(g) In addition to requirements set forth in Rule 1.2(c),

(1) a lawyer may provide limited representation to a client who is or may become involved in a proceeding before a tribunal (hereafter referred to as litigation), provided that the limitations are fully disclosed and explained, and the client gives informed consent to the limited representation. The form set forth in section (g) of this Rule has been created to facilitate disclosure and explanation of the limited nature of representation in litigation. Although not prohibited, the provision of limited representation to a client who is involved in litigation and who is entitled as a matter of law to the appointment of counsel is discouraged.

(2) a lawyer who has not entered an applicable limited appearance, and who provides assistance in drafting pleadings, shall advise the client to comply with any rules of the tribunal regarding participation of the lawyer in support of a pro se litigant.

(h) Sample form. ***[Omitted from CLE materials.]***

Ethics Committee Comment

1. **This rule differs from the ABA Model Rule by:**

Deleting the last two sentences of ABA Model Rule 1.2 (a).
Adding a second sentence to Rule 1.2(c).

Adding the phrase, "except as stated in paragraph (e) to 1.2(d).
Adding a new 1.2(e).
Adding a new 1.2(f).
Adding a new 1.2(g).

Adding a new 1.2(h).

2. **The deleted sentences of ABA Model Rule 1.2 (a) provide as follows:**

"A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify."

The particular binding client decisions articulated in the third sentence of Rule 1.2(a) are by no means exclusive. There will obviously be other important client decisions that will be binding upon the lawyer

depending upon the fact specific circumstances of any representation. The Model Rule sentences correctly state those particular client decisions that are binding upon the lawyer. However, specifically including these in the Rule may be wrongly construed by a lawyer to be the *only* binding decisions that can be made by a client. A lawyer must always carefully consider all client requests or decisions, in light of all relevant factors, including but not limited to, the particular fact pattern, type of representation, a client's social and economic considerations, and the scope of representation and earlier decisions reached during the representation. *See, e.g.,* Restatement Third, The Law Governing Lawyers § 21 ("Allocating the Authority to Decide Between a Client and a Lawyer"), § 22 ("Authority Reserved to a Client"), and § 23 ("Authority Reserved to a Lawyer") (2000).

3. The second sentence of Rule 1.2(c) confirms that lawyers providing limited representation are bound by all professional responsibility rules. The Rule also recognizes that these ethical obligations will need to be interpreted, or analyzed, within the context of the limited representation. One example of such an obligation could be the duty, under Rule 1.1(c)(3), to "develop a strategy, in collaboration with the client, for solving the legal problems of the client." A client who retains an attorney for limited purposes may simply want the lawyer to research and provide the applicable law in a specific area, thereby making Rule 1.1(c)(3) inapplicable. Conversely, the lawyer's duty pursuant to Rule 4.1(a) not to make false statements to third persons is the type of fundamental obligation that would remain applicable regardless of the limits placed on the scope of representation.

4. A new section (e) is added to allow a lawyer to counsel or assist a client regarding conduct expressly permitted by state law that conflicts with federal law. The new section is consistent with similar amendments or revisions to Rule 1.2 in other states that have legalized therapeutic cannabis or the recreational use of marijuana. States that have adopted a regulatory approach to marijuana's public health and commercial applications nonetheless contravene the Controlled Substances Act and other federal law. Under the former version of Rule 1.2, a lawyer counseling a client to engage, or assist a client, in conduct that the lawyer knows violates federal law was in violation of section (d). The new section allows the lawyer to counsel or assist a client engaging in the conduct without violating the New Hampshire Rules of Professional Conduct, despite the conflict with federal law, provided that the lawyer also counsels the client about the potential legal consequences under applicable federal law.

5. The added provision in Rule 1.2 (f), restates a rule revision that has been adopted (in various forms) in several other states. Especially in light of a growing concern by New Hampshire practicing lawyers for the professionalism of lawyers, it is appropriate to make a distinction between following client objectives during representation, and the general civility and professionalism expected by all practicing New Hampshire attorneys. The lawyer should also be guided by The New Hampshire Lawyer Professional Creed, adopted April 4, 2001, by the New Hampshire Bar Association Board of Governors (which can be found under "NH Practice Guidelines" on the Bar's website, www.nhbar.org).

6. A new section (g) is added to apply specific rules for the limited representation of a client in a litigation setting, which would require full disclosure and informed consent. A recommended written Consent to

Limited Representation form for compliance with this provision, while not mandated, is provided in section (h). Subsection (g)(2) requires the lawyer to advise the client to comply with whatever applicable court rules may apply, with respect to any "ghost written" pleadings prepared by that lawyer who is not actually involved, by appearance, in the particular litigation.

2004 ABA MODEL CODE COMMENT
RULE 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be

necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Rule 4.4. Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not take any action if the lawyer knows or it is obvious that the action has the primary purpose to embarrass, delay or burden a third person.

(b) A lawyer who receives materials relating to the representation of the lawyer's client and knows that the material was inadvertently sent shall promptly notify the sender and shall not examine the materials. The receiving lawyer shall abide by the sender's instructions or seek determination by a tribunal.

Ethics Committee Comment

Paragraph (a) substantially differs from the ABA model rule by using the word "obvious" to set a higher objective standard.

Paragraph (b) differs from the ABA model rule in three respects: the broader term "materials" replaces "document;" the phrase "reasonably should know" is deleted setting an objective standard for "knowledge"; and a second sentence is added. The second sentence incorporates the New Hampshire Bar Association's Ethics Committee's June 22, 1994, Practical Ethics Article, "Inadvertent Disclosure of Confidential Materials." The Committee concluded that notice to the sender did not provide sufficient direct guidance to lawyers.

The term “materials” includes, without limitation, electronic data.

As to ABA Comments [2] and [3], see Ethics opinion 2008-9/4 discussing duties relating to “metadata”; www.nhbar.org/legal-links/Ethics-Opinion-2008-09_04.asp.

ABA Comment to the Model Rules
RULE 4.4 RESPECT FOR RIGHTS OF THIRD PERSONS

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, "document" or electronically stored information includes in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as "Metadata" that is subject to being read or put into readable form. Metadata in electronic documents creates and obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

[3] Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

CASES

The following cases are representative and helpful, but do not represent the full panoply of available cases. Additional cases exist in the federal context. Our review did not find New Hampshire state cases that were on point but not included.

William D. and Barbara S. Totherow, v. Rivier College & a., No. 05-C-296, 2007 WL 811734 (N.H. Super. Feb. 20, 2007)

2007 WL 811734 (N.H.Super.) (Trial Order)
Superior Court of New Hampshire.

William D. and Barbara S. Totherow,
v.
Rivier COLLEGE, William J. Farrell and Therese Larochelle.

No. 05-C-296.
February 20, 2007.

West Headnotes (1)

[1] **Attorney and Client** Relations, dealings, or communications with witness, juror, judge, or opponent

Counsel for plaintiff in wrongful termination action against college were entitled, consistent with Rules of Professional Conduct, to conduct ex parte interviews with employees of college who were not members of college's control group, that is, current employees of college other than those high level management officials responsible for or significantly involved in making of final decisions with regard to college's legal position in instant litigation. Rules of Prof.Conduct, Rules 1.13, 4.2.

Amended Order on Motion Authorizing Communications With Employees of Defendant Rivier College

Robert J. Lynn, Chief Justice.

Lynn, C.J.

The plaintiff, William D. Totherow, a long time professor of chemistry at defendant Rivier College, was discharged from his employment in 2003. Claiming that his discharge was improper, Totherow thereafter instituted this action against the college and two of its officials, President William J. Farrell and Academic Vice President Therese Larochelle. The writ contains counts for breach of contract, violation of the covenant of good faith and fair dealing, defamation, negligent and intentional infliction of emotional distress and enhanced compensatory damages. Plaintiff Barbara Totherow, the wife of William, also has made a claim for loss of consortium. Presently before the court is plaintiffs' motion for an order authorizing their counsel to conduct ex parte interviews (i.e., without prior notice to the defendants) of "lower echelon employees [of Rivier College] who are not representatives of the organization."[1] For the reasons stated below, I grant the motion in part and deny it in part.

Among the "lower echelon employees" plaintiffs' counsel seek permission to contact and interview on an ex parte basis are current and former members of the college's Rank & Tenure Committee and Ad Hoc Hearing Committee. According to plaintiff, both of these committees played an advisory, but non-binding, role in the internal proceedings undertaken by the college prior to the termination of Professor Totherow. In their response to the motion, the defendants, without specifying which employees fall within this designation, contend that Rule 4.2 prohibits plaintiffs' counsel from having ex parte contact with any current or former "members of the administration" of Rivier College.[2]

As amended effective July 1, 2006[FN3], New Hampshire Rule of Professional Conduct 4.2 states:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. An otherwise unrepresented party to whom limited representation is being provided or has been provided in accordance with Rule 1.2(f)(1) is considered to be unrepresented for purposes of this Rule, except to the extent the limited representation lawyer provides other counsel written notice of a time period within which other counsel shall communicate only with the limited representation lawyer.

This rule traces its origins to the American Bar Association Canons of 1908, and was previously embodied in Disciplinary Rule ("DR") 7-104(A)(1) of the 1970 Model Code of Professional Responsibility (which in 1986 was replaced by the Rules of Professional Conduct). The rule has been adopted in one form or another by federal and state courts throughout the country. The purpose of the rule is "to protect the attorney-client relationship and to prevent clients from making ill-advised statements without counsel of their attorneys." *Clark v. Beverly Health & Rehabilitation Services, Inc.*, 797 N.E.2d 905, 909 (Mass. 2003) (quoting *Messing, supra*, 764 N.E.2d at 833-34)); accord. *United States v. Jamil*, 707 F.2d 638, 646 (2d Cir. 1983) (rule justified as effort to prevent skilled counsel from taking advantage of a represented person through use of "artfully crafted questions").

Although application of the rule is relatively straightforward when the represented person is an individual, the opposite is true when the one represented is a corporation or other collective organization. The difficulty arises, of course, because an organization can act only through it agents and employees, and the critical issue therefore is determining which agents or employees of the organization fall within the protection of the rule. A review of the decisions that have grappled with this issue reveals that courts have adopted no less than five different formulations, as specified below.

Control Group Test: This test is the narrowest and includes within its coverage the fewest number of organization employees. The control group is defined as:

> [T]hose top management persons who [have] the responsibility of making final decisions and those employees whose advisory roles to top management are such that a decision would not normally be made without those persons' advice or opinion or whose opinions in fact form the basis for any final decision.

Fair Automotive Repair, Inc. v. Car-X Serv. Sys., Inc., 471 N.E.2d 554, 560 (Ill.App. 1984). *See* *Klier v. Sordoni Skanska Construction Co.*, 766 A.2d 761, 766-70 (N.J.App. 2001).[4]

Blanket Ban: This approach represents the other extreme; it bans ex parte contact with all current and (under some formulations) former employees of the corporate adversary. Courts which have adhered to this view have tended to rely on the United States Supreme Court's decision in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), which rejected the "control group" test in the attorney-client privilege context, and held that the privilege can apply to communications between lower echelon corporate employees and the corporation's lawyer. *See Young v. Plymouth State College*, Civil No. 96-75-SD (Oct. 22, 1998)(Devine, S.J.); *Public Service Elec. & Gas Co. v. Associated Elec. & Gas, Inc.*, 745 F.Supp. 1037,1039 (D.N.J. 1990).

Managing/Speaking Test: The managing/speaking test holds that the prohibition on ex parte contact applies only to those agents of the corporation who, under the applicable substantive law, have the legal authority to speak for and bind the corporation. The leading case authority for this approach is *Wright by Wright v. Group Health Hospital*, 691 P.2d 564 (Wash. 1984). *See also* *Palmer v. Pioneer Inn Associates, Ltd.*, 59 P.3d 1237, 1247-49 (Nev. 2002).[5]

Alter Ego Test: This test is similar to but slightly broader than the Managing/Speaking Test. It encompasses within the ambit of Rule 4.2 those employees or agents of a represented organization (1) whose acts or omissions have the legal power to bind the organization in the matter, (2) whose acts or omissions are imputed to the organization for the purposes of determining its

liability, or (3) who are responsible for implementing the advice of the organization's lawyer. The leading case supporting this test is *Niesig v. Team I,* 559 N.Y.S.2d 493 (N.Y.Ct.App. 1990). *See also* *United States ex rel. O'Keefe v. McDonnell Douglas Corp.* 132 F.3d 1252 (8th Cir. 1998); *Strawser v. Exxon Co., U.S.A.*, 843 P.2d 613, 619-21 (Wyo. 1992). This test is broader than the Managing/Speaking Test in that it covers low level employees who have no authority to speak for or bind the organization, but who allegedly committed the act or omission upon which the organization's liability is based under the doctrine of respondeat superior. Under this test, ex parte contact with low level employees who are merely witnesses is not prohibited. As one court has pointed out, however, a practical difficulty with this test is that it may not be possible to determine whether a particular employee fits into the category of "mere witness" or one whose liability is imputed to the organization until after an interview of the employee is completed, and obviously a lawyer's right to conduct the interview cannot be made to turn on its outcome. *See* *Matter of Advisory Committee Opinion 688*, 633 A.2d 959, 962 (N.J. 1993).

Balancing Test: This test weighs the following factors -- (1) whether an employee's statements are likely to be admissible against the employer, (2) the employer's need to have counsel present in the particular circumstance of the case, and (3) the plaintiff's need for informal discovery -- and then makes a case by case determination of whether ex parte contact should be allowed. *See* *Curley v. Cumberland Farms, Inc.*, 134 F.R.D. 77, 82 (D.N.J. 1991); *Morrison v. Brandeis University*, 125 F.R.D. 14 (D.Mass. 1989); *Mompoint v. Lotus Development Corp.*, 110 F.R.D. 414, 418-19 (D.Mass. 1986); *Frey v. Department of Health & Human Services*, 106 F.R.D. 32,36 (E.D.N.Y. 1985).

Although the New Hampshire Supreme Court has not had occasion to address the issue of how Rule 4.2 applies in the organizational context, the existing commentary to New Hampshire's rule strongly suggests that the drafters intended to adopt the control group test. The New Hampshire Comments specifically reflect that certain language from the ABA comments to Model Rule 4.2 were eliminated by the Committee which drafted the New Hampshire rule. The New Hampshire comments state:
The New Hampshire Committee has modified the official comment to Rule 4.2 by eliminating the following language from the comment thoughts by the ABA in August of 1983: "This rule prohibits communications by a lawyer... with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." Instead the New Hampshire Committee decided to adopt the comments originally proposed by the Kutak Committee in May of 1981.

Using the example of taking a statement from the driver of a Titanic Oil gasoline truck involved in an accident, the committee felt there was nothing improper or unethical for plaintiff's counsel to take a statement from the driver even though counsel knew that Titanic Oil was represented by retained counsel.[6]

The conclusion that the drafters of New Hampshire Rule 4.2 intended to adopt the control group test is further reinforced by the fact that our rules of evidence explicitly adopt this test for purposes of applying the attorney-client privilege. *See* N.H.R. Evid. 502(a)(2) (defining "representative of a client" as "one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client"); *id.*, Reporter's Notes ("Uniform Rule 502(a)(2) adopts a definition in terms of authority to obtain or act upon the basis of legal services, the so-called 'control group' test, which the Federal Advisory Committee described as the 'most restricted position.' ... The approach of the Uniform Rule has been adopted, because it is consistent with the purpose of the privilege to encourage communications without unduly inhibiting trial preparation in the special context of corporate activity. The 'control group' test is preferable to the principal alternative, which is that the privilege cover any employee communication to counsel directed by the employer and referring to the performance of his duties.").

Given the drafters' apparent purpose in promulgating New Hampshire Professional Conduct Rule 4.2, and in the absence of controlling precedent to the contrary from our supreme court, I apply the control group test in deciding the instant motion. Utilizing this test, I hold that plaintiffs' counsel may initiate ex parte contacts with, and may conduct ex parte interviews of, all current employees of defendant Rivier College other than those high level management officials of the college who are responsible for or are significantly involved in the making of final decisions with regard to the college's legal position in this litigation. *See* *Klier, supra,* 766 A.2d at 768. The mere fact that an employee of the college may possess factual information concerning the litigation, or even may have engaged in conduct that could be imputed to the college or upon

which the college could be found liable, does not render such a person a member of the control group. *Id.* at 768-70.

However, I further hold that plaintiffs' counsel may not conduct ex parte interviews with current employees of Rivier College who either presently are members of the college's Rank & Tenure Committee or Ad Hoc Hearing Committee or were members of these committees at the time the proceedings against Professor Totherow were ongoing. Although it is true, as plaintiffs argue, that members of the foregoing committees lacked the authority to make final decisions regarding Professor Totherow's employment status, the record indicates that, at the very least, these committees played significant advisory roles to the college's top management in its decision-making on this matter. Consequently, I conclude that both committees are part of the college's control group for purposes of this litigation.

Lastly, I consider application of Rule 4.2 with respect to former employees of the college, including those former employees who may have been members of the Rank and Tenure Committee or the Ad Hoc Hearing Committee at the time those committees dealt with the Totherow matter. As to all such former employees of the college, I find the reasoning of cases such as *Clark, supra*, and *H.B.A. Management, Inc. v. Schwartz*, 693 So.2d 541 (Fla. 1997), persuasive and I therefore follow the majority view in holding that Rule 4.2 simply does not apply to former employees of an organization. Accordingly, former employees of the college may be contacted and interviewed ex parte by plaintiffs' counsel.[7]

So ordered.

February 20, 2007

ROBERT J. LYNN

Chief Justice

Footnotes

1 Although asserting their belief that they have a right to conduct ex parte interviews with lower echelon employees, plaintiffs' counsel note that if their view was later found to be incorrect they could be faced with possible sanctions for violating Rule 4.2 of the New Hampshire Rules of Professional Conduct. In order to avoid the prospect of such career-damaging exposure, counsel requests an affirmative order of approval from this court prior to undertaking said action.

2 Plaintiffs' motion suggests that the parties have engaged in a game of cat and mouse over this issue. Thus, in response to the request of plaintiffs' counsel that the defense assent to ex parte interviews, defendants' counsel have asserted that such assent cannot be provided until after plaintiffs' counsel identify the individuals they desire to interview. Not surprisingly, plaintiffs' counsel declined this request and instead proposed that defendants' counsel identify which present or former employees of Rivier College the defendants claim are "administration members." Defendants' counsel have similarly declined to show their cards first.

3 The 2006 amendment substituted the word "person" for the word "party" in the first sentence and added the second sentence to the Rule. While it can be argued that, in some contexts, substitution of the word "person" for the word "party" reflects an intention that the amended rule prohibit ex parte contact with a broader class than the former version, courts generally have not interpreted this change to exp and the scope of the prohibition applicable to employees of a represented organization. *See* *Messing, Rudavsky & Weliky, P.C. v. President and Fellows of Harvard College*, 764 N.E.2d 825, 830-31 (2002).

4 In 1996, New Jersey adopted a more refined version of the control group formulation. It amended Rule 4.2 so as to specifically prohibit contact with a represented organization's "litigation control group." It then adopted RPC [Rule of Professional Conduct] 1.13, which states:
For the purposes of RPC 4.2 ... the organization's lawyer shall be deemed to represent not only the organizational entity but also members of its litigation control group. Members of the litigation control group shall be deemed to include current agents and employees responsible for, or significantly involved in, the determination of the organization's legal position in the matter whether or not in litigation, provided, however, that "significant involvement" requires involvement greater, and other than, the supplying of factual information or data respecting the matter. Former agents and employees who were members of the litigation control group shall presumptively be deemed to be represented in the matter by the organization's lawyer but may at any time disavow such representation.

[5] The cases purporting to apply the Managing/Speaking Test have not always reached consistent results on the issue of whether an attorney is prohibited from having ex parte contact with any agent or employee of a represented organization whose statement could merely bind the organization in an *evidentiary* sense (i.e., the employee's statement would be admissible against the organization as non-hearsay evidence under Rule of Evidence 801 (d)(2)(D)), or whether the agent or employee must have the authority to *conclusively* bind the organization. *See* *Weider Sports Equip. Co., Ltd. V. Fitness First, Inc.*, 912 F.Supp. 502, 507 n.7, 509-10 (D.Utah 1996). In its recent adoption of this test, the Nevada Supreme Court made it clear that only an employee who can conclusively *bind* the organization is included within that state's no-contact rule. *See Palmer, supra*, 53 P.3d at 1248.

[6] Although the New Hampshire Supreme Court adopted the version of Rule 4.2 quoted at the beginning of this opinion in 2006, the court has not yet adopted either the revised ABA or New Hampshire comments to the rule. Thus, the existing comments quoted in the text are the ones applicable to this case. Proposed revisions to the comments are currently before the New Hampshire Supreme Court's Advisory Committee on Rules. The ABA comments to its latest (2004) version of the rule state that the rule is intended to adopt the Managing/Speaking Test. The proposed New Hampshire comments merely identify the various tests, indicate that the New Hampshire Supreme Court has not ruled on the matter, and note that New Hampshire has adopted the Control Group Test for purposes of applying the attorney-client privilege.

[7] Of course, should any present or former employee of the college indicate that he or she is represented (either by the college's attorneys or by independent counsel), Rule 4.2 will preclude plaintiffs' attorneys from interviewing that person without the consent of the person's lawyer. Moreover, in conducting any ex parte interviews, plaintiffs' counsel must comport with Professional Conduct Rules 4.1 (governing a lawyer's duty of truthfulness to a third person), 4.3 (governing a lawyer's dealings with unrepresented persons), and 4.4 (requiring that a lawyer not resort to improper or illegal methods of obtaining evidence), and must refrain from inquiring into matters that are privileged. *See Clark, supra*, 797 N.E.2d at 911-12.

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FORTUNE LAURELL, LLC V. YUNNAN NEW OCEAN AQUATIC PRODUCT SCIENCE AND TECHNOLOGY GROUP CO., LTD., ET AL., No. 218-2017-CV-01449, 2018 WL 3942230 Order on Pl. Mot. to Compel (N.H. Super. Aug. 14, 2018)

2018 WL 3942230 (N.H.Super.) (Trial Order)
Superior Court of New Hampshire.
Rockingham County

FORTUNE LAURELL, LLC,
v.
YUNNAN NEW OCEAN AQUATIC PRODUCT SCIENCE AND TECHNOLOGY GROUP CO., LTD., et al.

No. 218-2017-CV-01449.
August 14, 2018.

Order on the Plaintiff's Motion to Compel

N. William **Delker**, Judge.

***1** The plaintiff, Fortune Laurell, LLC, commenced this action against Yunnan New Ocean Aquatic Product Science and Technology Group Co., Ltd. and a number of its subsidiaries (the "YOK defendants") for, *inter alia*, common law breach of contract. One issue that is currently being litigated in this action centers around the propriety of a trustee attachment levied against High Liner Foods (USA) incorporated ("High Liner (USA)"), which is a subsidiary of High Liner Foods (Canada) ("High Liner (Canada)"). High Liner (Canada) is not a party to this law suit in any capacity. The plaintiff moves to compel the production of certain emails between employees of High Liner (Canada) and the YOK defendants, arguing that they are relevant to the dispute concerning the trustee attachment at issue. High Liner (USA) objects. For the following reasons, the plaintiff's motion to compel is GRANTED.

Background

A description of the facts underlying this action is set forth in the Court's prior order on High Liner (USA)'s motion to discharge, and is incorporated by reference herein. *See* Doc. # 18. In short, the plaintiff seeks to attach money which High Liner (USA) allegedly owes to the YOK defendants.

Pursuant to RSA 512:14, High Liner (USA) and the plaintiff have conducted discovery relative to High Liner (USA)'s chargeability as a trustee in this matter. In response to the plaintiff's document requests, High Liner (USA) produced a privilege log which, among other things, listed email communications between High Liner (Canada)'s head of procurement, Denis Galleria ("Galleria"), and his counterpart at the YOK defendants, Jane Yu ("Yu"). *See* Pl.'s Mot. Comp. Ex. C; *see also* Def.'s Obj. at 2 (listing the communications at issue).

On May 7, 2018, Fortune Laurell filed a motion to compel the production of these communications, arguing that the attorney client privilege did not apply because no attorney or agent thereof was a party to the communications. High Liner (USA) objected, arguing that the communications fell within the common interest doctrine. To support this position, High Liner (USA) submitted the affidavit of Tim Rorabeck ("Rorabeck") who is the Executive Vice President, Corporate Affairs, General Counsel, and Secretary for High Liner (Canada), and the Executive Vice President and Secretary of High Liner Foods (USA).

Rorabeck claims that the YOK defendants and High Liner (USA) share a common interest in the pending attachment. Rorabeck Aff. ¶ 5. Specifically, Rorabeck avers that "out of respect for" this Court, High Liner (USA) has acquired $600,000 from High Liner (Canada)—which funds would have been paid to the YOK defendants for fish it supplied to High Liner (Canada)—and that if the plaintiff prevails in this matter, High Liner (USA) will pay that money as directed by the Court. *Id.* Rorabeck further asserts that the communications at issue reflect the advice as well as the thoughts and impressions of counsel for both entities as it relates to the attachment, and that such communications are part of a coordinated plan to align their respective strategies to better oppose the plaintiff. Rorabeck Aff. ¶ 6–7. Thus, the Court must determine whether the common interest doctrine shields the communications at issue.

Analysis

***2** Long before the adoption of the Rules of Evidence in 1985, the New Hampshire Supreme Court held that "[t]he common law rule that confidential communications between a client and an attorney are privileged and protected from inquiry is recognized and enforced in this jurisdiction." *Riddle Spring Realty Co. v. State*, 107 N.H. 271, 273 (1966) (quotation omitted). It is well settled that "[w]here legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications related to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser unless the protection is waived by the client or his legal representatives." *Id*. (citation omitted). The burden of establishing the existence of the attorney-client privilege rests with the party asserting it. *McCabe v. Arcidy*, 138 N.H. 20, 25 (1993). In New Hampshire, "the rules of evidence which [ ] govern privileged matters at trial govern such matters when they arise during discovery." *Riddle Spring Realty Co.*, 107 N.H. at 273 (citation omitted).

"Although occasionally termed a privilege itself, the common interest doctrine is really an exception to the rule that no privilege attaches to communications between a client and an attorney in the presence of a third person." *United States v. BDO Seidman, LLP*, 492 F.3d 806, 815 (7th Cir. 2007) (citation omitted). The common interest doctrine applies when two or more clients consult or retain the same attorney to represent them on a matter of common interest. *Cavallaro v. United States*, 284 F.3d 236, 249 (1st Cir. 2002); *see also United States v. Schwimmer*, 892 F.2d 237, 243 (2d. Cir. 1989) (noting that the common interest rule is also known as the joint defense privilege). "In such a situation, the communications between each of them and the attorney are privileged against third parties." *Cavallaro*, 284 F.3d at 249 (citations omitted). Similarly, "the privilege [also] applies to communications made by the client or the client's lawyer to a lawyer representing another in a matter of common interest." *Id*. at 249-50 (quoting *Proposed Fed. R. Evid*. 503(b) (emphasis added).

As relevant here, New Hampshire Rule of Evidence Rule 502(b) codifies the common interest rule. It provides as follows:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between the client or his or her representative and the client's lawyer or the lawyer's representative, (2) between the client's lawyer and the lawyer's representative, *(3) by the client or the client's representative or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein*, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

N.H. R. Evid. 502(b) (emphasis added); *see also N.H. R. Evid.* 502 (a)(5) (stating that "[a] communication is 'confidential' if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication."). The New Hampshire rule was taken from the Uniform Rules of Evidence. *See N.H. R. Evid.* 502 (committee notes which state that "[n]one of the privilege rules were adopted from the Federal Rules of Evidence" but that some of the privilege rules were adopted from the Uniform Rules of Evidence); *cf. Uniform Rule of Evidence* 502(b)(3) ("by the client or a representative of the client or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein").

***3** The language of the New Hampshire rule is similar, but narrower than, proposed Federal Rule of Evidence 503. Although this federal rule was never adopted by Congress, it has guided the federal courts for decades. *See BDO Seidman, LLP*, 492 F.3d at 814-15 (noting that this proposed rule was promulgated by the United States Supreme Court in 1972). The proposed rule provides as follows:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications[,] made for the purpose of facilitating the rendition of professional legal services to the client…[,] by him or his lawyer to a lawyer representing another in a matter of common interest.

Proposed Fed. R. Evid. 503 (b); *see also* 56 F.R.D. 183, 236 (1972). The common interest rule is also recognized by the Restatement (Third) of the Law Governing Lawyers (the "Restatement"). The Restatement provides:

> If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged … that relates to the matter is privileged as against third persons....

Restatement (Third) of the Law Governing Lawyers § 76(1); *see also id*. at cmt. d (stating that "[u]nder the privilege, any member of a client set—a client, the client's agent for communication, the client's lawyer, and the lawyer's agent [cross reference omitted]—can exchange communications with members of a similar client set. However, a communication directly among the clients is not privileged unless made for the purpose of communicating with a privileged person …"); *Hanover Ins. Co. v. Rapo & Jepsen Ins. Services, Inc.*, 870 N.E.2d 1105, 1110 (Mass. 2007) (adopting the Restatement and noting that the common interest doctrine "prevents waiver of the attorney-client privilege when otherwise privileged communications are disclosed to and shared, in confidence, with an attorney for a third person having a common legal intent for the purpose of rendering legal advice to the client.").

Despite the absence of a uniform rule, there is a significant body of federal case law as to the common interest rule. However, the federal case law is incoherent on the issue of whether clients with a common interest may communicate with each other (outside the lawyers' presence) without waiving the attorney client privilege. Although the federal courts look to the proposed rule for guidance, the scope of the rule is ultimately a matter of federal common law. Put another way, the federal common interest rule is a judicially-created doctrine that is not strictly tethered to the language of Proposed Federal Rule of Evidence 503. This has led to differing results, a lack of clarity, and much dictum on the issue of whether a communication between clients is privileged under the rule.

A leading federal case on this issue is *In re Teleglobe Communications Corp.*, 493 F.3d 345, 364 (3d. Cir. 2007). In that case the, Third Circuit Court of Appeals construed a provision of the Delaware Rules of Evidence, which is similar to New Hampshire Rule 502(b). In analyzing that rule, the Court reasoned that in order for the common interest doctrine to apply, the communication must be shared with an attorney. Specifically, the Court said as follows:
***4** [T]o be eligible for continued protection, the communication must be shared with the *attorney* of the member of the community of interest. *Cf. Ramada Inns, Inc. v. Dow Jones & Co.*, 523 A.2d 968, 972 (Del. Super. Ct. 1986) (emphasizing that the relevant Delaware evidentiary rule protects communications disclosed to an attorney). Sharing the communication directly with a member of the community may destroy the privilege. Second, all members of the community must share a common legal interest in the shared communication. Rice § 4:35. Delaware Rule of Evidence 502(b)(3), which sets out the State's version of the community-of-interest privilege, incorporates both requirements (that the clients' separate attorneys share information and that the clients have a common legal interest):

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications[,] made for the purpose of facilitating the rendition of professional legal services to the client… [,] by the client or the client's representative or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another in a matter of common interest.

Del. R. Evid. 502(b)(3).

The requirement that the clients' separate attorneys share information (and not the clients themselves) derives from the

community-of-interest privilege's roots in the old joint-defense privilege, which (to repeat) was developed to allow *attorneys* to coordinate their clients' criminal defense strategies. *See Chahoon v. Commw.*, 62 Va. 822, 21 Gratt. 822, 1871 WL 4931, at *11 (1871). Because the common-interest privilege is an exception to the disclosure rule, which exists to prevent abuse, the privilege should not be used as a *post hoc* justification for a client's impermissible disclosures. 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.

Id. at 364–65 (emphasis in the original).

To the chagrin of many commentators, numerous federal courts have cited the above proposition of law (albeit, in dictum) even though it was premised upon a Delaware evidentiary rule. *See* William T. Barker, *The Attorney-Client Privilege, Common-Interest Arrangements, and Networks of Parties with Preexisting Obligations*, 53 Tort Trial & Ins. Prac. L.J. 1, n. 213 (2017) (collecting and commenting on the following relevant cases: *Shipyard Assocs., L.P. v. City of Hoboken*, No. 14-1145 (CCC), 2015 U.S. Dist. LEXIS 100927, at *15–16, *20 (D.N.J. Aug. 3, 2015) (refraining from ruling on common interest); *In Re: Plasma-Derivative Protein Therapies Antitrust Litig.*, No. 09 C 7666, No. 11 C 1468, 2013 U.S. Dist. LEXIS 29624, at *13 (N.D. Ill. Mar. 4, 2013) (citing *Teleglobe* on this point but never relying on it); *McLane Foodservice, Inc. v. Ready Pac Produce, Inc.*, No. 10-6076 (RMB/JS), 2012 U.S. Dist. LEXIS 76343, at *12-13 (D.N.J. Jun. 1, 2012) (summarizing *Teleglobe*); *In re Processed Egg Prods. Antitrust Litig.*, 278 F.R.D. 112, 118(E.D. Pa. Oct. 19, 2011) (summarizing *Teleglobe*); *D&D Assocs., Inc. v. Bd. of Educ. of N. Plainfield*, No. 03-1026 (MLC), 2011 U.S. Dist. LEXIS 51853, at *13–14 (D.N.J. May 13, 2011) (citing *Teleglobe* on this point but not relying on it); *Munich Reins. Am., Inc. v. Am. Nat'l Ins. Co.*, No. 09-6435 (FLW), 2011 U.S. Dist. LEXIS 41826, at 63–64 (D.N.J. Apr. 18, 2011) (summarizing *Teleglobe*); *Robert Bosch LLC v. Pylon Mfg. Corp.*, 263 F.R.D. 142, 146 (D. Del. 2009) (citing *Teleglobe* on this point but rejecting some privilege claims on other grounds and sustaining other claims without discussing this issue); *In re Ginn-LA St. Lucie Ltd.*, 439 B.R. 801, 805 & n.4 (Bankr. S.D. Fla. Nov. 9, 2010) (quoting *Teleglobe* and Restatement on this point in describing common interest doctrine, but only as background for another issue).

***5** In fact, nearly all the federal cases cited by High Liner (USA) contain dictum asserting that the communication must be made to an attorney to satisfy the rule. *See BDO Seidman, LLP*, 492 F.3d at 815 (citing proposed Rule 503(b) and stating that in order for the attorney-client privilege to attach, the communication in question must be made "to an attorney"); *In re Bevill, Bresler, & Shulman Asset Mgmt.*, 805 F.2d 120, 126 (3d. Cir. 1986) ("The joint defense privilege protects communications between an individual and an attorney for another when the communications are part of an on-going and joint effort to set up a common defense strategy." (quotation omitted)); *In re Tyco Int'l, Inc.*, No. MDL XXXXXX-B, Civ. 0-352–B, 02-1357–B, 2004 WL 556715, *1, *2 (D.N.H. Mar. 19, 2004) ("As the First Circuit has recognized, the common interest exception exists to permit lawyers for parties bound by a common interest to work together to achieve a shared goal." (citation omitted)); *In re Grand Jury Subpoena*, 274 F.3d 563, 572 (1st Cir. 2001) ("The joint defense privilege protects communications between an individual and an attorney for another when the communications are part of an ongoing and joint effort to set up a common defense strategy." (quotation omitted)); *United States v. Schwimmer*, 892 F.2d 237, 243 (2d. Cir. 1989) ("The common interest rule serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel." (citation omitted)); *Haines v. Liggett Group Inc.*, 975 F.2d 81, 94 (3d Cir. 1992) ("This joint defense privilege enables counsel for clients facing a common litigation opponent to exchange privileged communications and attorney work product in order to adequately prepare a defense without waiving either privilege." (citation omitted)); *Dexia Credit Local v. Rogan*, 231 F.R.D 268, 273 (N.D. Ill. 2004) ("Thus, where persons confer with counsel for the purpose of advancing their joint defense, the conference is sealed from outside view." (quotations omitted)).

However, as the Court observed while conducting its own research, there are numerous federal cases which hold that clients may communicate amongst each other on matters of common interest without waving the attorney client privilege. Take, for example, *Crane Sec. Techs., Inc. v. Rolling Optics, AB*, 230 F. Supp. 3d 10, 22 (D. Mass. 2017). In that case, the Massachusetts District Court held that "[t]he fact that communications are between nonlawyers does not per se waive the privilege." *Id*. at 21–22. The court described this holding as "uncontroversial" and cited a number of district court cases to support its reasoning. *See id*. at 22 ("In *In re Prograf Antitrust Litigation*, No. 1:11-md-02242-RWZ, 2013 WL 1868227, *1, 3 (D. Mass. May 3, 2013), the idea that non-lawyers could discuss or relay legal advice without copying an attorney was so uncontroversial that Judge Zobel, incorporating it into her ruling, did not even discuss it. Other courts have held the same."); *see id*. (citing *Gucci America, Inc. v. Gucci*, 2008 WL 5251989, *1 (S.D.N.Y. Dec. 15, 2008) (if privileged information is

shared between parties that have a common legal interest, "the privilege is not forfeited even though no attorney either creates or received that communication"); *INVISTA North America S.a.r.l. v. M&G USA Corp.*, 2013 WL 12171721, *1, *5 (D. Del. Jun. 25, 2013) (common-interest doctrine protects communications between non-attorneys); *IBJ Whitehall Bank & Trust v. Cory & Associates, Inc.*, 1999 WL 617842, at *6-7 (N.D. Ill. Aug. 12, 1999) (attorney-client privilege exists for communications between non-lawyers: "[s]o long as the parties keep the advice within their circle of common interest, the privilege is not waived"); *McCook Metals LLC v. Alcoa Inc.*, 192 F.R.D. 242, 255 (N.D. Ill. Mar. 2, 2000) ("[I]t appears implicit in present day litigation with multiple attorneys required for proper representation that attorneys must be allowed to confer with each other regarding the representation of a client on a privileged basis in the same way that clients must be able to discuss the advice of counsel amongst themselves on a privileged basis" (citations omitted)); *see also Heidelberg Harris, Inc. v. Mitsubishi Heavy Industries, Ltd.*, No. 95 C 0673, 1996 WL 514997, *1 (N.D. Ill. Sept. 6, 1996) ("Of necessity, communications between their respective counsel - and between themselves as communicators of their counsels' opinions are well within the common legal interest extension of the attorney-client privilege."); *cf. United States v. Gotti*, 771 F. Supp. 535, 545 (E.D.N.Y. July 19, 1991) ("The defendants would extend the application of the joint defense privilege to conversations among the defendants themselves even in the absence of any attorney during the course of those conversations. Such an extension is supported neither in law nor in logic and is rejected.").

***6** Academics are as divided as the federal courts on this issue. Some have advocated for a broad rule that allows for similarly-situated parties to openly share the maximum amount of information possible without fear of compromising their respective legal strategies. *See* Barker, *supra* at 22-23 (discussing the opinion of Professor James Fischer). Others have argued that such a broad rule would do serious damage to the truth-finding mission of the justice system. *See id*. at 23 (discussing the opinion of Professor Gladys Giesel); *see also id*. ("[N]o one has ever made a convincing argument that strategy sessions among co-defendants produce a benefit to the legal system that outweighs the cost of the loss of evidence to the courts." (quoting *24 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure* § 5505, nn.2–3 (1986)); Katherine Traylor Schaffzin, *An Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It*, 15 B.U. Pub. Int. L.J. 49, 79–80, n. 114 (2005) (arguing that "[e]xcluding direct client-to-client communications from a uniform common interest doctrine will uphold the boundaries of the attorney-client privilege and further the underlying search for truth.").

Thankfully, the Court need not become embroiled in this legal quagmire, as the requirements of New Hampshire Rule of Evidence 502(b) are unambiguous. "When interpreting a rule of evidence, as with a statute, [the Court] will first look to the plain meaning of the words." *State v. Willis*, 165 N.H. 206. 212 (2013). The Court finds that Rule 502(b) clearly states that a client may prevent the disclosure of a confidential communication made by him, his representative, his lawyer, or a representative of his lawyer; *to a lawyer* or an agent thereof "representing another party in a pending action and concerning a matter of common interest therein." *N.H. R. Evid.* 502(b). Thus, under the New Hampshire rule, there is no exception to the waiver of attorney-client privilege when a client communicates otherwise privileged information to a co-party. Schaffzin, *supra* at 79–80, n. 114 (listing New Hampshire, and other states which have a similar evidentiary rule, and noting that the plain language of those rules suggests that those jurisdictions would not extend the common interest doctrine to direct client-to-client communications made outside the presence of counsel). This interpretation is in accord with well-settled New Hampshire law which holds that evidentiary privileges should be construed narrowly. *See Willis*, 165 N.H. at 212.

Put another way, if the drafters of the rule had intended to protect client-to-client communications, they would have worded the rule to allow a client to prevent the disclosure of a confidential communication made by him, his representative, his lawyer, or a representative of his lawyer, to another client or his agent(s) involved in a pending action and concerning a matter of common interest therein. *See Restatement, supra* § 76(1) ("If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, *a communication of any such client that otherwise qualifies as privileged* … that relates to the matter is privileged as against third persons...." (emphasis added)). Because they did not, the Court finds that the communications at issue are not privileged under the rule. *See N.H. R. Evid.* 502(b); Gordon J. MacDonald, *Wiebusch on New Hampshire Civil Practice and Procedure* § 22.21, [11] (4th Ed. Matthew Bender & Co.) (listing the 17 categories of confidential communications protected by the rule, with the one suggested by High Liner (USA) not being listed).

Although very few courts have addressed this precise issue, *see* Schaffzin, *supra* at 79 (noting as much), the Court finds support for its ruling in the Supreme Court of Texas' decision in *In re XL Specialty Ins. Co.*, 373 S.W.3d 46 (2012). In that case, the court construed an evidentiary rule which is substantively identical to New Hampshire Rule of Evidence 502(b).

Compare N.H. R. Evid. 502(b) ("by the client or the client's representative or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein"), *with Tex. R. Evid*. 503(b)(1)(C) ("by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein").

***7** The relevant facts of that case are as follows: Jerome Wagner, an employee of a Cintas Corporation ("Cintas"), sought workers compensation benefits from Cintas' insurance provider ("XL"). *In re XL Specialty Ins. Co.*, 373 S.W.3d at 48. A claims adjuster with XL's third party administrator denied Wagner's claim. *Id*. During the course of resulting administrative litigation, XL's outside counsel sent communications about the status of the administrative proceedings directly to Cintas. *Id*. In a subsequent lawsuit, Wagner sought those communications. *Id*. In finding that the attorney-client privilege did not shield them, the court held that "the communications were between XL's lawyer and a third party, Cintas, who was not represented by XL's lawyer (or any other lawyer) and was not a party to the litigation or any other related pending action." *Id*. at 53. After recognizing that Cintas may have shared a common interest with XL in the administrative proceeding, the court then held that "no matter how common XL's and Cintas's interest might have been, [the Texas] rule requires that the communication be made to a *lawyer or her representative* representing another party in a *pending action*" and therefore the privilege did not apply. *Id*. at 54 (emphasis in the original, citation omitted). Given the textual similarities in the Texas and New Hampshire rules, the Court is persuaded by this holding. Schaffzin, *supra* at 79, n. 114 (listing Texas and New Hampshire among the states unlikely to permit communications directly among clients given the language of their evidentiary rules); *Selby v. O'Dea*, 90 N.E.3d 1144, 1155 (Ill. App. Ct. 2017) (listing Texas and New Hampshire as states which have adopted rule 502(b)(3) of the Uniform Rules of Evidence).

For the foregoing reasons, the Court finds that the common interest rule does not apply to the email communications passed between Galleria and Yu because they were not made to "a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein." *See* N.H. R. Evid. 502(b). Accordingly, the plaintiff's motion to compel the production of those electronic communications is GRANTED.

So Ordered.

8/14/2018

DATE

<<signature>>

N. William **Delker**

Presiding Justice

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AARON WALLACK AND STEVE WALLACK V. SOUTHERN DISTRICT YMCA/ CAMP LINCOLN, INC. AND GIANT BICYCLES, INC., No. 218-2013-CV-823 (N.H. Super. June 12, 2014)

The State of New Hampshire
Superior Court

Rockingham S.S.

AARON WALLACK AND STEVE WALLACK

V.

SOUTHERN DISTRICT YMCA/CAMP LINCOLN, INC. AND GIANT BICYCLES, INC.

NO. 218-2013-CV-823

ORDER

The plaintiffs brought this case alleging negligence and seeking to recover costs expended for medical treatment resulting from a bicycling injury. The plaintiffs are Aaron and Steve Wallack. Aaron is Steve's son, who sustained the injuries as a minor. Because the medical expenses were Steve's responsibility, the two plaintiffs together brought this action. The plaintiffs now move to allow them to engage in *ex parte* communications with two former employees of the defendant, Southern District YMCA/Camp Lincoln ("YMCA"). YMCA objects.[1] The Court held a hearing on this motion on June 3, 2014. For the reasons discussed herein, the plaintiffs' motion is GRANTED.

Aaron Wallack is alleged to have sustained injuries while biking at YMCA's summer camp on August 12, 2010. Aaron was fifteen years old at the time and was a counselor in training. He was riding a Giant brand bicycle when the front wheel of the bicycle fell off. Aaron toppled over the handle bars of the bicycle and sustained a severe head injury.

[1] While this motion has been pending, by agreement of the parties, this dispute is moot as to one of the YMCA's former employees: Christopher Becker.

Apparently, the parties have identified the cause of the wheel malfunction as the quick release skewer on the bicycle's front wheel. The plaintiffs allege that YMCA negligently maintained and inspected the bicycle, causing Aaron's injuries. The plaintiffs also allege that YMCA negligently trained and supervised the counselors responsible for maintaining the camp's bicycles.

Two counselors were present on the bicycle ride during which Aaron sustained his injuries. One was William Sullivan, who ran the camp's bicycle program and was solely responsible for maintaining the camp's bicycles. Sullivan was also the first responder, who treated Aaron Wallack immediately following his accident. The other counselor was Christopher Becker, who was riding a bicycle in the back of the group of bicyclists on August 12, 2010. Becker witnessed the incident but then went to call for help after Aaron fell off the bicycle. Sullivan had been employed by YMCA from 2010 to 2013. In the summers, Sullivan worked full time at Camp Lincoln as a counselor, and during the school year, Sullivan worked part time running an after school program at the Southern District YMCA. In the summer of 2013, Sullivan started Camp Lincoln's bicycle program and ran it himself. He ended his employment with the YMCA in September 2013.

After the plaintiffs filed suit in this matter, YMCA's attorney contacted Sullivan to prepare a defense. As a result of this contact and subsequent meetings with Sullivan and the camp's current management, YMCA argues that Sullivan is a represented "person" under New Hampshire's Rule of Professional Conduct 4.2 and that he was a "client" within the meaning of New Hampshire Rule of Evidence 502. YMCA has agreed to make Sullivan available for deposition but will limit the scope of questioning by the

plaintiffs. The plaintiffs, on the other hand, assert that Sullivan is not a represented person and was never a client of YMCA's counsel. As such, the plaintiffs argue that they can question Sullivan about the facts underlying the accident giving rise to litigation and any interactions he had with defense counsel.

Considering these issues in turn, the Court finds that Rule of Professional Conduct 4.2 does not apply to former employees, and Sullivan was not a client for purposes of Evidence of Rule 502.

I. Represented person

New Hampshire Rule of Professional Conduct 4.2 precludes attorneys from contacting represented persons. It states:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. An otherwise unrepresented party to whom limited representation is being provided or has been provided in accordance with Rule 1.2(f)(1) is considered to be unrepresented for purposes of this Rule, except to the extent the limited representation lawyer provides other counsel written notice of a time period within which other counsel shall communicate only with the limited representation lawyer.

(Emphasis added). The comment to this rule explains that:

> [W]hen an organization—a corporation, governmental body, or other entity—is the represented person, certain organizational personnel will be "off-limits" under Rule 4.2. This issue has frequently been the subject of litigation. The ABA Comments adopt what is known as the managing-speaking test. Several other tests have been used, known as the control group test, the blanket ban, the alter ego test and the balancing test. The New Hampshire Supreme Court has not ruled on this matter.

Ethics Comm. Comment. The comment goes on to explain:

> While not controlling on the question of permissible *ex parte* contact with employees of a corporate opponent, it is worth noting that New Hampshire

> has adopted the control-group test for purposes of applying the attorney-client privilege in the corporate setting. See N.H. R. Evid. 502(a)(2); Klonoski v. Mahlab, 1996 U.S. Dist. LEXIS 20360 n.2, rev'd. on other grounds 156 F.3d 225 (1st Cir. 1998).

Id.

YMCA asserts that while Sullivan was employed, he was a member of the management team under the "managing-speaking test," so he is a represented person under Rule 4.2. The plaintiffs argue that because Sullivan is a former employee, Rule 4.2 does not apply at all. In this way, the Court must first determine whether Rule of Professional Conduct 4.2 applies to former employees.

I. Applicability of N.H. Rule of Professional Conduct 4.2

New Hampshire law, although not decided by the Supreme Court, appears clear that Rule 4.2 only applies to current employees.

> New Hampshire Rules of Professional Conduct 4.2 do not prohibit *ex parte* communications with former employees even as to those whose conduct can be imputed to the corporation. There is no basis to conclude that New Hampshire would extend Rule 4.2 to former employees, including senior ones, since "[n]either the Rule nor its comment purports to deal with former employees of a corporate party."

In re Tyco Intern. Ltd. Securities Litigation, No. 00–MD–1335–B, 2001 WL 34075721 at * 3 (D.N.H. Jan. 30, 2001); see Totherow v. College, Hillsborough County Superior Court, South, No. 2005-CV-296 at *8-9 (Order, Lynn, J.) (Feb. 20, 2007) (permitting counsel to make *ex parte* contact with former employees of defendant after finding Rule 4.2 does not apply to former employees). Similarly, the Business and Commercial Dispute Docket has also ruled that Rule 4.2 does not apply to former employees. XTL-NH, Inc. v. N.H. Liquor Comm'n & Exel, Inc., Merrimack County Superior Court, No.

2013-CV-119 at *10-12 (Order, McNamara, J.) (Dec. 31, 2013) (finding jurisdictions that limit interviews with former employees to be in the minority). In short, New Hampshire does not recognize application of Rule 4.2 to former employees.

As such, the plaintiffs are entitled to interview Sullivan outside the presence of YMCA's attorney about any factual information he has regarding the events giving rise to this lawsuit and any dealings he has had with YMCA following September 2013, when he stopped working for YMCA. In other words, Rule 4.2 does not prohibit the plaintiffs' attorney from requesting Sullivan for an interview. Sullivan, of course, is not compelled to speak with plaintiffs' counsel outside of a deposition.

II. Attorney-Client Privilege

Nonetheless, YMCA claims that because of Sullivan's position as director of the bicycle program, his communications with YMCA's corporate counsel are protected by the attorney-client privilege. In relevant part, Rule 502(b) protects confidential communications "between the client or his or her representative and the client's lawyer" which were made for the purpose of providing legal services to the client. New Hampshire Rule of Evidence 502(a)(1) defines "client" as "a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him." When a client is an organizational entity, certain employees may be considered a "representative of the client" for purposes of Rule of Evidence 502, making their communications privileged. See N.H. R. Evid. 502(a)(2) ("A 'representative of a client' is one having authority to obtain

professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client.").

The threshold inquiry is who is the "client" in this case. Attorney Quarles seemed to suggest that he represented Sullivan in his individual capacity, while at the same time Attorney Quarles represented YMCA in its corporate capacity. Attorney Quarles' suggestion that he could represent both YMCA and Sullivan raises troubling issues regarding potential conflicts of interest. See N.H. R. Prof. C. 1.7, 1.8, 1.13(a), (f), (g). The Court, however, need not tackle these thorny issues in this case because nothing in the record supports the suggestion that Attorney Quarles represented Sullivan in his individual capacity. There is no affidavit from Sullivan asserting that he believed that Attorney Quarles represented him personally. In fact, the law presumes that a lawyer does not represent the corporation and its employees simultaneously. See generally PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:32 (2d ed. 1999). Courts have established a presumption that such concurrent representation does not exist. See In re Grand Jury Subpoena, 274 F.3d 563, 571-72 (1st Cir. 2011) (holding that presumption is that corporate counsel represents the entity and not individual employees unless specific factors are established to overcome that presumption). The individual agent must prove the existence of the privilege and "[c]ourts have made it virtually impossible to do this." RICE, supra § 4:21, at 99.

In this case, the record does not come close to establishing the existence of an attorney-client relationship between Attorney Quarles and Sullivan. Sullivan has not filed an affidavit indicating that he believes he is represented by Quarles. Indeed, Quarles himself admitted that since the plaintiffs have filed this motion, Quarles has not

contacted Sullivan and did not advise Sullivan what to do if plaintiffs' counsel contacted him. This admission indicates that Quarles himself does not believe he represents Sullivan because such an admission would surely indicate a violation of Quarles' ethical obligations to maintain contact and advise his client: Sullivan. YMCA has not asserted any facts to support the conclusion that its corporate counsel was representing Sullivan, as opposed to the corporate client. The Court finds no privilege can exist between Sullivan and Attorney Quarles.

Thus, the "client" in this case is YMCA. The question then becomes is whether Sullivan is a "representative of the client" as that term is defined in Rule 502(a)(2). To address this argument, the parties debate how to categorize Sullivan as an employee. Under New Hampshire Rule of Evidence 502, courts employ different tests to determine whether an employee is a "representative of the client" in communicating with corporate counsel. The plaintiffs seek to impose the narrower of these tests: the "control group" test. By contrast, YMCA argues for application of the broader "managing-speaking" test.

Although not decided by the New Hampshire Supreme Court, the United States District Court for the District of New Hampshire has interpreted Rule 502 as adopting the control group test when determining whether an employee is a "representative of the client." Klonoski v. Mahlab, 953 F. Supp. 425, 427 (D.N.H. 1996) (applying New Hampshire law); see N.H. R. Ev. 502(a)(2). This test is the narrowest and includes within its coverage the fewest number of organization employees. It includes only "those top management persons who [have] the responsibility of making final decisions and those employees whose advisory roles to top management are such that a decision

would not normally be made without those persons' advice or opinion or whose opinions in fact form the basis for any final decision." Totherow, supra No. 2005-CV-296 at 3-4 (quotation omitted). Put another way, the control group is "defined as decisionmakers who have authority to obtain legal advice or are in a position to act on the advice received from counsel." Alexander C. Black, Determination Of Whether A Communication Is From A Corporate Client For Purposes Of The Attorney–Client Privilege—Modern Cases, 26 A.L.R. 5th 628 §4a (1995).

By contrast, the managing-speaking test extends to "those employees who have the legal authority to 'bind' the corporation in a legal evidentiary sense, i.e., those employees who have 'speaking authority' for the corporation." Wright by Wright v. Group Health Hosp., 691 P.2d 564, 569-70 (Wash. 1984).[2] One court has explained that these persons are "[e]mployees who can commit the organization are those with authority to make decisions about the course of the litigation, such as when to initiate suit, and when to settle a pending case." Messing, Rudavsky & Weliky, P.C. v. President & Fellows of Harvard Coll., 764 N.E.2d 825, 833 (Mass. 2002). However, Wright, the seminal case setting forth this test, does not so narrowly define the test, and it highlights that the test turns on principles agency. 691 P.2d at 569. Any employee with authority to bind the company with his or her words or actions fits the managing-speaking test under Wright. Id.

YMCA argues that Sullivan is a manager under the managing-speaking test because his actions running the camp's bicycling program have the potential to bind the organization with civil liability. The Court disagrees that Sullivan is a "representative of

[2] See Jerome N. Krulewitch, Ex Parte Communications with Corporate Parties: The Scope of the Limitations on Attorney Communications with One of Adverse Interest, 82 NW. U. L. REV. 1274, 1298 (1988)

the client" for purposes of the attorney-client privilege because he was not a member of the "control group."

The "managing-speaking" test is not consistent with the language of Rule 502(a)(2), which limits the "representative of the client" to those corporate agents who have "authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client." See N.H. R. Evid. 502 rptr. notes (recognizing that New Hampshire had adopted the "control group" test).

In this case, Sullivan may have been some form of manager, in light of his role running the bicycle program at the camp. However, this lower level managerial role does not make Sullivan the type of person who makes final decisions or who would have authority to obtain legal advice on behalf of the organization. Indeed, as the plaintiffs highlight, defense counsel contacted Sullivan, not the other way around, after the plaintiffs filed this action. Similarly, YMCA does not allege that Sullivan's activities running a mountain bike program gave Sullivan authority to speak for or bind the organization in any formal contracts for legal services. Nor is there anything in the record to suggest that Sullivan could have unilaterally acted on legal advice given by Attorney Quarles in this case. YMCA's argument turns on Sullivan's activities planning and organizing the brand new biking program, but that activity alone does not bind the organization in connection with its legal representation. As such, Sullivan was not a "representative of a client" under the control group test. See Knief v. Soto, 537 N.E.2d 832, 835 (Ill. App. Ct. 1989) (statements made by head bar manager and waitress to corporate counsel were discoverable because they were not part of control group in a dram shop act case).

As such, the plaintiffs' motion to allow *ex parte* communications is GRANTED. The plaintiffs may ask Sullivan the facts underlying the accident that gave rise to this lawsuit, about all of his interactions with YMCA counsel, and about anything else Sullivan is willing to answer. Moreover, if Sullivan is deposed in this case neither he nor YMCA may assert attorney-client privilege with respect to conversations Sullivan had with Attorney Quarles at any point either while Sullivan was employed by YMCA or afterward.

SO ORDERED.

6/12/2014
DATE

N. William Delker
Presiding Justice

AARON WALLACK AND STEVE WALLACK V. SOUTHERN DISTRICT YMCA/CAMP LINCOLN, INC. AND GIANT BICYCLES, INC., No. 218-2013-CV-823, Order on Motion for Reconsideration (N.H. Super. Nov. 4, 2014)

The State of New Hampshire
Superior Court

Rockingham S.S.

AARON WALLACK AND STEVEN WALLACK

v.

SOUTHERN DISTRICT YMCA/CAMP LINCOLN, INC. AND GIANT BICYCLES, INC.

NO. 218-2013-CV-00823

ORDER ON THE DEFENDANT'S MOTION FOR RECONSIDERATION

The plaintiffs Aaron Wallack and Steven Wallack brought this action against the defendants, Southern District YMCA/Camp Lincoln, Inc. ("YMCA"), and Giant Bicycles, Inc., alleging claims of negligence. YMCA has moved for reconsideration of the Court's order authorizing the plaintiffs to communicate ex parte with one of YMCA's former employees, William Sullivan. For the reasons set forth herein, YMCA's motion is DENIED.

Facts

Because most of the facts relevant to this motion have been fully set forth in the Court's June 13 order, they need not be recited here. In its motion for reconsideration, YMCA provided the Court with the affidavit of William Sullivan, which YMCA asserts contains material facts relating to the attorney-client relationship between Mr. Quarles – YMCA's corporate counsel – and Mr. Sullivan. Since this affidavit was not filed with the Court while the plaintiff's original motion was pending, the Court will briefly describe the facts set forth therein.

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In the affidavit, Mr. Sullivan states that he has "believed since August 21, 2013" that Attorney Quarles represented him personally in this matter. Sullivan Aff. ¶ 1 (dated June 26, 2014). In early August 2013, Jeff Gleason, the Camp Director at Camp Lincoln, had informed Mr. Sullivan that the plaintiffs had filed suit against YMCA as a result of injuries Aaron Wallack sustained from a mountain biking incident. Id. ¶ 4. Even though Mr. Sullivan recognized that the plaintiffs did not name him "as a defendant in their lawsuit," he states, "in light of their accusations of wrongdoing, I believed I needed an attorney." Id. Mr. Gleason asked Mr. Sullivan to attend a meeting on August 21, at which Attorney Quarles would discuss the lawsuit. Id. ¶ 5.

At the meeting, "Attorney Quarles explained to [the employees] that he had been hired by Camp Lincoln's insurance company to defendant against [the plaintiffs'] allegations in this case." Id. ¶ 6. He further informed the employees that the conversation was "confidential and protected by the attorney-client privilege." Id. For three hours Attorney Quarles and the employees discussed the "Mountain Bike Program and policies, [the plaintiff's] accident and the allegations in [the plaintiffs'] Complaint." Id. ¶ 7. "At no time during the meeting did Attorney Quarles . . . advise [Mr. Sullivan] he did not represent [him] and that [he] should find [his] own attorney." Id. Mr. Sullivan states, "It was my understanding that Attorney Quarles represented me personally . . . in this case." Id. ¶ 6. Mr. Sullivan believed that the meeting was for the purpose of allowing Attorney Quarles to give legal advice to him and to Camp Lincoln. Id. ¶ 7. Mr. Sullivan raises the attorney-client privilege in the affidavit. Id. ¶ 8.

Analysis

In light of the assertions contained in the affidavit, YMCA requests that the Court reconsider its ruling that there is no attorney-client privilege between Attorney Quarles and Mr. Sullivan in his individual capacity. YMCA further asserts that, given Mr. Sullivan's status, the plaintiffs are not permitted to communicate with him ex parte under Rule 4.2 of the New Hampshire Rules of Professional Conduct. The Court considers these issues below.

As a threshold matter, the Court concludes that dismissal of YMCA's motion is warranted because it failed to present the evidence contained in Mr. Sullivan's affidavit in its filings to the original motion. A party moving for reconsideration is confined to identifying "points of law or fact that the court has overlooked or misapprehended . . . ." Super. Ct. R. 12(e) (emphasis added). "[T]he rule does not purport to authorize either party to submit further evidence bearing on the motion." Brown v. John Hancock Mut. Life Ins. Co., 131 N.H. 485, 492 (1989). It is within the trial court's discretion to accept new evidence, see id., though absent good cause it should reject it. See State v. Winn, 141 N.H. 812, 814 (1997) ("Because the defendant asserted no reason why she had previously failed to raise the new factual allegations in her original motion to suppress, the trial court correctly declined to consider them [on a motion for reconsideration].").

YMCA has articulated no reason – in its motion or at the hearing – why it did not present this affidavit to the Court in the first instance. Furthermore, although "[a] court may deviate from or modify a rule as justice requires," Super. Ct. R. 1 cmt. a, there is no just reason in this case to permit consideration of the evidence. In ordering a hearing on the motion for reconsideration, the Court indicated to YMCA that it would only

consider the evidence contained in Mr. Sullivan's affidavit if he testified at the hearing. Because the facts contained within the affidavit are, for the most part, conclusory and vague, live presentation of the evidence would have provided a valuable occasion for the parties and for the Court to understand the circumstances surrounding the alleged formation of an attorney-client relationship between Attorney Quarles and Mr. Sullivan. The actual content of the discussions between Attorney Quarles and Mr. Sullivan during the meeting on August 21 would have been particularly illuminating. Mr. Sullivan was not present to testify on the day of the hearing. The parties proffered that Mr. Sullivan refused to attend the hearing voluntarily and there is no indication that the defendant attempted to subpoena him. Thus, as it stands, the Court would need to accept uncritically Mr. Sullivan's opinions regarding his relationship with Attorney Quarles without an adequate appreciation of the facts underlying those opinions. The Court declines to do so. See McCabe v. Arcidy, 138 N.H. 20, 25 (1993) (noting that burden of establishing attorney-client relationship cannot be "discharged by mere conclusory or ipse dixit assertions"). Denial of the motion is proper on this basis alone.

Assuming arguendo that the Court were inclined to consider Mr. Sullivan's affidavit, it would nevertheless deny YMCA's motion on the merits. YMCA has not met its burden in proving that Mr. Sullivan, in his individual capacity, can claim an attorney-client privilege with its corporate counsel, Attorney Quarles. See id. at 25 (stating that "[t]he burden of establishing the existence of the attorney-client relationship rests on the party who alleges such fact"). As discussed in the original order, "[t]he default assumption is that the attorney only represents the corporate entity, not the individuals within the corporate sphere, and it is the individuals' burden to dispel that presumption."

In re Grand Jury Subpoena, 274 F.3d 563, 571 (1st Cir. 2001).

The New Hampshire Supreme Court has yet to set forth a standard by which a trial court should decide in what circumstances an employer's attorney represents both an employer and an individual employee, though its decision in McCabe v. Arcidy provides some general principles that assist the Court in its analysis. 138 N.H. at 25–26. In McCabe, one of the issues the court examined was whether the defendant had formed an attorney-client relationship with the plaintiff, an attorney who had sued the defendant for unpaid legal fees arising from a third-party fee arrangement. Id. at 23. The defendant was a fifty-percent shareholder in two corporations and had agreed to guarantee a fee agreement between the plaintiff and the defendant's business partner, who managed the corporations. Id. The fee agreement related to litigation between the corporations and two other businesses. Id.

In concluding that the plaintiff had not represented the defendant in his individual capacity, the court noted that none of the evidence provided a "basis for concluding that when [the defendant] consulted [the plaintiff] he did so to further his individual personal interest; there is only evidence that [the plaintiff] was retained to represent . . . the two corporations." Id. at 25. The court went on to note that "[a] lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents. Id. at 26 (citing N.H. R. Prof. Conduct 1.13(a)). Consequently, "[a]bsent evidence that a corporation's attorney furnished legal advice to a shareholder, the attorney is not the representative of the corporation's shareholders simply because the attorney's actions on its behalf also benefit the shareholders." McCabe, 138 N.H. at 26 (internal citations omitted).

Other courts have formulated tests to determine when an individual employee, in his individual capacity, can claim an attorney-client privilege for conversations with his employer's counsel. See United States v. Stein, 463 F. Supp. 2d 459, 462–63 (S.D.N.Y. 2006) (collecting cases). However formulated, these tests seek to distinguish between situations where the employer's attorney communicates with an employee solely to further the attorney's responsibility to the employer and those where the attorney represents the employer and the employee concurrently in a matter. As with any determination of whether an attorney-client relationship exists, it is a highly fact-intensive inquiry. See McCabe, 138 N.H. at 25.

The Court pauses to note that resolution of this issue can have significant consequences for all of the parties involved. For the employer, "[a]llowing individual employees to assert personal attorney-client privilege over communications with the employer's counsel could frustrate an employer's ability to act in its own self interest, perhaps to the detriment of other employees, stockholders, or partners." Stein, 463 F. Supp. 2d at 461–62. There are also possible consequences for an employee; for example, when cooperating with the employer's attorney, the employee may divulge sensitive information in the mistaken belief that the attorney represents him personally. See id. at 461. Finally, the attorney who represents both parties concurrently is subject to the professional rules regarding conflicts of interest. See N.H. R. Prof. Conduct 1.7, 1.8, 1.13(a), (f), (g).

The Court finds that the test adopted by the First Circuit Court of Appeal protects the parties' interests and promotes the principles emphasized by the McCabe court. See In re Grand Jury Subpoena, 274 F.3d 563 (1st Cir. 2001); see also In re Bevill,

Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120 (3d Cir. 1986); In re Grand Jury Proceedings, 156 F.3d 1038 (10th Cir. 1998). The Court analyzes YMCA's claim within that framework. The Bevill test, as it is known, consists of five elements:

> First, [employees] must show they approached [counsel] for the purpose of seeking legal advice. Second, they must demonstrate that when they approached [counsel] they made it clear that they were seeking legal advice in their individual rather than in their representative capacities. Third, they must demonstrate that the [counsel] saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise. Fourth, they must prove that their conversations with [counsel] were confidential. And fifth, they must show that the substance of their conversations with [counsel] did not concern matters within the company or the general affairs of the company.

In re Grand Jury Subpoena, 274 F.3d at 571 (citing Bevill, 805 F.2d at 123). As to the first element, the requirement that the employee approach the employer's attorney for advice demonstrates that the employee intended to seek personal legal advice and evidences that the employee and the attorney have the same understanding of their relationship. See McCabe, 138 N.H. at 26 (noting that an attorney-client relationship requires a meeting of the minds). Moreover, "it allows the attorney to gauge whether it would be appropriate to advise the individual given the attorney's obligations concerning representation of the corporation." Ross v. City of Memphis, 423 F.3d 596, 605 (6th Cir. 2005); but see United States v. Stein, 463 F. Supp. 2d 459, 463 n.21 (S.D.N.Y. 2006) (asserting that "it is often the entity and its in house attorneys who first learn of the need for representation of the firm and its partners."). The second, third, and fourth elements further promote these interests. The fifth element may be satisfied with a showing that "the communication between a[n] [employee] and corporate counsel specifically focuses upon the individual [employee's] personal rights and liabilities, . . . even though the general subject matter of the conversation pertains to matters within the general affairs

of the company." In re Grand Jury Proceedings, 156 F.3d at 1041.

YMCA has failed to demonstrate that all of these elements are satisfied. According to the affidavit, an attorney-client relationship between Mr. Sullivan and Attorney Quarles was formed at some point during the meeting. The affidavit is bereft of facts sufficient to support that conclusion, however. In the first place, Mr. Sullivan did not approach Attorney Quarles. Mr. Gleason asked Mr. Sullivan to attend the meeting. See Sullivan Aff. ¶ 5. And there is nothing in the affidavit that suggests that Mr. Sullivan "made clear" that he wanted personal legal advice from Attorney Quarles. See in re Grand Jury Subpoena, 274 F.3d at 571. Furthermore, the third element has not be demonstrated, as there has been no information provided to the Court that shows that Attorney Quarles assessed and accepted the risk of concurrent representation on August 21 when he met with Mr. Sullivan.

Most importantly, as to the fifth element, there is no evidence that the content of the discussions ever related to Mr. Sullivan's personal liabilities or interests. See id. At the beginning of the meeting, Attorney Quarles stated that he had been hired to defend the lawsuit, to which Mr. Sullivan was not (and has never been) a party. In fact, YMCA's counsel proffered to the Court at the hearing that, by August 21, 2013, the statute of limitations would have barred any claim by the plaintiffs against Mr. Sullivan in his individual capacity. Thus, it appears that Mr. Sullivan had no individual liabilities that could have been a topic of discussion. See McCabe, 138 N.H. at 25 (stating that an attorney-client relationship may be formed where the putative client consults with an attorney "to further his individual personal interest"). At least four of the five elements of the Bevill test are not present here. The conclusory nature of the affidavit, along with

these considerations, compels the Court to find that no attorney-client relationship arose between Attorney Quarles and Mr. Sullivan as a result of their meeting on August 21.

YMCA argues that the reasoning in Anderson v. O'Mara supports its position. Grafton County Superior Ct., No. 05-C-047 (Nov. 29, 2005) (Order, Burling, J.). The Court disagrees. In Anderson, the court concluded that an attorney-client relationship had formed between the hospital's attorney and an employee of the hospital, a nurse. Id. at 2. In doing so, the Court held that McCabe governed and stated that a relationship had formed because "[the employee] consulted with [the attorney] with the intent of seeking legal advice . . . ." Id. The Court did not find material the fact that the attorney had first approached the employee. Id.

The dispositive consideration in both McCabe and Anderson was whether the putative client consulted with an attorney with the intent of seeking personal legal advice. As stated above, there is no evidence of such an intent on Mr. Sullivan's part. Therefore, Anderson is distinguishable from the present case. Moreover, the Anderson court failed to explain why it did not find material the fact that the attorney had approached the employee first. The Court does not find its bare conclusion persuasive. Here, the fact that Attorney Quarles initiated contact with Mr. Sullivan indicates that he was discharging his responsibility to YMCA in holding a meeting with the camp employees, not soliciting a new client.[1] It also evinces Mr. Sullivan's lack of intent to procure legal advice relating to his personal liabilities. In light of all the facts contained

[1] Indeed, if the Court were to accept the fact that the attorney-client relationship was formed when Attorney Quarles initiated the contact with Mr. Sullivan before Mr. Sullivan sought Attorney Quarles' advice, this would raise a question about whether that initial contact with a violation of N.H. Rule of Professional Conduct 7.3(a) (prohibiting a lawyer from initiating contact with a prospective client except in certain narrow circumstances). This circumstance, at least, highlights the need for live testimony about how the alleged attorney-client relationship came into being.

in the affidavit, the Court finds that Mr. Sullivan cannot avail himself of the attorney-client privilege based on his single conversation with Attorney Quarles on August 21.

YMCA next asserts that its motion should be granted because "there is a significant risk that Mr. Sullivan may inadvertently disclose privileged information" to the plaintiffs. Mot. Reconsideration ¶ 9. It contends that Mr. Sullivan was exposed to "privileged information and work product" at the meeting, which should not be disclosed to the plaintiffs. Id. YMCA primarily cites to two cases in support of its position. First, it cites to XTL-NH, Inc. v. New Hampshire State Liquor Commission, where Judge McNamara held that a protective order could be granted if "specific reasons exist to prohibit [an] interview of a particular former employee." Merrimack County Superior Ct., No. 2013-CV-00119, at 11 (Dec. 31, 2013) (McNamara, J.). Second, YMCA cites Polycast Technology Corp. v. Uniroyal, Inc., for the proposition that "ex parte communications with a former employee should be barred to prevent inadvertent disclosure of confidential communications." Mot. Reconsideration ¶ 8; 129 F.R.D. 621 (S.D.N.Y. 1990).

The Court agrees with the reasoning of these cases as a general matter. A protective order may be appropriate to guard against inadvertent disclosure of confidential communications by former employees in some circumstances. This is not one of those circumstances, however. Judge McNamara expressed in his order that a protective order would be proper if "specific reasons" existed to protect against inadvertent disclosure. XTL-NH, Inc., No. 2013-CV-00119, at 11 (emphasis added). Likewise, the Polycast court ultimately refused to grant a protective order to the movant, as it had "failed to identify any specific privileged information" to which the former

employee was privy. Polycast Tech. Corp., 129 F.R.D. at 629. In this case, while YMCA does assert that Mr. Sullivan is privy to privilege information, it fails to identify with any particularity what that information was. Mr. Sullivan's affidavit states that the discussions at the meeting related to "Camp Lincoln's Mountain Bike Program and policies, [the plaintiff's] accident and the allegations in [the] Complaint." Sullivan Aff. ¶ 7. These are factual topics, ostensibly unrelated to any privileged information, and YMCA's general allegation to the contrary will not suffice. YMCA has failed to prove that a protective order is appropriate in this circumstance. See Polycast Tech. Corp., 129 F.R.D. at 629 (noting that proponent of privilege has burden "of justifying any protective order"). Moreover, the presence of Mr. Sullivan at a meeting between YMCA and its attorney destroys the confidentiality of the communication between lawyer and client. See Riddle Spring Realty Co. v. State, 107 N.H. 271, 273 (1966) ("[T]he essence of a privileged communication between attorney and client and likewise the basis of its exemption from discovery is its confidentiality.") (quotation omitted); cf. State v. Willis, 165 N.H. 206, 212 (2013) (defendant could not invoke religious privilege for conversation with his pastor where the pastor's wife was present because "the presence of an 'extraneous' third party during a privileged conversation operates to destroy the privilege"). Denial of YMCA's motion is proper.

For the reasons discussed above, YMCA's motion for reconsideration is DENIED.

SO ORDERED.

11/4/2014
DATE

N. William Delker
Presiding Justice

In re Tyco Intern., Ltd. Securities Litigation, No. 00-MD-1335-B, 2001 WL 34075721 at *3 (D.N.H. Jan. 30, 2001)

(finding NH rules of Professional Conduct "do not prohibit ex parte communications with former employees even as to those whose conduct can be imputed to the corporation).

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2001 WL 34075721
Only the Westlaw citation is currently available.
United States District Court, D. New Hampshire.

In re TYCO INTERNATIONAL LTD. SECURITIES LITIGATION

No. 00–MD–1335–B.
|
Jan. 30, 2001.

ORDER

MUIRHEAD, Magistrate J.

***1** Defendants seek a protective order either to prohibit plaintiffs' counsel from investigatory interviews of former employees of Tyco and of companies acquired by Tyco or to set guidelines for such interviews to insure compliance with the New Hampshire Rules of Professional Conduct. They additionally seek to prohibit plaintiffs from relying on such information in any way in the lawsuit and to require plaintiffs' counsel to provide the name of, and information provided by, each interviewee. For reasons set forth below, the motion is denied.

DISCUSSION

1. *Failure to Comply With Local Rule 7.1(c)*
Local Rule 7.1(c) provides in pertinent part:

> Any party filing a motion other than a dispositive motion shall certify to the court that a good faith attempt has been made to obtain concurrence.

The "certification attached to defendants' motion states:

> In accordance with Local Rule 7.1(c), on August 17, 2000, Defendants' counsel asked Plaintiffs' counsel whether they would assent to the granting of this motion. The answer was no.

Counsel's certification does not comply with either the letter or spirit of the rule. It certainly fails to state that counsel made a "good faith" attempt at concurrence. Failure to certify a good faith attempt is understandable when the August 17 actions of

defense counsel are examined. The record provided in connection with this motion reveals the following:

1. By August 17 defense counsel had prepared a two-page motion accompanied by an eighteen-page memorandum and a twenty-three-page appendix.

2. Letter complaints by defense counsel about plaintiffs' investigation were consistently met with prompt responses requesting defense counsel to provide any factual and legal basis for requiring a cessation of plaintiffs' counsel interviews.[1] Defense counsel's responses were skeletal at best. Offers by plaintiffs' counsel to meet and confer were ignored.

At some point in the morning of August 17, 2000, New Hampshire defense counsel called and then faxed New Hampshire plaintiffs' counsel seeking assent to the motion. Prior to these events every piece of correspondence on this subject was sent by a New York lawyer. New Hampshire counsel did not even copy plaintiffs' New York counsel with his faxed ultimatum.

4. Defense counsel's August 17 fax was received by the office of plaintiffs' New York counsel from its New Hampshire counsel at 12:06 p.m. The fax contained an ultimatum requiring a response by 2:00 p.m. that day.[2]

5. By 2:09 p.m. plaintiffs' New York counsel responded to New Hampshire defense counsel by fax clearly again signaling a willingness to meet and confer. That fax was sent to New York defense counsel by 2:19 pm. Except for the filing of the motion, defense counsel did not respond.

6. At 4:14 p.m. on August 17, 2000, the motion was filed.

In light of these facts, defense counsel certainly could not certify that they had made a "good faith" attempt at concurrence. The conduct of counsel in connection with this motion does not meet the standards for practice in this court and the Local Rule 7.1(c) certification is a sham. At the very least counsel flirted with a violation of Rule 3.1 of the New Hampshire Rules of Professional Conduct by signing a Rule 2.1(c) certification which explicitly requires claiming an attempt at good faith concurrence. As but one basis for the denial of defendants' motion it is denied as a sanction under LR 1.3(a).

2. *The Private Securities Litigation Reform Act ("PSLRA") and Investigatory Interviews*

***2** The argument offered by defendants is as well-crafted as a Byzantine tapestry. However, it hangs together only if common sense and well-recognized terms are ignored or redefined to suit the outcome desired. Defendants' argument, in its simplest form, is that the PSLRA prohibits discovery during the pendency of any motion to dismiss; that the term "discovery" includes informal discovery; and that investigatory interviews by counsel are informal discovery. Plaintiffs strongly disagree.

The stay provision of the PSLRA which relates to discovery provides that:

> In any private action arising under this chapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

15 U.S.C. § 78u–4(b)(3)(B). The question is whether a non-compelled interview of a third party, i.e., a former employee of Tyco or of one of the companies it has acquired, is included in the word "discovery."

The term "discovery" in the context of lawsuits has a well-recognized meaning. It is: "the disclosure in practice or in pretrial procedures by a party to an action ... of facts or documents which will afford material evidence in determining the rights of a party asking it...." *Websters Third New International Dictionary*, 647 (3d Ed.1993). It is "data or documents that a party to a legal action is compelled to disclose to another party either prior to or during a proceeding." *The American Heritage Dictionary*, 401 (2d College Ed.1982).

This common understanding of the term "discovery" is the same understanding given to it by the legal community as it relates to trial practice:

> The pre-trial devices that can be used by one party to obtain facts and information about the case from the other party in order to assist the party's preparation for trial. Under Federal Rules of Civil Procedure (and in states which have adopted rules patterned on such), tools of discovery include: Depositions upon oral and written questions, written interrogatories, production of documents or things, permission to enter upon land or other property, physical and mental examinations and requests for admission. Rules 26–37. Term generally refers to disclosure by defendant of facts, deeds, documents or other things which are in his exclusive knowledge or possession and which are necessary to party seeking discovery as a part of a cause of action pending, or to be brought in another court, or as evidence of his rights or title in such proceeding.

Black's Law Dictionary, 466 (6th Ed.1990).

Congress, in its enactment of the PSLRA, understood what discovery is and that is what it put a hold upon. A review of the House and Senate record reveals that Congress intended to put "... requests for voluminous documents and time consuming depositions of company CEOs and other key employees" on hold "... until the judge rules on whether the case should be kicked out of court." 141 Cong. Rec. at 5 19146, * S 19151. There is not the slightest hint in the congressional record that the discovery stay was intended to apply to either parties' own investigation.

***3** Defense counsel previously convinced the Second Circuit Court of Appeals that restrictions on witness interviews by counsel could "impair the constitutional right to effective assistance of counsel" and that this activity is part of "time-honored and decision-honored principles, namely, that counsel for all parties have a right to interview an adverse party's witnesses (the witness willing) in private, without the presence or consent of opposing counsel ..." *IBM v. Edelstein*, 526 F.2d 37, 42 (1975). The court in *IBM* got it right. The right to conduct such investigations is protected and is not impaired by the PSLRA.

Defendants' argument is unconvincing. Those unfamiliar with case preparation might confuse "discovery" with the work product protected investigatory interviews of third party witnesses. However, Congress did not confuse them. Neither logic, tradition, the constitution nor the PSLRA prohibit interviewing prospective witnesses. This court will not prohibit such interviews either. The motion is denied as to the request to prohibit third party interviews.

3. *Prohibiting or Regulating Plaintiffs Interviews*

Defendants claim that plaintiffs' counsels' actions "appears to violate several of New Hampshire's Rules of Professional Conduct" in its interviewing process. Defense counsel have not filed a professional conduct complaint under Local Rule 83.5 nor, apparently, under N.H. Rules of Professional Conduct 8.3(a). If defendants' position had any substance, defense counsel's failure to report the alleged violations is itself a violation of the Rules. *See* N.H. Rules of Professional Conduct 8.3 and 8.4(a).

The failure of defense counsel to report plaintiffs' counsel is justified since defendants' argument lacks substance.

Defendants have no current agency relationship with its ex-employees and no relationship, past or present, with ex-employees of companies it purchased. New Hampshire Rules of Professional Conduct 4.2 do not prohibit ex parte communications with former employees even as to those whose conduct can be imputed to the corporation. There is no basis to conclude that New Hampshire would extend Rule 4.2 to former employees, including senior ones, since "[n]either the Rule nor its comment purports to deal with former employees of a corporate party." ABA Formal Op. 91–359 (march 22, 1991). The formal opinion, not the few cases to the contrary, is true to the text of the Rule. Rule 4.2 was not violated.

Defendants claim that plaintiffs violated N.H. Rules of Professional Conduct 4.3 and 8.4 in the language of two messages left on answering machines and in two e-mails. *See* Document no. 34, Exhibits A to D. None of these messages "state or imply" that counsel is disinterested and none contain any misrepresentations. Each identifies that the individual seeking the contact is an investigator for a law firm and that the desired contact involves background research on, or investigating of, Tyco. There is nothing in that to suggest disinterest and it does not constitute a misrepresentation. ABA Formal Op. 91–359 (March 22, 1991) as it relates to Rule 4.3 "requires that the lawyer contacting a former employee of an opposing corporate party make clear the nature of the lawyer's role in the matter giving occasion for the contact, including the identity of the lawyer's client and the fact that the witness's former employer is an adverse party". Even assuming that this portion of the opinion is not an improper reach far beyond the text of the rule and assuming that this court would give some deference to that portion of the formal opinion, the

procedure set forth in Ms. Janis' affidavit which she attests is what she does in actual conversations with unrepresented potential witnesses easily meets the requirements of the opinion. Extending the procedure referenced in the opinion to phone and e-mail messages which simply request a conversation would be a hyper-technical, ill-advised, extension of Rule 4.3 far beyond its text.

***4** Nothing plaintiffs' counsel has done in seeking interviews is unethical and their conduct does not justify special regulation. Furthermore, defendants will not be permitted to obtain discovery (of work product no less) while plaintiffs are prohibited from doing so and defendants are not entitled to an order precluding the use of counsel's work product by them in the lawsuit.

The motion (document no. 34) is denied. Further liberties with LR 7.1(c) certifications would be an ill-advised risk for any attorney in this case to take.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2001 WL 34075721

Footnotes

1 While Cravath claims not to have received plaintiffs' August 14 fax, the New Hampshire attorney filing the motion *did* receive it.

2 "Lunch time" and "late day" ultimatums are sharp practices which are not consistent with a "good faith" attempt to obtain concurrence.

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XTL-NH, Inc. v. N.H. State Liquor Comm'n, 2013-CV-00119, 2013 N.H. Super. LEXIS 24 (N.H. Super. Dec. 31, 2013)

(finding jurisdictions that limit interviews with former employees to be in the minority).

Neutral
As of: December 28, 2019 8:02 PM Z

XTL-NH, Inc. v. N.H. State Liquor Comm'n

Superior Court of New Hampshire, Merrimack County

December 31, 2013, Decided

NO. 2013-CV-00119

Reporter
2013 N.H. Super. LEXIS 24 *

XTL-NH, Inc. v. New Hampshire State Liquor Commission and Exel, Inc.

Notice: THE ORDERS ON THIS SITE ARE TRIAL COURT ORDERS THAT ARE NOT BINDING ON OTHER TRIAL COURT JUSTICES OR MASTERS AND ARE SUBJECT TO APPELLATE REVIEW BY THE NEW HAMPSHIRE SUPREME COURT.

Prior History: *XTL-NH, Inc. v. N.H. State Liquor Comm'n, 2013 N.H. Super. LEXIS 11 (2013)*

Judges: [*1] Richard B. McNamara, Presiding Justice.

Opinion by: Richard B. McNamara

Opinion

ORDER

The Plaintiff, XTL-NH, Inc. ("XTL"), has filed a Motion for Permission to Conduct Ex Parte Interviews of Certain Witnesses seeking, in substance, that it be permitted to interview, on an ex parte basis, current and former employees of the Defendant, the New Hampshire State Liquor Commission (the "Commission"). The Commission objects. For the reasons stated in this Order, XTL's motion is GRANTED in part and DENIED in part.

I

After unsuccessfully bidding on a Request for Proposal to obtain the Commission's warehousing contract, XTL brought a Petition for Preliminary and Permanent Injunction, challenging the award of the contract to Exel, Inc. By Order dated May 7, 2013, this Court denied relief, and the Petition was amended in July 2013 to seek a permanent injunction or other equitable relief, damages, and a jury trial. XTL has now filed a Motion for Permission to Conduct Ex Parte Interviews of Certain Witnesses seeking an order granting permission to conduct ex parte interviews of certain current and former employees of the Commission, and an order prohibiting counsel for the Commission from doing anything to affect the willingness **[*2]** of those witnesses who are willing to speak with XTL's counsel. XTL seeks to conduct ex parte interviews of the following categories of witnesses:

a. Former managerial employees of the [Commission];
b. Former non-managerial employees of the [Commission];
c. Former State employees of agencies other than the [Commission];
d. Current [Commission] non-managerial employees;
e. Current State employees of agencies other than the [Commission]; and
f. Former [Commission] employees who were acting as consultants to the [Commission] at all times pertinent to the events of this lawsuit.

(Pl.'s Mot. for Ex Parte Interviews ¶ 1.)

XTL asserts that it has the right under New Hampshire Rule of Professional Conduct 4.2 ("Rule 4.2") to conduct these interviews without the consent, or presence, of counsel for the Commission, and without any interference from the Commission. The Commission objects, and asserts that the Attorney General's Office represents all current or former state employees who may have information regarding XTL's claims. (Def.'s Obj. to Ex Parte Interviews ¶¶ 6-7). In effect, XTL seeks a prophylactic ruling from the Court in advance of the interviews.[1]

Both parties agree that the starting point for analysis is the text of Rule 4.2, which provides, in relevant part:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

N.H. R. Prof. Conduct 4.2.

This Rule is derived from the 2004 ABA Model Code. As XTL notes, by itself the Rule is "ambiguous with regard to whether a lawyer may conduct ex parte interviews of current or former employees or of other constituents of an organizational litigant without the consent of the organization's lawyer." (Pl.'s Mot. for Ex Parte Interviews ¶ 4.) The Comments to the Rule by the Ethics Committee note that the ABA comments adopt what is known as the managing-speaking test to determine when organizational personnel are "off-limits" under Rule 4.2. The Ethics Committee Comments note that several other tests have been used, known as the control group test, the blanket ban, the alter ego test, and the balancing test and that the New Hampshire Supreme **[*4]** Court has not ruled on the issue. The Ethics Committee Comments further note, however, that "while not controlling on the question of permissible ex parte contact with employees of a corporate opponent, it is worth noting that New Hampshire has adopted the control-group test for purposes of applying the attorney-client privilege in the corporate setting." *N.H. R. Prof. Conduct 4.2*, Ethics Committee Comment (citing *N.H. R. Ev.* 502(a)(2); *Klonoski v. Mahlab, No. 95-153-M, 1996 U.S. Dist. LEXIS 20360, at *9 n. 2 (D.N.H. July 16, 1996)*, *rev'd on other grounds*, *156 F.3d 255 (1st Cir. 1998)*).

However, the Court believes that the 2004 ABA Comments along with Rule 4.2 informs the Court's decision on what standard applies. The Comments to Rule 4.2 provided in relevant part:

---

[1] This procedure is recommended by the ABA **[*3]** Model Code Comment to Rule 4.2.

> [7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. **[*5]** Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for the purpose of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

Model Rules of Prof'l Conduct R. 4.2 cmt. 7 (2004). This test is plainly different than the narrow control group test, adopted by New Hampshire Rule of Evidence 502 in order to effectuate attorney-client privilege.

II

A

The Attorney General argues that it represents all state employees and that therefore ex parte contact is prohibited by Rule 4.2. While tacitly recognizing that Rule 4.2 implies a managing-speaking test, it argues that *RSA 99-D* requires that all State employees be considered their clients. *RSA 99-D* provides, in substance, that current and former New Hampshire employees are entitled to a defense and indemnification in civil suits brought against them pursuant to New Hampshire law. **[*6]** The Court cannot accept this argument. By its own terms, the statute only applies to those against whom a claim has been made, and does not apply to those against whom a claim has not yet been made or may never be made.

As a general rule, "[a]n entity cannot claim a blanket protection from ex parte interviews by taking the position that house counsel is responsible for all future legal matters affecting that entity." *Matter of Madris, 97 A.D.3d 823, 825, 949 N.Y.S.2d 696, (N.Y. App. Div. 2d. Dep't 2012)* (citation and internal quotation omitted). Similarly "if a governmental party were always considered to be represented by counsel for purposes of the rule against ex parte communications, the free exchange of information between the public and the government would be greatly inhibited." *Id.* (brackets omitted) (quoting *Schmidt v. State of New York, 279 A.D.2d 62, 65, 722 N.Y.S.2d 623 (2000))*. The *Restatement (Third) of the Law Governing Lawyers § 101* explicitly rejects the Commissions position, and allows direct lawyer contact with a government officer or employee except when a governmental client is represented with respect to negotiation or litigation of a specific claim. Comment c explains:

> *c. Negotiation or litigation **[*7]** involving a specific claim.* When the government is represented in a dispute involving a specific claim, the status of the Government as client may be closely analogous to that of any other organizational party (see §100). Where such a close analogy exists, as stated in subsection (2), the anti-contact rule of § 99 applies, although with reduced scope. Thus, in prosecuting a tort claim against a governmental agency based on the activities of an agency employee in operating a motor vehicle, a personal interview with the employee is subject to the anti-contact rule. (See § 100(2)(b)). In any specific claims representation, contact is permissible with officers of governmental agencies other than the agency be specifically involved and with officers of the governmental agency in question who do not have power to bind the agency with respect to the specific matter.

Restatement (Third) of law Governing Lawyers § 101, cmt. c (2000).

Moreover, the mere assertion by the Attorney General's Office that it represents all State employees is insufficient to establish an attorney-client relationship. *Harry A. v. Duncan, 330 F.Supp.2d 1133, 1141-142 (D. Mont. 2004)*. It follows that *RSA 99-D* does not **[*8]** prohibit XTL's counsel from interviewing current employees of the Commission who do not supervise, direct or regularly consults with the Commission's lawyer concerning the matter, who have authority to obligate the Commission with respect to the matter, or whose act or omission may be imputed to the organization.

B

Professional Conduct Rule 4.2 generally prohibits a lawyer from speaking with a nonclient he knows to be represented by counsel. With respect to general entities such as corporations or the Government, the identity of the client must be determined in order to understand the reach of the prohibition.

Courts in many jurisdictions seeking to define the underlying purpose of Rule 4.2 have cited Formal Opinion 91-359 of the American Bar Association Standing Committee on Ethics and Professional Responsibility. *See, e.g., Humco, Inc. v. Noble, 31 S.W.3d 916, 920 (Ky. 2000)*; *H.B.A. Mgmt., Inc. v. Estate of Schwartz, 693 So.2d 541, 544-46 (Fla. 1997)*. In that opinion, the Committee interpreted Rule 4.2 of the Model Code of Professional Responsibility, which is identical to New Hampshire Professional Conduct Rule 4.2, and "identified a dual rationale of the rule: to preserve the proper **[*9]** functioning of the legal system and to shield the adverse party from improper approaches." *See P.T. Barnum's Nightclub v. Duhamell, 766 N.E.2d 729, 733 (Ind. Ct. App. 2002)* (citation and internal quotation omitted) (examining Formal Opinion 91-359 of the American Bar Association Standing Committee on Ethics and Professional Responsibility). The Committee also noted that the Rule "rests on the notion that the presumptively superior skills of the trained advocate should not be matched against those of one not trained in the law." *Id.* (citation and internal quotation omitted).

The language of Rule 4.2 is clear, but its application may not always be when jural entities are involved. The Comments note that this Rule prohibits communication with "a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter, or has authority to obligate the organization with respect to the matter, or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." There is always a risk of violation of Rule 4.2 when current employees are interviewed for several reasons. **[*10]** First, the lawyer seeking to interview the nonclient may not be aware of what employees of the Government agency regularly consult with the organization's lawyers, or receive advice from them, or provide information to them. and Second, an adverse party's lawyer may also be unaware of what government employees have authority to bind the organization. Finally, an organization's lawyer has a legitimate concern about protecting the organization's privilege, which belongs to the organization and not to the employee.

The last concern is particularly acute in this case, which involves a public bidding process for a State contract which occurred over a lengthy period of time, and was, according to the record, subject to review and oversight by the Attorney General's Office. The Court can take judicial notice of right-to-know requests which have been filed in this matter in which the Commission has asserted work product privilege with respect to numerous documents. Rule 4.2 does not exist in a vacuum. Rule 4.4 (b) specifically requires that a lawyer not utilize material which was inadvertently provided, such as privileged material. But what is or is not work product may not be apparent to a **[*11]** non-lawyer.

The problem is ultimately protecting the organization's privilege. Under the circumstances of this case, the Court therefore believes that while there may be current Commission or State nonmanagerial employees who may be interviewed without violating the strictures of Rule 4.2, the risk of disclosure requires prophylactic procedures. Accordingly, with respect to current employees, ex parte interviews may be permitted only under the following circumstances:

1. The Plaintiff shall provide counsel for the Commission with a list of current Commission or State employees it seeks to interview. The list shall be designated "attorneys' eyes only", and shall not be disclosed to anyone beyond counsel for the Commission.
2. Within 20 days of receipt of the list, counsel for the Commission shall advise the Plaintiff if they believe that any witness the Plaintiff seeks to interview falls within the prohibition of Rule 4.2. If the parties dispute whether or not a witness may be interviewed consistent with Rule 4.2, a motion for protective order shall be filed prior to any interview taking place.

With respect to any employees whose interview is not barred by Rule 4.2, the Plaintiff's counsel **[*12]** shall be permitted to contact them on an ex parte basis and without prior notice to the Commission's counsel so long as the Plaintiff's counsel shall:

1. Identify himself to each person, including the fact of the litigation and that he represents the plaintiff in the litigation. See Rule 4.3;
2. Inform each person that he or she has the right to decline to be interviewed and has the right to request the counsel from the Attorney General's Office be present during the interview;

3. Refrain from asking questions that would likely reveal information protected by the attorney-client privilege or work product doctrine; and
4. Limit his questions to the subject matter of this litigation.

Counsel for the Commission must refrain from doing anything "to affect the willingness of current and former employees to decide whether they are or will be willing to speak with plaintiff's counsel." *Davis v. Creditors Interchange Receivable Mgmt., LLC., 585 F.Supp.2d 968 (N.D. Ohio 2008)*.

C

More difficult is the issue of whether Rule 4.2 prohibits the interview of prior employees in the somewhat unusual circumstances of this case which involves bidding on a public contract which will last for some 20 years. In **[*13]** the years since promulgation of Rule 4.2, the majority of the courts in jurisdictions with a cognate of Rule 4.2 have held that contacts with former employees are not barred by Rule 4.2. *See* Hazard, Jr. & Irwin, *Toward a Revised 4.2 No-Contact Rule*, 60 HASTING L.J. 797, 840-41 (2009) (stating "The Model Rule, the Restatement (Third), and most courts permit communications with former employees. These authorities generally assert that once a constituent's affiliation with an organization ceases, there is a greatly diminished risk that communications with that person will harm the organization's client-lawyer relationship) (citing ABA Committee on Ethics and Professional Responsibility, Formal Opinion 359 (1991)).[2]

A few courts take a more restrictive view, reasoning that employee statements could eventually constitute admissions. *Pardo v. General Hosp. Corp., No. 98-2714, 2000 Mass. Super. LEXIS 536, 2000 WL 33170689, at *2-3 (Mass. Super. Ct. Oct. 31, 2000)*.[3] This reasoning tends to rely upon the Comments to Rule 4.2 and focuses on the acts, omissions, or statements of former employees that occurred while they were employed and that could be imputed onto a corporation. *See Rockland Trust Co., 1999 U.S. Dist. LEXIS 2008, 1999 WL 95722, at *11-16*. Some courts adopt a flexible approach, holding that the key factor in evaluating the propriety of a lawyer's contact with a former unrepresented employee of an adverse party is the likelihood that privileged information will be disclosed to an opponent in litigation. **[*15]** *See* Hazard, Jr. & Irwin, *supra*, at 841 (citing cases for the proposition that"[o]ther courts prohibit communication if the ***former employee*** has been privy to confidential or privileged information. . . ."); *see also Fleetboston Robertson Stephens, Inc. v. Innovex, Inc., 172 F.Supp.2d. 1190, 1195 (D. Mass. 2001)*. These views are, however, plainly in the minority. *Restatement (Third) of the Law Governing Lawyers § 100, cmt. g*.

Counsel for XTL is certainly aware of his responsibility to adhere to Professional Conduct Rules 4.3, Dealing With Unrepresented Person and 4.4, Respect for Rights of Third Persons. However, a ***former employee*** may not be aware of his or her rights, including his or her right not to speak to an attorney at all or to seek advice from his or her ***former employee***'s counsel. A significant risk in the unusual circumstances of this case is that a **[*16]** nonlawyer may not realize that information he is providing is protected by the work product privilege. Part of the purpose of Rule 4.2 is to ensure that the "presumptively superior skills of the trained advocate should not be matched against those of one not trained in the law."*P.T. Barnum's Nightclub, 766 N.E.2d at 733* (citation omitted).

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[2] *See also Valassis v. Samelson, 143 F.R.D. 118, 121-22 (E.D. Mich. 1992)* (noting that the majority of courts have held that Rule 4.2 does not apply to former employees and applying an analysis focusing on the language of Rule 4.2 over its underlying comments); *P.T. Barnum's Nightclub, 766 N.E.2d at 734, 737* (adopting a text-based approach of Rule 4.2 permitting contact with ***former employee*** of adverse party and citing additional cases); *Humco, 31 S.W.3d 916, 920 (Ky. 2000)*; ***Estate of Schwartz, 693 So.2d 544-46***; **[*14]** *State ex rel Charleston Area Medical Ctr. v. Zakaib, 190 W. Va. 186, 437 S.E.2d 759, 763 (W. Va. 1993)*; 2 Hazard, Jr. & Hodes *The Law of Lawyering* § 38.7 (3d ed. Supp. 2011) ("The no-contact regime . . . does not address communications with *former* agents and employees and technically there should be no bar, because former employees cannot bind the organization, and their statements cannot be introduced as admissions of the organization.") (emphasis in original).

[3] Citing, *inter alia, Hurley v. Modern Continental Constr. Co., No. 94-11373, 1999 U.S. Dist. LEXIS 2003, 1999 WL 95723, at *2 (D. Mass. Feb. 19, 1999)*, *Rockland Trust Co. v. Computer Assocs. Int'l, Inc., No. 95-11683 DPW, 1999 U.S. Dist. LEXIS 2008, 1999 WL 95722, at *4 (D. Mass. Feb. 19, 1999)* and *Pratt v. National R.R. Passenger Corp., 54 F. Supp. 2d 78, 79-80 (D. Mass. June 28, 1999)*.

The identity of individuals who are both *former* employees and individuals who may have provided or received privileged work product is likely small, and counsel for the Commission certainly has the ability to meet with those individuals in advance of any interview by counsel for XTL, and advise them of their rights. Furthermore, counsel for the Commission has the ability to advise them of areas of inquiry that are privileged and the fact that the privilege belongs to the Commission and not to them [4]. Moreover, counsel for XTL is or should be aware that where privileged information is obtained as the result of an interview which violates the Rules of Professional Conduct, the ordinary remedy is disqualification to avoid tainting the litigation before the court. *ChampionsWorld, LLC v. United States Soccer Federation, 276 F.R.D. 577, 589, (N.D. Ill. 2011)*. **[*17]** This fact provides a powerful deterrent for XLT's counsel to proceed cautiously.

Balancing these considerations, the Court believes that application of the majority rule, as set forth in the Restatement, allowing counsel for XTL to proceed with interviews of all former employees who are willing to speak to them is appropriate, because the risk of a violation of the Commission's attorney-client privilege or work product privilege is low. *Restatement (Third) of Law Governing Lawyers, § 100*. This Order does not, however, bar the Commission from seeking a protective order if specific reasons exist to prohibit interview of a particular ***former employee***. For example, if the Plaintiff's counsel seeks to interview a ***former employee*** who held a confidential position or whose conduct is the subject of the litigation in question, a different result might be reached. *See generally Polycast Technology Corp. v. Uniroyal, Inc., 129 F.R.D. 621, 628-29 (S.D.N.Y. 1990) Chancellor v. Boeing Co., 678 F.Supp. 250, 253 (D. Kan. 1988)*.

III

XTL also seeks to interview former Commission employees "who **[*18]** were acting as consultants to the [Commission] at all times pertinent to the events of this lawsuit." (Pl.'s Mot. for Ex Parte Interviews ¶ 1.) As previously noted, the Court is aware from Right-to-Know Requests which have been filed that a significant number of documents relating to this transaction have been withheld based upon the work product privilege. Different considerations are therefore applicable in this circumstance. Such consultants may have been retained for many reasons; based on the representations made so far in this litigation, there is at least a reasonable basis to believe that communication by the Commission with retained consultants might well have been in anticipation of litigation and therefore privileged under both the Superior Court Rules and the work product doctrine, which is available to the State. *Riddle Spring Realty v. State, 107 N.H. 271, 220 A.2d 751 (1966)*.

Whether a communication is privileged pursuant to the work product doctrine is often difficult to determine and likely unintelligible to a layperson. Under the unusual circumstances of this case, based on the record before the Court, the balance tips in favor of prohibiting ex parte communication of consultants **[*19]** hired by the State at times pertinent to the events of this lawsuit. Counsel for XTL may not engage in ex parte contact with former Commission employees who were acting as consultants to the Commission at any time pertinent to the events of this lawsuit.

SO ORDERED

12/31/13

DATE

/s/ Richard B. McNamara

Richard B. McNamara,

Presiding Justice

[4] Although they may not, of course, attempt to discourage potential witnesses from meeting with Plaintiff's counsel.

End of Document

In re Grand Jury Subpoena, 274 F.3d 564, 571-72 (1st Cir. 2011).

(The law presumes that a lawyer does not represent the corporation and its employees simultaneously.)

KeyCite Yellow Flag - Negative Treatment
Distinguished by Gavin v. Liberty Mut. Group Inc., D.N.H., August 6, 2012

274 F.3d 563
United States Court of Appeals,
First Circuit.

In re GRAND JURY SUBPOENA (Custodian of Records, Newparent, Inc.),
A. Nameless Lawyer (A Pseudonym) et al., Intervenors, Appellants.

No. 01–1975.
|
Heard Sept. 14, 2001.
|
Decided Nov. 8, 2001.

Synopsis

Former officers of subsidiary corporation, and attorney who had served as subsidiary's outside counsel and also represented officers in their personal capacities, moved to quash subpoena duces tecum in which federal grand jury sought to compel parent corporation to produce records pertaining to subsidiary's affairs. The United States District Court for the District Of Massachusetts, Reginald C. Lindsay, J., denied motion. Intervenors appealed. The Court of Appeals, Selya, Circuit Judge, held that: (1) officers and attorney had sufficient interest in proceedings to intervene in order to seek to quash subpoena; and (2) denial of motion to quash was appealable even though it was not a final judgment; but (3) subsidiary's waiver of attorney-client and work product privilege was effective as to any privilege protecting communications between officers and attorney, regardless of any joint defense agreement; (4) failure to present sufficient information regarding nature of materials withheld resulted in waiver of any privileges; and (5) district court did not abuse its discretion by declining to hold evidentiary hearing.

Affirmed.

Attorneys and Law Firms

***567** Andrew Good, with whom Harvey A. Silverglate, Silverglate & Good, Norman Zalkind, David Duncan, Zalkind, Rodriguez, Lunt & Duncan, Martin G. Weinberg, Oteri, Weinberg & Lawson, Elizabeth B. Burnett, and Mintz Levin Cohn Ferris Glovsky & Popeo were on consolidated brief, for appellants.

John M. Hodgens, Jr., Assistant United States Attorney, with whom James B. Farmer, United States Attorney, and Stephen P. Heymann, Assistant United States Attorney, were on brief, for the United States.

Before SELYA and LIPEZ, Circuit Judges, and DOUMAR,[*] Senior District Judge.

Opinion

SELYA, Circuit Judge.

This appeal requires us to traverse largely unexplored terrain concerning the operation of the attorney-client and work product privileges. The underlying controversy arises out of a subpoena duces tecum issued by a federal grand jury to a corporation, seeking records pertaining to the affairs of a subsidiary. Although the ***568** corporation and the subsidiary waived all claims of privilege, the subsidiary's former attorney and two of its former officers intervened and moved to quash the subpoena. They claimed that the subsidiary had entered into a longstanding joint defense agreement with the former officers and contended that the subpoenaed materials were privileged (and, thus,

not amenable to disclosure). The district court eschewed an evidentiary hearing and denied the motion to quash, but stayed production of the documents pending appeal.

We affirm the district court's order. We hold that an individual privilege may exist in these circumstances only to the extent that communications made in a corporate officer's personal capacity are separable from those made in his corporate capacity. Because the intervenors do not allege that any of the subpoenaed documents are solely privileged to them but rest instead on the theory that all the documents are jointly privileged, their claim, as a matter of law, does not survive the subsidiary's waiver. The joint defense agreement does not demand a different result: privileges are created, and their contours defined, by operation of law, and private agreements cannot enlarge their scope. Moreover, this particular joint defense agreement is unenforceable.

We have a second, independently sufficient ground for our decision. The denial of the motion to quash must be upheld in all events because the intervenors failed to generate a descriptive list of the documents alleged to be privileged.

I. BACKGROUND

We start by recounting the events leading to this appeal. Consistent with the secrecy that typically attaches to grand jury matters, *see, e.g.*, Fed.R.Crim.P. 6(e), this case has gone forward under an order sealing the proceedings, the briefs, and the parties' proffers. To preserve that confidentiality, we use fictitious names for all affected persons and corporations.

On March 26, 2001, Oldco—a Massachusetts corporation in the business of processing, packaging, and distributing food products—entered into a plea agreement with the United States Attorney for the District of Massachusetts. Under the agreement's terms, Oldco pled guilty to charges of conspiracy to defraud the Internal Revenue Service and agreed to cooperate with the government's ongoing investigation of certain present and former officers, employees, and customers. As part of this cooperation, Oldco expressly waived applicable attorney-client and work product privileges. Soon thereafter, a federal grand jury issued a subpoena duces tecum to Oldco's parent corporation, Newparent, Inc., demanding the production of documents relating to its "rebate program"—a program under which, according to the government, Oldco would charge certain complicit customers more than the going rate for its products, but would then refund the difference by payments made directly to principals of these customers.

At the time the subpoena was served, Oldco was a wholly-owned subsidiary of Newparent. Its records were in the possession of Newparent's counsel, a law firm that we shall call Smith & Jones. Newparent had acquired Oldco in June of 1998, but the grand jury investigation focused on conduct that occurred prior to the acquisition date. During that earlier period, Oldco had operated as a closely held corporation, owned by a number of members of a single family; one family member (Richard Roe) served as its board chairman and chief executive officer, and another (Morris Moe) served on the board and as executive vice-president for sales and marketing. A. Nameless Lawyer was Oldco's principal outside counsel. These three individuals—Roe, Moe, and Lawyer—intervened in the ***569** proceedings and filed a motion to quash the subpoena.

The factual premise for the motion to quash is derived largely from Lawyer's affidavit. He states that while representing Oldco he also represented Roe and Moe in various individual matters. Moreover, he claims to have conducted this simultaneous representation of corporate and individual clients under a longstanding joint defense agreement. According to Lawyer, this agreement, although never committed to writing, provided that communications among the three clients were jointly privileged and could not be released without unanimous consent. Despite the absence of any reference to this agreement in the corporate records—there was no resolution or other vote of the board of directors authorizing Oldco to participate in such an arrangement—the intervenors assert that Roe, as chief executive officer, had the authority to commit the corporation to it.

Pertinently, Lawyer claims to have represented Oldco and its officers in connection with the grand jury investigation from and after October 1997 (when the grand jury served Oldco with an earlier subpoena requesting the production of certain customer records). He says that the oral joint defense agreement applies to this multiple-party representation and that he told the government that he represented Oldco and "all of its executives."

There is, to be sure, a written joint defense agreement entered into by and between Lawyer, as counsel for Roe/Moe, and Smith & Jones, as counsel for Newparent/Oldco.[1] However, that agreement was not executed until the fall of 1999 (by which time Lawyer was no longer representing Oldco). There is no evidence in the voluminous record (apart from Lawyer's affidavit) that any joint defense agreement existed before that time. Moreover, the intervenors neglected to mention the existence of an oral joint defense agreement when Newparent acquired Oldco and likewise failed to incorporate any reference to such a pact into the subsequent written agreement.

Notwithstanding these discrepancies, the intervenors solemnly maintain that the oral joint defense agreement existed from 1990 forward; that its terms apply to the grand jury investigation; and that it gives them a joint privilege—they mention both attorney-client and work product privileges—in the Oldco documents currently in the hands of Smith & Jones. But they do not identify any particular documents as privileged, nor do they specify the reasons why certain communications should be considered privileged. Thus, like soothsayers scrutinizing the entrails of a goat, we are left to scour the record for indications of what these documents might be and what they might contain. As best we can tell, some of the documents comprise transcripts of interviews with Oldco employees (including Roe and Moe); others comprise Lawyer's written summaries of Oldco's internal investigation into the rebate program.

Not surprisingly, the government and Oldco both filed oppositions to the intervenors' motion to quash. In response, the intervenors sought leave to present immunized evidence with respect to the privilege claims. They also filed a formal offer of proof and requested an evidentiary hearing. The district court denied the motion to quash at a non-evidentiary hearing held on July 2, 2001, thereby implicitly denying the intervenors' other requests. This expedited appeal ensued.

***570 II. JUSTICIABILITY**

We turn first to a pair of threshold questions that implicate our authority to hear and determine this appeal. Neither question need occupy us for long.

[1] [2] [3] First, we are satisfied that Roe, Moe, and Lawyer were properly allowed to intervene in the proceedings below for the purpose of pursuing quashal of the subpoena. Intervention is appropriate as of right when the disposition of an action may impair or impede the applicant's cognizable interest. Fed.R.Civ.P. 24(a)(2). Colorable claims of attorney-client and work product privilege qualify as sufficient interests to ground intervention as of right. *See In re Grand Jury Proceedings (Diamante)*, 814 F.2d 61, 66 (1st Cir.1987) (implying that "the existence of a privileged relationship or of a legitimate property or privacy interest in the documents possessed by the third party" is sufficient to establish standing). Clearly, those interests would be forfeited if Newparent were to comply with the grand jury subpoena—and, as matters now stand, Newparent has no incentive to protect the intervenors' interests. Consequently, this is a textbook example of an entitlement to intervention as of right.

[4] [5] [6] Second, although denial of a motion to quash a subpoena is not usually considered a final judgment and thus is not ordinarily an appealable event, we believe that we have appellate jurisdiction in this instance. An exception to the requirement of finality exists when "a substantial privilege claim ... cannot effectively be tested by the privilege-holder through a contemptuous refusal [to produce the documents]." *FDIC v. Ogden Corp.*, 202 F.3d 454, 459–60 (1st Cir.2000); *see also Perlman v. United States*, 247 U.S. 7, 12–13, 38 S.Ct. 417, 62 L.Ed. 950 (1918) (recognizing that, as a practical matter, denials of an intervenor's privilege-based motion to quash a subpoena must be immediately appealable because no effective post-judgment remedy otherwise would exist). Courts have invoked this exception when, as now, "a client (who is herself a party or a grand jury target) seeks to appeal an order compelling her attorney ... to produce allegedly privileged materials." *Ogden*, 202 F.3d at 459; *accord In re Grand*

Jury Subpoenas, 123 F.3d 695, 697 (1st Cir.1997). Although in this case the documents are in the hands of Newparent's counsel rather than in the custody of the intervenors' counsel, this only reinforces the essential fact that, absent an immediate appeal, the allegedly privileged material will be disclosed. Accordingly, we have jurisdiction to hear and determine this appeal.

III. THE MERITS

This appeal presents a smorgasbord of legal issues, but we must forgo the temptation to sample them all. Instead, we masticate only those issues that are necessary to a principled resolution of the matter.

We begin by discussing the ramifications of Roe's and Moe's claim that they were individual clients of Lawyer with respect to the grand jury investigation. We conclude that although such individual representation might have occurred in theory, no individual privilege exists as to documents in which Oldco also has a privilege. Because no independently enforceable privilege is alleged here, the corporation's waiver is effective for all communications covered by the subpoena, notwithstanding the existence *vel non* of the oral joint defense agreement. In all events, the intervenors failed adequately to inform the district court of the particular communications to which their claims of privilege allegedly attached. In the pages that follow, we proceed to discuss these issues one by one.

*571 A. *Privilege Claims.*

Because the attorney-client and work product privileges differ, we treat them separately.

[7] [8] **1. *Individual Attorney–Client Privilege Claims.*** The attorney-client privilege protects communications made in confidence by a client to his attorney. *See, e.g., United States* v. *Mass. Inst. of Tech.,* 129 F.3d 681, 684 (1st Cir.1997) (limning the scope of the privilege). Because it stands in the way of a grand jury's right to every man's evidence, the privilege applies only to the extent necessary to achieve its underlying goal of ensuring effective representation through open communication between lawyer and client. *See Fisher v. United States,* 425 U.S. 391, 403, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976).

[9] Roe and Moe can mount a claim of attorney-client privilege only if, and to the extent that, Lawyer represented them individually. If the only attorney-client privilege at stake is that of their corporate employer, then Oldco's waiver defeats the claim of privilege. After all, the law is settled that a corporation's attorney-client privilege may be waived by current management. *See CFTC v. Weintraub,* 471 U.S. 343, 349, 105 S.Ct. 1986, 85 L.Ed.2d 372 (1985) ("[W]hen control of a corporation passes to new management, the authority to assert and waive the corporation's attorney client privilege passes as well.").

[10] It is often difficult to determine whether a corporate officer or employee may claim an attorney-client privilege in communications with corporate counsel. The default assumption is that the attorney only represents the corporate entity, not the individuals within the corporate sphere, and it is the individuals' burden to dispel that presumption. *See United States v. Bay State Ambul. & Hosp. Rental Serv., Inc.,* 874 F.2d 20, 28 (1st Cir.1989). This makes perfect sense because an employee has a duty to assist his employer's counsel in the investigation and defense of matters pertaining to the employer's business. *See United States v. Sawyer,* 878 F.Supp. 295, 296 (D.Mass.1995).

[11] To determine when this presumption bursts, several courts have adopted the test explicated in *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.,* 805 F.2d 120 (3d Cir.1986). That test enumerates five benchmarks that corporate employees seeking to assert a personal claim of attorney-client privilege must meet:

> First, they must show they approached [counsel] for the purpose of seeking legal advice. Second, they must demonstrate that when they approached [counsel] they made it clear that they were seeking legal advice in their individual rather than in their representative capacities. Third, they must demonstrate that the [counsel] saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise. Fourth, they must prove that their conversations with [counsel] were confidential. And fifth, they must show that the substance of their conversations with [counsel] did not concern matters within the company or the general affairs of the company.

Id. at 123; *accord Grand Jury Proceedings v. United States,* 156 F.3d 1038, 1041 (10th Cir.1998); *United States v. Int'l Bhd. of Teamsters,* 119 F.3d 210, 215 (2d Cir.1997); *In re Sealed Case,* 29 F.3d 715, 719 n. 5 (D.C.Cir.1994).

We think that *Bevill* 's general framework is sound. Of course, the first four elements of its test are most relevant when an attorney disputes a corporate officer's claim of individual privilege. Here, however, Lawyer's affidavit makes it clear that he represented both Roe and Moe in their ***572** personal capacities. Thus, even though the intervenors' brief does not specifically address the *Bevill* factors, we assume for argument's sake that the first four prongs of the test are satisfied.

[12] [13] With respect to the final prong, the government claims that all of Roe's and Moe's communications were within the orbit of Oldco's general affairs, and therefore could not be individually privileged. In the government's view, *Bevill* precludes a finding of individual representation with respect to matters—such as the grand jury investigation into the rebate program—that involve the corporation. We do not read *Bevill* so grudgingly. As the Tenth Circuit explained:

> The fifth prong of *In Matter of Bevill,* properly interpreted, only precludes an officer from asserting an individual attorney client privilege when the communication concerns the *corporation's* rights and responsibilities. However, if the communication between a corporate officer and corporate counsel specifically focuses upon the *individual officer's* personal rights and liabilities, then the fifth prong of *In Matter of Bevill* can be satisfied even though the general subject matter of the conversation pertains to matters within the general affairs of the company.

Grand Jury Proceedings, 156 F.3d at 1041. We adopt this interpretation and conclude that, theoretically, Lawyer could have represented Roe and Moe individually with respect to the grand jury investigation. Still, this attorney-client relationship would extend only to those communications which involved Roe's and Moe's individual rights and responsibilities arising out of their actions as officers of the corporation.

[14] **2. *The Corporation's Right to Waive the Attorney–Client Privilege.*** Having concluded that there are potentially some communications protected by the attorney-client privilege, we next consider the effect of Oldco's waiver of that privilege. The major difficulty—there are others, but we need not discuss them here—is that the individuals' allegedly protected communications with Lawyer do not appear to be distinguishable from discussions between the same parties in their capacities as corporate officers and corporate counsel, respectively, anent matters of corporate concern. The intervenors propose that such "dual" communications be treated as jointly privileged such that the consent of all parties would be required to waive the privilege. But they fail to cite authority supporting this position, and we ultimately decline to accept it: permitting a joint privilege of this type would unduly broaden the attorney-client privilege by allowing parties outside a given attorney-client relationship to prevent disclosure of statements made by the client.

[15] [16] [17] The reference to an alleged joint defense agreement does little to advance the intervenors' argument on this point. "The joint defense privilege protects communications between an individual and an attorney for another when the communications are 'part of an ongoing and joint effort to set up a common defense strategy.' " *Bay State Ambul.,* 874 F.2d at 28 (citation omitted). Because the privilege sometimes may apply outside the context of actual litigation, what the parties call a "joint defense" privilege is more aptly termed the "common interest" rule. *See*

United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir.1989). Even when that rule applies, however, a party always remains free to disclose his own communications. *See In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir.1997). Thus, the existence of a joint defense agreement does not increase the number of parties whose consent is needed to waive the attorney-client privilege; it ***573** merely prevents disclosure of a communication made in the course of preparing a joint defense by the third party to whom it was made.

[18] In the clamor over the existence *vel non* of a joint defense agreement, the parties tend to overlook case law dealing directly with the circumstances under which statements made in a joint conference remain privileged. Although these cases do not speak with one voice, they inform our resolution of the issue. They establish that joint communications with a single attorney are privileged with respect to the outside world because clients must be entitled to the full benefit of joint representation undiluted by fear of waiving the attorney-client privilege. *See Ogden*, 202 F.3d at 461. Nevertheless, the privilege does not apply in subsequent litigation between the joint clients, *see id.;* in that sort of situation, one client's interest in the privilege is counterbalanced by the other's interest in being able to waive it.

The instance of a criminal investigation in which one former co-client is willing to aid in the prosecution of the other lies in the wasteland between these two doctrinal strands, and courts have split on whether the target of the prosecution may block disclosure in this context. *See McCormick on Evidence*, § 91 at 365 n.13 (John W. Strong ed., 5th ed. 1999) ("Whether the privilege is effective where one joint client is prosecuted and the other is willing to testify as to the joint consultations is a question which has divided the courts."); *see also Conn. v. Cascone*, 195 Conn. 183, 487 A.2d 186, 189–90 (1985) (collecting cases on both sides of the issue).

[19] Although the instant case arises as a motion to quash a subpoena, rather than as an attempt to block a former co-client's testimony, the issue of privilege is entirely congruent. But there is another difference here—a significant one that cuts against the intervenors. In this iteration, the former co-clients were not independent actors, but, rather, corporate officers who owed a fiduciary duty to the corporation. Faced with an analogous assertion of privilege by corporate managers, the Fifth Circuit has held that the managers' interest must yield to the shareholders' interest in disclosure of the privileged materials. *Garner* v. *Wolfinbarger*, 430 F.2d 1093, 1101–04 (5th Cir.1970). Taking a similar tack, we hold that a corporation may unilaterally waive the attorney-client privilege with respect to any communications made by a corporate officer in his corporate capacity, notwithstanding the existence of an individual attorney-client relationship between him and the corporation's counsel.

The line we draw parallels the holding of *Bevill*, 805 F.2d at 124 (rejecting the contention that "because [corporate officers'] personal legal problems were inextricably intertwined with those of the corporation, disclosure of discussions of corporate matters would eviscerate their personal privileges"). In this regard, we think it significant that the fifth prong of the *Bevill* test is stated in the negative: communications may be individually privileged only when they "*[do] not* concern matters within the company or the general affairs of the company," rather than when they *do* concern an individual's rights. *Id.* at 123 (emphasis supplied).

On this view, it follows that Roe or Moe may only assert an individual privilege to the extent that communications regarding individual acts and liabilities are segregable from discussions about the corporation. When one bears in mind that a corporation is an incorporeal entity and must necessarily communicate with counsel through individuals, the necessity for such a rule becomes readily apparent. Holding otherwise would open the door to a claim of jointly held privilege in virtually every corporate communication with counsel.

***574** Here, neither Roe nor Moe have even attempted to make any showing of segregability. On the contrary, their main argument in the district court and on appeal appears to be that the documents at issue do not lend themselves to separation into individual and corporate categories. The intervenors' brief is replete with references to "joint privilege," but contains no allegation that any particular communication related solely to the representation of Roe or Moe. Given the absence of such an allegation and the allocation of the burden of proof (which, on this issue, rests with the intervenors), we perceive no error in the district court's explicit finding that "all communications in this case are corporate communications." That dooms the intervenors' claim of attorney-client privilege, *see Grand Jury Proceedings*, 156 F.3d at 1042 (rejecting claim of individual privilege when "appellant has not produced for [the court's] review the particular documents at issue nor has he otherwise adequately demonstrated in the record that

any of the documents ordered produced were limited to the topic of his *individual* legal rights and responsibilities"), and renders moot the question of whether Roe and Moe also possessed an attorney-client privilege in these documents.

[20] [21] **3. *The Work Product Privilege.*** The claim of work product privilege raises a similar set of issues anent joint privilege. The work product rule protects work done by an attorney in anticipation of, or during, litigation from disclosure to the opposing party. *E.g.*, *Sealed Case*, 29 F.3d at 718. The rule facilitates zealous advocacy in the context of an adversarial system of justice by ensuring that the sweat of an attorney's brow is not appropriated by the opposing party. *Hickman v. Taylor*, 329 U.S. 495, 511, 67 S.Ct. 385, 91 L.Ed. 451 (1947). Although the record does not include an index of allegedly privileged documents—a shortcoming to which we shall return—it appears that at least two categories of files contemplated by the subpoena might qualify as work product: Lawyer's interviews of employees during Oldco's internal investigation into the rebate program, and his notes and mental impressions of the investigation.

[22] Roe, Moe, and Lawyer as their attorney may, at least in theory, invoke the work product privilege as to work done exclusively for Roe and Moe as individuals. Yet, their argument does not claim exclusivity,[2] but, rather, amounts to an insistence that they should have a veto over the disclosure of documents produced for the joint benefit of the individuals and the corporation. As in the case of the attorney-client privilege, however, the intervenors may not successfully assert the work product privilege with respect to such documents. Because they effectively conceded that the work was performed, at least in part, for the corporation, Oldco's waiver of all privileges negates their potential claim of privilege. In these circumstances, therefore, the work product privilege does not preclude disclosure of the documents sought by the subpoena.

[23] Undaunted, the intervenors argue that the presence of the oral joint defense agreement demands a different result. We do not agree. Although a valid joint defense agreement may protect work product, *see In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir.1990), one party to such an agreement may not preclude disclosure of work product by another party on whose behalf the work originally was performed. Nor can the parties, by agreement, ***575** broaden the scope of the privilege that the law allows. *See United States v. Lee*, 107 F. 702, 704 (C.C.E.D.N.Y.1901). Such an agreement would contravene public policy (and, hence, would be unenforceable).[3]

[24] [25] We add, moreover, that the type of joint defense agreement described in Lawyer's affidavit would be null and void. After all, a primary requirement of a joint defense agreement is that there be something against which to defend. *Bay State Ambul.*, 874 F.2d at 28. In other words, a joint defense agreement may be formed only with respect to the subject of potential or actual litigation. *Polycast Tech. Corp. v. Uniroyal, Inc.*, 125 F.R.D. 47, 50 (S.D.N.Y.1989). Lawyer's affidavit avers that his three clients (Oldco, Roe, and Moe) entered into an oral joint defense agreement in 1990, at which time no particular litigation or investigation was in prospect. The agreement thereafter remained in effect, Lawyer says, attaching *ex proprio vigore* to all matters subsequently arising (including the current grand jury investigation). The law will not countenance a "rolling" joint defense agreement of this limitless breadth.

[26] The rationale for recognizing joint defense agreements is that they permit parties to share information pertinent to each others' defenses. *See Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir.1965). In an adversarial proceeding, a party's entitlement to this enhanced veil of confidentiality can be justified on policy grounds. But outside the context of actual or prospective litigation, there is more vice than virtue in such agreements. Indeed, were we to sanction the intervenors' view, we would create a judicially enforced code of silence, preventing attorneys from disclosing information obtained from other attorneys and other attorneys' clients. Common sense suggests that there can be no joint defense agreement when there is no joint defense to pursue. We so hold.[4]

B. *Fed.R.Civ.P. 45(d)(2).*

[27] [28] [29] As an alternate ground for our decision, we note that the motion to quash was properly denied because the intervenors failed to present sufficient information with respect to the items to which their claim of privilege attaches. The Civil Rules specifically provide that:

> When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications or things not produced that is sufficient to enable the demanding party to contest the claim.

Fed.R.Civ.P. 45(d)(2). The operative language is mandatory and, although the rule does not spell out the sufficiency requirement in detail, courts consistently have held that the rule requires a party resisting disclosure to produce a document index or privilege log. *See, e.g., Bregman v. Dist. of Columbia,* 182 F.R.D. 352, 363 (D.D.C.1998); *First American Corp. v. Al–Nahyan,* 2 F.Supp.2d 58, 63 n. 5 (D.D.C.1998); *see also Avery Dennison Corp. v.* ***576** *Four Pillars,* 190 F.R.D. 1, 1 (D.D.C.1999) (describing privilege logs as "the universally accepted means" of asserting privilege claims in the federal courts); *cf. Vaughn v. Rosen,* 484 F.2d 820 (D.C.Ct.App.1973) (articulating the justifications for requiring privilege logs in the context of the FOIA). A party that fails to submit a privilege log is deemed to waive the underlying privilege claim. *See Dorf & Stanton Communications, Inc. v. Molson Breweries,* 100 F.3d 919, 923 (Fed.Cir.1996) (holding that failing "to provide a complete privilege log demonstrating sufficient grounds for taking the privilege" waives the privilege). Although most of the reported cases arise in the context of a claim of attorney-client privilege, the "specify or waive" rule applies equally in the context of claims of work product privilege. *See, e.g., Smith v. Conway Org., Inc.,* 154 F.R.D. 73, 76 (S.D.N.Y.1994).

In a somewhat indirect fashion, the intervenors suggest that they were hampered in their ability to present a list of privileged documents by the district court's refusal to hold an evidentiary hearing. This suggestion does not withstand scrutiny. After all, the intervenors were not without knowledge of the communications to which the subpoena pertained; Lawyer originally had possession of them and turned them over to Smith & Jones only when Newparent decided to change counsel. Despite this knowledge, the intervenors made no effort to prepare a privilege log. That omission is fatal.

[30] Privilege logs do not need to be precise to the point of pedantry. Thus, a party who possesses some knowledge of the nature of the materials to which a claim of privilege is addressed cannot shirk his obligation to file a privilege log merely because he lacks infinitely detailed information. To the contrary, we read Rule 45(d)(2) as requiring a party who asserts a claim of privilege to do the best that he reasonably can to describe the materials to which his claim adheres.

[31] [32] [33] At any rate, the district court did not err by failing to hold an evidentiary hearing. We test a trial court's decision on whether or not to convene an evidentiary hearing for abuse of discretion. *E.g., David v. United States,* 134 F.3d 470, 477 (1st Cir.1998). Our cases exhibit a strong preference for

> a "pragmatic approach" to the question of whether, in a given situation, an evidentiary hearing is required. The key determinant is whether, "given the nature and circumstances of the case ... the parties [had] a fair opportunity to present relevant facts and arguments to the court and to counter the opponent's submissions."

In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig., 56 F.3d 295, 302 (1st Cir.1995) (quoting *Aoude v. Mobil Oil Corp.,* 862 F.2d 890, 893–94 (1st Cir.1988)). In this instance, the paper record is quite extensive, containing affidavits from Lawyer as well as from representatives of Newparent and Smith & Jones. Furthermore, the intervenors had ample opportunity to respond to the other side's arguments, and took advantage of this opportunity by submitting a lengthy offer of proof. Under the circumstances, the district court was not obliged to convene an evidentiary hearing to fill in gaps in the intervenors' privilege claims. *See Aoude,* 862 F.2d at 894 (observing that matters often can be "heard" adequately on the papers).

[34] Next, the intervenors lament that the district court's failure to rule on their motion for immunity deprived them of

the opportunity to supplement the record with further evidence. Even if the district court had denied the immunity motion, the intervenors reason, they would have had an opportunity to decide whether to submit ***577** affidavits at the risk of incriminating themselves. This lamentation does not strike a responsive chord.

For one thing, the intervenors' failure to furnish a privilege log cannot plausibly be said to have resulted from the lack of an explicit ruling on the motion for immunity. Roe and Moe could have submitted a privilege log by proffer or over an attorney's signature without in any way compromising their Fifth Amendment rights.

[35] For another thing, although it is plainly the better practice for a trial court to rule explicitly on every substantial motion, it has long been accepted that a trial court may implicitly deny a motion by entering judgment inconsistent with it. *Wimberly v. Clark Controller Co.*, 364 F.2d 225, 227 (6th Cir.1966). In this case, the district court's rejection of the motion to quash effectively denied the intervenors' motion for a grant of immunity. That ruling hardly can be questioned on the merits. The intervenors point to no case authorizing a grant of judicial immunity to a grand jury target in order to facilitate the presentation of a privilege claim, and they offer no persuasive reason why this case should be the first.

What remains is the intervenors' unhappiness with what they characterize as the district court's rush to judgment. The facts are simple: the district court convened a status conference and then converted the status conference into a non-evidentiary hearing on the merits of the intervenors' privilege claims. The proper time to raise an objection to this procedure was directly after the court's announcement of its intention to proceed to the merits, but the intervenors stood mute. Having neither contemporaneously objected to the court's procedural ruling nor sought a continuance, the intervenors have waived any right to complain about the court's timing. *See In re United States (Franco)*, 158 F.3d 26, 32 n. 3 (1st Cir.1998); *United States v. Diaz–Villafane*, 874 F.2d 43, 47 (1st Cir.1989).

IV. CONCLUSION

We need go no further. We hold that the intervenors' claims of privilege fail because the oral joint defense agreement on which they rely cannot defeat Oldco's express waiver of privilege, and, alternatively, because the intervenors failed without justification to produce a privilege log (thereby waiving the underlying attorney-client and work product privileges). Similarly, the district court did not err either in refusing to convene an evidentiary hearing or in ruling simultaneously on the motion to quash and the motion for immunity. Accordingly, the order refusing to nullify the grand jury subpoena is unimpugnable.

Affirmed.

All Citations

274 F.3d 563, 51 Fed.R.Serv.3d 936

Footnotes

* Of the Eastern District of Virginia, sitting by designation.

1 The written joint defense agreement need not concern us as the grand jury has limited its request to documents predating the execution of that agreement.

2 For example, with respect to the employee interviews conducted by Lawyer, the intervenors argued to the lower court that the work product privilege does not belong exclusively to Oldco because the work was performed on behalf of all three clients.

3 This same reasoning applies to defeat the intervenors' claim that the parties' understanding, at the time they entered into the oral joint defense agreement, somehow serves to trump the normal operation of the attorney-client privilege. *See Lee*, 107 F. at 704.

[4] Given this holding, we need not address other potential problems with the purported joint defense agreement in this case (e.g., the absence of any indicium of corporate authority and the related question of whether corporate officers have the power to bind a corporation to such agreements when a conflict of interest plainly exists).

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POWERPOINT PRESENTATION

Webster-Batchelder Inns of Court

Table 4 CLE

Rule of Evidence 502 (Lawyer-Client Privilege)
&
Rule of Professional Conduct 4.2 (Communication with Person Represented by Counsel)

Overview

- Rule of Evidence 502 defines the Lawyer-Client Privilege.
- Rule of Professional Conduct 4.2 prohibits an attorney from communicating about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter.
- When representing individuals, these rules seems relatively straightforward.
- However, complications can arise when litigation involves businesses and other entities/organizations.
  - Where does the lawyer-client privilege lie?
  - Who do you represent?
  - To whom do you owe a duty?
  - How does your representation of one affect perceived responsibilities to others?
  - Which people or entities can you contact?

Who is this person or entity (and what am I doing here)?

- **Is it my client?** → Rule 502
  - Rule 502(a)(1): "A 'client' is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him."

- **If it is not my client, can I speak to him/her/it?** → Rule 4.2
  - Well, maybe.
  - But also, maybe not.
  - There are differing legal tests, and NH has yet to definitively choose one.
  - So what do you do?

Rule of Evidence 502 (Lawyer-Client Privilege)

- (b) *General Rule of Privilege.* A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client
  - (1) between the client or his or her representative and the client's lawyer or the lawyer's representative,
  - (2) between the client's lawyer and the lawyer's representative,
  - (3) by the client or the client's representative or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein,
  - (4) between representatives of the client or between the client and a representative of the client, or
  - (5) among lawyers and their representatives representing the same client.

Rule of Professional Conduct 4.2
(Communication with Person Represented by Counsel)

- In representing a client,
- a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter,
- unless the lawyer has the consent of the other lawyer
- or is authorized to do so by law or a court order.

Rule of Professional Conduct 3.4
(Fairness to Opposing Party and Counsel)

- A lawyer shall not:

  […]

  (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

  (1) the person is a relative or an employee or other agent of a client; and

  (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

- ABA Model Comment [4]:
  - Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. *See also* Rule 4.2.

NH Ethics Committee Comment on Rule 4.2

- ABA Comments on Rule of Professional Conduct 4.2
  - The ABA Comments adopt what is known as the managing-speaking test.
  - Several other tests have been used, known as the control group test, the blanket ban, the alter ego test and the balancing test.
  - The New Hampshire Supreme Court has not ruled on this matter.

The same NH Ethics Committee Comment on Rule 4.2 implicates Rule 502

- The same ABA Comments implicate Rule of Evidence 502
  - While not controlling on the question of permissible *ex parte* contact with employees of a corporate opponent,
  - For the purpose of Rule of Evidence 502, New Hampshire has adopted the control-group test for purposes of applying the attorney-client privilege in the corporate setting. *See* N.H. R. Evid.502(a)(2); *Klonoski v. Mahlab*, 1996 U.S. Dist. LEXIS 20360 n.2, *rev'd. on other grounds* 156 F.3d 225 (1st Cir. 1998).

While the New Hampshire Supreme Court "has not ruled on this matter" …

- … then Superior Court Judge Lynn did rule on this matter in 2007.
- *William Totherow et al. v. Rivier College et al.*, No. 05-C-296, 2007 WL 811734 (N.H. Super.Ct. Feb. 20, 2007).
  - Professor Totherow sued for improper discharge.
  - He named the college and two of its top officials as defendants.
  - "Presently before the court is plaintiffs' motion for an order authorizing their counsel to conduct ex parte interviews (i.e., without prior notice to the defendants) of 'lower echelon' [college] employees who are not representatives of the organization."
  - Judge Lynn analyzed the history and language of Rule 4.2.
  - He identified the various tests for permissible ex parte contact.
  - He applied the control group test to Rule 4.2.

Control Group Test

- *Control Group Test:*
  - This test is the narrowest and includes within its coverage the fewest number of organization employees.
  - The control group is defined as:
    - Those top management persons who have the responsibility of making final decisions and
    - Those employees whose advisory roles to top management are such that a decision would not normally be made without those persons' advice or opinion or whose opinions in fact form the basis for any final decision.

Blanket Ban

- *Blanket Ban:*
  - This approach represents the other extreme;
  - It bans ex parte contact with all current and (under some formulations) former employees of the corporate adversary.
  - Courts which have adhered to this view have tended to rely on the United States Supreme Court's decision in *Upjohn Co. v. United States,* 449 U.S. 383 (1981), which rejected the 'control group' test in the attorney-client privilege context, and held that the privilege can apply to communications between lower echelon corporate employees and the corporation's lawyer.

Managing-Speaking Test

- *Managing/Speaking Test:*
  - The prohibition on ex parte contact applies only to those agents of the corporation who, under the applicable substantive law, have the legal authority to speak for and bind the corporation.

Alter Ego Test

- *Alter Ego Test:*
  - This test is similar to but slightly broader than the Managing/Speaking Test.
  - It encompasses within the ambit of Rule 4.2 those employees or agents of a represented organization
    - (1) whose acts or omissions have the legal power to bind the organization in the matter,
    - (2) whose acts or omissions are imputed to the organization for the purposes of determining its liability, or
    - (3) who are responsible for implementing the advice of the organization's lawyer.
  - This test is broader than the Managing/Speaking Test in that it covers low level employees who have no authority to speak for or bind the organization, but who allegedly committed the act or omission upon which the organization's liability is based under the doctrine of respondeat superior.
  - Under this test, ex parte contact with low level employees who are merely witnesses is not prohibited.
  - As one court has pointed out, however, a practical difficulty with this test is that it may not be possible to determine whether a particular employee fits into the category of "mere witness" or one whose liability is imputed to the organization until after an interview of the employee is completed, and obviously a lawyer's right to conduct the interview cannot be made to turn on its outcome.

Balancing Test

- *Balancing Test:*
  - This test weighs the following factors –
    - (1) whether an employee's statements are likely to be admissible against the employer,
    - (2) the employer's need to have counsel present in the particular circumstance of the case, and
    - (3) the plaintiff's need for informal discovery –
  - and then makes a case by case determination of whether ex parte contact should be allowed.

The intersection of Rules 502 and 4.2

- Rule 502
  - ACME Corp. is my client.
  - But in New Hampshire, members of the (probably) control group within ACME Corp. are not my clients.

- Rule 4.2
  - If the members of the control group within ACME Corp. are not your clients …
  - Why can't I talk to them?

ACT I

ACT II


ST. MUNGO'S HOSPITAL
FOR MAGICAL MALADIES AND INJURIES

ACT III

Umbridge (Malfoy's lawyer)

Dobby (investigator)

Yaxley (Snape's lawyer)

Millicent Bulstrode (investigator)