GENERAL FACTS:
INTOXICATED Dr. BOOZER CAUSES DEATH OF PATIENT IN SURGERY, LEGAL INTRIGUE IN TRIAL LEADS TO BAR COMPLAINTS

The case of the patient who died at the hand of Dr. Boozer (Les Joughin), who was operating while drunk, according to his former lawyers, went to trial last month. The trial pitted two of the country's most renowned trial lawyers against each other in a high stakes legal drama. Fee Bailey (Michael Ruel), represented the family of the dead patient. Bailey asked for millions from Dr. Boozer, and the hospital that allowed Dr. Boozer to operate drunk. Bailey obtained a $20 million verdict against the doctor, but the hospital was acquitted of all liability.

Bailey has now asked for a new trial because of a phone call he received after the trial from Nurse Hatchett (Jennie Tarr), the operating room nurse who assisted Dr. Boozer in the surgery. Nurse Hatchett told Bailey that the hospital covered up documents she wrote, before the operation, informing the hospital of the doctor's history operating drunk and of her observations during the fatal operation. The hospital, represented by the flamboyant Gerri Spence (Kelley Howard-Allen), says she did nothing wrong and that the documents were fully disclosed. Spence claimed Bailey just failed to do his job. Nurse Hatchett filed a bar complaint against Spence complaining of the cover up.

Dr. Boozer, the now infamous drunk doctor, has also filed bar complaints against hospital lawyers Joe Sarbanes (Dominic Kouffman) and Spence. Boozer claims he thought in-house counsel Sarbanes represented him shortly after the incident. Boozer then confessed to Sarbanes that he had operated in an alcoholic haze, which caused the death of the patient. Sarbanes told Spence about the confession, who used it to blame Boozer and obtain the acquittal for her client. Boozer also filed a bar complaint against Spence who questioned him, during the recent trial, about a previous DUI. Spence had represented Boozer on the DUI. Boozer had also told Spence, during the DUI representation, that he had operated drunk in the past. The drunken doctor claims the lawyers should have kept his confessions and past history secret.

Bar Counsel, John Disbarrem (Henry Lee Paul), has vowed to get all the facts necessary to prosecute the lawyers. He will present the case to the grievance committee on March 12, 2013 at 7 p.m. The committee will be asked to vote as to whether probable cause exists to prosecute the charged lawyers.

Judge Jenkins will first address the committee with a discussion about the history of privilege and Bob Warchola will moderate the rest of the presentation. After committee deliberations conclude, Dominic Kouffman and Michael Ruel will instruct the committee about the applicable law of privilege and related ethical issues. Michael Ruel will provide a toast to conclude the proceedings.

IN THE CIRCUIT COURT OF THE HAPPY HOUR JUDICIAL CIRCUIT
IN AND FOR DRY COUNTY, FLORIDA
CIVIL DIVISION

BEN LOVED, as personal representative of
the Estate of JACK DANIELS, deceased,

Plaintiff,

v. Case No.: 12-CA-1234

ONTAP HOSPITAL,

Defendant.
_____/

DEFENDANT'S PRIVILEGE LOG

Defendant, ONTAP HOSPITAL, by and through its undersigned attorneys, pursuant to Fla. R. Civ. P. 1.280, herein claims the following information is privileged and not discoverable.

No.	Date	From	To	Description	Privilege
1	01/18/11	Nurse	Hospital Attorney	Email to in house counsel	AC WP
2	01/25/11	Hospital Attorney	Hospital Staff	Email requesting report and advice on communications	AC WP
3	02/10/11	Nurse	Risk Management	Hand written notes	AC WP
4	02/22/11	Dr. Boozer	Attorney	Written statement	AC WP
5	05/15/12	Hospital consultant	Attorney	Report	WP
6	03/01/12	Hospital Peer Review Committee	Attorney	Incident peer review report	AC WP

IN THE SUPREME COURT OF FLORIDA
(Before a Grievance Committee)
(A Fictitious Notice Prepared for the Cheatwood Inn of Court)

In re: A disciplinary matter conducted under authority of the Rules Regulating the Florida Bar	**Notice of Evidentiary Hearing before Grievance Committee: 13 Cheatwood** **TFB Nos. 2013-11,123(13 Cheatwood)** **2013-11,234(13 Cheatwood)** **2013-11,345(13 Cheatwood)**

To: In-house Hospital Counsel, Joe Sarbanes;
Outside Hospital Litigation Counsel, Gerri Spence;

Date of Hearing: March 12, 2013

Time: 7 p.m.

Place: HCBA

Subject of Hearing: Complaints of Dr. Boozer and Nurse Hatchett.

You will please take notice that the undersigned Grievance Committee will sit at the time and place mentioned for the purpose of investigating the alleged misconduct stated above. Rules 3-7.4(h) and (i) and 3-7.11(d)(7) of the Rules Regulating The Florida Bar are attached.

You are requested to attend and give testimony.

The conduct being investigated by the Committee is contained in the documents previously provided. A summary of the allegations is provided below.

Pursuant to the requirements of Rule 3-7.4(h), the following is a list of rules which may have been violated in this case. This list may be amended, at any time, by the Grievance Committee:

CASE 1

TFB No. 2013-11,123 (13 Cheatwood): Complaint of Dr. Boozer (Les Joughin) against in-house Hospital counsel, Joe Sarbanes (Dominic Kouffman).

Rule 4-1.6(a) (Confidentiality of Information): Mr. Sarbanes, in-house counsel for Hospital, mislead Dr. Boozer into believing he represented him as counsel in relation to causing the death of a patient during an operation performed by Dr. Boozer in the Hospital. Dr. Boozer admits to Mr. Sarbanes that he was drunk during the operation and that is why the patient died. Attorney

Sarbanes then disclosed this information for the benefit of the Hospital and to the detriment of Dr. Boozer. Dr. Boozer complains Mr. Sarbanes revealed privileged and confidential information, without informed consent, in violation of Rule 4-1.6(a).

Rule 4-1.6(a)
A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.

(b) When Lawyer Must Reveal Information. A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary:
. (1) to prevent a client from committing a crime; or
. (2) to prevent a death or substantial bodily harm to another.
(c) When Lawyer May Reveal Information. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
(1) to serve the client's interest unless it is information the client specifically requires not to be disclosed;
(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;
(3) to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;
(4) to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
(5) to comply with the Rules of Professional Conduct.
(d) Exhaustion of Appellate Remedies. When required by a tribunal to reveal such information, a lawyer may first exhaust all appellate remedies.

* * *

CASE 2

TFB No. 2013-11,234 (13 Cheatwood): Complaint of Dr. Boozer (Les Joughin) against outside Hospital litigation counsel, Gerri Spence (Kelley Howard-Allen).

Rule 4-1.9(b) and 4-1.9(c) (Conflict of Interest - Using Confidential Information to Disadvantage of Former Client, Revealing Confidential Information of Former Client): Gerri Spence was hired by Hospital as outside litigation counsel to defend the hospital from liability for the death of patient. Ms. Spence had previously represented Dr. Boozer in a DUI and was told by Dr. Boozer, during this representation, that he had operated while drunk. Attorney Spence negotiated a plea of reckless driving and had the records sealed. Ms. Spence had been successful in keeping the DUI confidential and out of public knowledge. Attorney Spence asked Dr. Boozer about the DUI and his alcohol use while operating, in a deposition taken in a lawsuit filed on behalf of the patient. Dr. Boozer complains Ms. Spence revealed privileged and confidential information in violation of Rule 4-1.9(b) and 4-1.9(c).

Rules 4-1.9(b) and 4-1.9(c)

A lawyer who has formerly represented a client in a matter shall not thereafter:
(b) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client or when the information has become generally known; or
(c) reveal information relating to the representation except as these rules would permit or require with respect to a client.

*** * ***

CASE 3

TFB No. 2013-11,345 (13 Cheatwood): Complaint of Nurse Hatchett (Jennie Tarr) against outside Hospital litigation counsel, Gerri Spence (Kelley Howard-Allen). Plaintiff's counsel Fee Bailey (Michael Ruel) is also a witness in support of the complaint.

Rules 4-3.4(a), 4-3.4 (c) and 4-3.4(d) (Fairness to Opposing Party – Concealing Evidence): Nurse Hatchet, the operating room nurse when the patient died at the hands of Dr. Boozer, had sent an email to in-house counsel, prior to the operation resulting in death, warning that Dr. Boozer was regularly drunk while operating. She also kept hand written notes after the death of the patient stating that Dr. Boozer was drunk, which she gave to hospital risk management shortly after the death. It is alleged that these documents were not adequately disclosed on the privilege log and Fee Bailey did not discover the existence of the documents until after the trial, when he spoke to Nurse Hatchett. Nurse Hatchet, upset by the concealment of her statements, complains that, Ms. Spence, obstructed access to material evidence in violation of Rules 4-3.4(a), 4-3.4(c) and 4-3.4(d).

Rules 4-3.4(a), 4-3.4(c) and 4-3.4(d)

A lawyer shall not:
(a) unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding; nor counsel or assist another person to do any such act;
(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
(d) in pretrial procedure, make a frivolous discovery request or intentionally fail to comply with a legally proper discovery request by an opposing party;

*** * ***

Pursuant to the requirements of Rule 3-7.4(a), attached is a list of the members of this Grievance Committee.

Any procedural objections, motions, etc. must be submitted to the committee, and a copy to Bar counsel, at least seven (7) days in advance of this proceeding. All such matters should be marked "Personal & Confidential -- To Be Opened By Addressee Only."

Pursuant to Rule 3-7.4(i), unless it is found to be impractical by the Chair of the Grievance Committee due to unreasonable delay or other good cause, the complainant shall be granted the right to be present at any grievance committee hearing when the respondent is present before the committee.

13(Cheatwood) Judicial Circuit Grievance Committee

_____

John Disbarrem, Esq.
Bar Counsel
The Florida Bar
4200 George J. Bean Parkway, Suite 2580
Tampa, FL 33607
(813) 875-9821
Florida Bar No. 123456

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original Notice of Hearing was provided by Certified Mail Return Receipt, to all Respondents.

_____

John Disbarrem, Esq.
Bar Counsel

Rule 3-7.4(h) Rights and responsibilities of the respondent.
The respondent may be required to testify and to produce evidence as any other witness unless the respondent claims a privilege or right properly available to the respondent under applicable federal or state law. The respondent may be accompanied by counsel. At a reasonable time before any finding of probable cause or minor misconduct is made, the respondent shall be advised of the conduct which is being investigated and the rules which have been violated. The respondent shall be provided with all materials considered by the committee and shall be given an opportunity to make a written statement, sworn or unsworn, explaining, refuting, or admitting the alleged misconduct.

Rule 3-7.4(i) Rights of the complaining witness. The complaining witness is not a party to the disciplinary proceeding. Unless found to be impractical by the chairman of the grievance committee due to unreasonable delay or other good cause, the complainant shall be granted the right to be present at any grievance committee hearing when the respondent is present before the committee. Neither unwillingness nor neglect of the complaining witness to cooperate, nor settlement, compromise, or restitution, will excuse the completion of an investigation. The complaining witness shall have no right of appeal.

Rule 3-7.11(d)(7) Contempt. Any persons who without adequate excuse fail to obey such a subpoena served upon them may be cited for contempt of this Court in the manner provided by this rule.

The Case of the Buried Bodies
Legal Ethics *and* What It Means To Be A Lawyer

By Lawrence Tibbles

If you decided to build on the fictional works of John Grisham and Stephen King you might make up a case that combines (1) all of the "client from hell" horror stories that you can remember, (2) defending a serial killer to the revulsion of the public and the lawyer's own clients and friends, and (3) a multitude of moral dilemmas, including whether to disclose the location of the bodies of two dead girls.

You might also want your case to shape the ethical doctrine of lawyer confidentiality, contribute to the development of legal ethics rules, and become a staple for law school professional responsibility courses. Perhaps, in addition, you want your case to instruct generations of lawyers and law students about what it means to be a lawyer. Impossible, you say, for one hypothetical case to do all of that.

Or you could talk with Frank Armani, a Syracuse, New York lawyer who in the mid-1970s lived such a case. Mr. Armani presented his story to central Ohio lawyers and law students at Capital University Law School last April. You can read his story in Privileged Information, a book about the case that he co-wrote.[1]

Here are the key points of the case in which Frank Armani risked his professional career, and his life, to represent a serial killer.

After murdering an eighteen-year-old boy, Armani's former client, Robert Garrow is the subject of the biggest police manhunt in New York history.

After his capture, Garrow asks Armani to represent him. The judge agrees and appoints Armani to represent Garrow on the murder charge—for assigned counsel compensation.

Garrow plays psychological games with Armani and his co-counsel Francis Belge, but after several long trips by the lawyers to where Garrow is being held, Garrow admits in confidence that he murdered the boy.

When his representation becomes known, Armani receives the scorn of the public, including many of his clients and friends.

Garrow tells Armani in confidence that he also has murdered and hidden the bodies of two young girls who have been reported missing by their parents. He draws a map.

Armani and Belge investigate and find the bodies of both girls. Armani decides that his oath of office prohibits him from disclosing this information either to the police or to the dead girls' frantic parents. He tells no one.

Armani makes an effort to plea bargain with this information, hoping for an early agreement on an insanity plea whereby Garrow will spend the rest of his life in a hospital for the criminally insane and Armani will be able to disclose his knowledge of the dead girls. The prosecutor rejects a plea bargain.

The police suspect Garrow in the disappearance of the two girls. The father of one of the girls comes to Armani's office and asks Armani to tell him anything that Armani knows about his missing daughter. Armani tells him nothing. Armani is so shaken that he refuses to see the father of the other girl.

Armani's life is threatened for representing that "kid killer." Armani carries a gun and stays in a different motel every night of the trial.

Armani knows that Garrow is a serial killer with a fondness for teenage girls. During the murder trial Armani and his wife discover that Garrow likely had stalked the Armani's own teenage daughter.

At trial Garrow takes the stand and confesses to seven rapes and four murders, including the eighteen-year-old boy and the two girls. The public is uncomprehending when Armani and Belge admit that they had seen the bodies of the two murdered girls and had told no one. Armani receives little support from his local bar.

After Garrow is convicted of murdering the boy, the prosecutor asks a grand jury to indict both Armani and Belge for the crime of not reporting the dead bodies. Armani defends himself by testifying without immunity before the grand jury. The grand jury does not indict Armani, but does indict Belge.[2]

The state bar brings disbarment proceedings against Armani, charging that he acted improperly by (1) failing to disclose to the authorities his knowledge of Garrow's murders of the two girls and the location of their bodies, (2) destroying the records of his conversation with Garrow and Garrow's map, (3) attempting to plea bargain with information of two unsolved murders. The state bar waits four years before releasing its opinion finding that Armani acted properly in every instance.[3]

A contract killer reportedly has been hired to kill Armani. Armani's wife and daughters are ostracized and threatened. They temporarily move to a safer location.

Armani's law practice drys up. A friend tells Armani that if it had been his daughter, he would have shot Armani.

After his conviction and imprisonment, Garrow sues Armani for malpractice.

Four years later, Garrow escapes from prison. A "hit list" of persons he plans to kill is found in his cell. Armani's name is on the list.

Armani gives the police information based on his previous conversations with Garrow suggesting that he may be hiding in an area previously searched by the police. The police reluctantly re-search this area. Garrow is there. There is a gunfight. Garrow is shot and killed by the police.

The case is commonly referred to as "The Buried Bodies Case," although neither body was actually buried. The most enduring aspect of the case is that Armani kept confidential his knowledge

of the existence and location of the girls' bodies. The information disclosed to Armani by his client was information about a past crime. The client was in police custody and unlikely ever to be released from jail or a mental institution. Because of the passage of time, if the girls were where Garrow told Armani they were, there was no possibility that either girl could still be alive. But Armani continually confronted other difficult personal moral dilemmas throughout the case.

Armani based his actions on the oath taken when he was admitted to practice in 1956 – to "maintain the confidence and preserve inviolate" the secrets of his clients – and the constitutional guarantee against self-incrimination. He was unaware that New York had recently promulgated the Code of Professional Responsibility with its requirement in DR 4-101 that the lawyer "shall not knowingly...reveal a confidence or secret of a client...[or] use a confidence or secret of a client to the disadvantage of the client...[except that] a lawyer may reveal...the intention of a client to commit a crime and the information necessary to prevent the crime." This language does not permit Armani to voluntarily reveal information about the girls' bodies. However, it does justify Armani's voluntarily disclosing information he had received years earlier from his client to direct the police to the hiding place of Garrow, a serial killer who had made a hit list of people he planned to kill.

Over the past thirty years, when discussing this case with their students, legal ethics teachers have done exactly what you have been doing while reading Armani's story – they changed the facts in order to raise additional, and more difficult, confidentiality issues. What if it was possible that Garrow had not already killed the girls, but was holding them prisoner? What if Garrow had given this information to Armani by telephone before he was apprehended? What if searchers were likely to be injured or killed while searching for the girls in treacherous terrain? What if another person was being charged with or convicted of murdering one of the girls? What if Garrow, a serial killer, had been improperly arrested and, upon a proper motion from Armani, would have to be released – perhaps to kill again?

Frank Armani's case has contributed to an important exception to client confidentiality now found in both the Model Rules of Professional Conduct and the new Ohio Rules of Professional Conduct. Ohio Rule 1.6(b)(1) provides that the lawyer may reveal "information relating to the representation of a client...to the extent that the lawyer reasonably believes necessary...to prevent reasonably certain death or substantial bodily harm...."

The importance of this case in the development of legal ethics has led a luminary in legal ethics, Professor Thomas Morgan, to conclude that "...this case is not simply an interesting footnote. It is a central case in the development of our understanding and appreciation of what it means to be a lawyer.[4]

This case is also about the courage of a lawyer who acted in the face of compassionate personal feelings for the parents of the dead girls, financial sacrifice, loss of clients and friends, death threats to himself and his family, threatened criminal prosecution, and disbarment proceedings. Professor Lisa Lerman, a leader in the field of legal ethics, has said that she does not have many heroes who are lawyers, but that Frank Armani would be at the top of her list.[5]

Frank Armani does not consider himself to be a hero – but a lawyer doing what our system of justice depends upon lawyers to do. Real heroes seldom tell the rest of us that they are heroes. But that should not stop us from recognizing and appreciating a member of our profession who, at great personal sacrifice, defines the essence of a good and decent lawyer.

April 2, 2008, the Ethics Institute of Capital University Law School and the Columbus Bar Association Professionalism Committee co-sponsored a program "Defending Detested Clients and Making Unpopular Decisions: Lawyers and Their Professional Responsibilities." Frank H. Armani was the featured speaker. The program included a panel discussion with local lawyers Jonathan Coughlan, David Goldberger, Dennis W. McNamara, and Holly Wallinger.

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1. *Tom Alibrandi with Frank H Armani, PRIVILEGED INFORMATION (Dodd, Mead 1984). The case is also the basis for the 1987 movie "Sworn to Silence."*

2. *Three courts in succession held that Belge could not be indicted for failing to comply with a misdemeanor statute requiring the reporting of dead bodies. The courts not only misunderstood the difference between the ethical doctrine of confidentiality and the attorney client privilege, but appeared to bow to the media-led public outcry over Armani and Belge's efforts to protect client confidentiality.*

> *"We believe that the attorney-client privilege attached insofar as the communications were to advance a client's interests, and that the privilege effectively shielded the defendant-attorney from his actions which would otherwise have violated the Public Health Law....We believe that an attorney must protect his client's interests, but also must observe basic human standards of decency, having due regard to the need that the legal system accord justice to the interests of society and its individual members....we limit our determination to the issue [of attorney-client privilege] and do not reach the ethical questions underlying the case."*
> *People v. Belge, 376 N.Y.S.2d 771 (NY App.Div. 1975).*

3. *N.Y. Bar Ass'n Comm. On Prof'l Ethics, O. 479 (1978)*

4. *Lerman, Armani, Morgan, and Freedman, "The Buried Bodies Case: Alive and Well after Thirty Years, 2007 SYMPOSIUM ISSUE OF THE PROFESSIONAL LAWYER 19 at 22 (2007).*

5. *Mark Hansen, "The Toughest Call," 93 A.B.A.J. 28 at 29 (2007).*

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Lawrence Tibbles,
Capital University Law School

776 So.2d 1096
District Court of Appeal of Florida,
Fifth District.

Frederick W.J. EGGERS, Appellant,
v.
Ellen EGGERS, Appellee.

No. 5D00-999. | Feb. 9, 2001.

Mother brought action against son for conversion. The Circuit Court, Citrus County, Barbara Gurrola, J., denied son's motions to transfer venue and to disqualify mother's attorney. Son appealed. The District Court of Appeal, Cobb, J., held that: (1) change of venue was warranted, but (2) mother's attorney did not have a conflict of interest.

Reversed and remanded.

West Headnotes (10)

[1] **Appeal and Error**
Venue

Having failed to raise improper venue in his motion below, defendant could not raise the issue for the first time on appeal. West's F.S.A. RCP Rule 1.140(b).

[2] **Venue**
Counter Affidavits and Other Evidence

Under the forum non conveniens statute, a plaintiff's forum selection is presumptively correct and the burden is on the defendant to show either substantial inconvenience or that undue expense requires change for the convenience of the parties or witnesses. West's F.S.A. § 47.122.

9 Cases that cite this headnote

[3] **Venue**
Counter Affidavits and Other Evidence

When a forum non conveniens challenge is raised, it is incumbent upon the parties to submit affidavits or other evidence that will shed necessary light on the issue of the convenience of the parties and witnesses and the interest of justice. West's F.S.A. § 47.122.

5 Cases that cite this headnote

[4] **Venue**
Counter Affidavits and Other Evidence

Plaintiff's unsworn response to defendant's motion to transfer venue was not evidence.

[5] **Venue**
Counter Affidavits and Other Evidence

Defendant was entitled to change of venue on grounds of forum non conveniens, where plaintiff countered with no sworn evidence after defendant attached affidavits from prospective witnesses indicating that it would be a hardship if they had to travel to plaintiff's venue to testify. West's F.S.A. § 47.122.

4 Cases that cite this headnote

[6] **Certiorari**
Subject-Matter

Denial of motion to disqualify attorney was reviewable by certiorari.

1 Cases that cite this headnote

[7] **Attorney and Client**
Disqualification in General

Disqualification of a party's chosen counsel is an extraordinary remedy and should be resorted to sparingly.

2 Cases that cite this headnote

[8] **Attorney and Client**
Particular Cases and Problems

In mother's conversion action against son, mother's attorney did not have conflict of interest arising from son's consultations with attorney during son's divorce case; no attorney-client relationship had existed between attorney and son, and conversion action was not related to the prior divorce action.

[9] **Attorney and Client**
What Constitutes a Retainer

Son did not have attorney-client relationship with his mother's attorney, even though attorney provided advice to son regarding his divorce case; son paid nothing to attorney, and no agreement for representation was discussed or reached.

2 Cases that cite this headnote

[10] **Attorney and Client**
What Constitutes a Retainer

Existence of a formal retainer agreement is not essential to the finding of an attorney-client relationship.

2 Cases that cite this headnote

Attorneys and Law Firms

***1097** Thomas F. Granahan of Thomas F. Granahan, P.A. and Karen E. Guito, Tampa, for Appellant.

Richard S. Fitzpatrick of Fitzpatrick & Fitzpatrick, P.A., Inverness, for Appellee.

Opinion

COBB, J.

Frederick Eggers seeks review of an interlocutory order which denies his motions to transfer venue and to disqualify attorney. The appellee, Ellen Eggers, sued her son, Frederick, for conversion. Frederick is a resident of Hillsborough County. The action was brought in Citrus County. The complaint does not allege the basis for venue in Citrus County.

Frederick moved to transfer and/or dismiss pursuant to section 47.122, Florida Statues, the *forum non conveniens* statute. This motion was sworn to by Frederick. Frederick alleged that venue was more appropriate in Hillsborough County where some 19 witnesses reside and that the expense and inconvenience to these witnesses if venue remained in Citrus County would be an undue hardship. Affidavits from some 10 prospective witnesses were attached to the motion. Ellen filed an unsworn response asserting that she is 87 years of age and resides in Citrus County and that it would be an undue hardship on her and her witnesses, all of whom are residents of Citrus County, if they were required to travel to Hillsborough County. Frederick also filed a motion to disqualify Ellen's attorney, Richard Fitzpatrick, claiming he and Fitzpatrick had an attorney-client relationship in the past when Fitzpatrick advised him in connection with his 1991 divorce.

A hearing was held and Frederick and attorney Fitzpatrick were the sole witnesses. Frederick testified that in his 1991 divorce case he found it necessary to consult with Fitzpatrick, who was his mother's attorney, on three occasions concerning his mother's will and monetary gifts in the form of savings accounts she had made to her grandchildren over the years. Fitzpatrick advised Frederick that he could withdraw the money ($60,000-$70,000) and return it to his mother, which Frederick did. Fitzpatrick billed Ellen for his work in this regard and Ellen paid the bill. Frederick has never received a bill from Fitzpatrick nor paid him for any professional services. During closing argument, Frederick's counsel referred to Ellen as living in Tampa "when all these activities took place." No testimony or

other evidence to this effect appears of record. The trial court denied both motions.

We reverse the venue ruling. Frederick's motion to transfer/dismiss was filed solely pursuant to section 47.122 which provides:

> For the convenience of the parties or witnesses or in the interest of justice, any court of record may transfer any civil action to any other court of record in which it might have been brought.

***1098** [1] Frederick did not assert in his motion or at the hearing that Citrus County was an improper venue for this action under the general venue statute, section 47.011, Florida Statutes. A motion to dismiss/transfer venue due to the impropriety of the plaintiff's venue selection is significantly different than a motion to transfer on *forum non conveniens* grounds. *See PricewaterhouseCoopers LLP v. Cedar Resources, Inc.*, 761 So.2d 1131 (Fla. 2d DCA 1999). Improper venue can be waived if not timely raised. *See* Florida Rule of Civil Procedure 1.140(b). Having failed to raise improper venue in his motion below, Frederick cannot raise the issue for the first time on appeal.[1] *See Sparta State Bank v. Pape*, 477 So.2d 3 (Fla. 5th DCA 1985); *Gross v. Franklin*, 387 So.2d 1046 (Fla. 3d DCA 1980). Given Frederick's waiver, Citrus County is deemed a legally acceptable venue and the issue on appeal concerns whether the trial court abused its discretion in concluding that Citrus County was the preferable site for litigation of this action. *See Hu v. Crockett*, 426 So.2d 1275 (Fla. 1st DCA 1983).

[2] [3] Under the *forum non conveniens* statute, a plaintiff's forum selection is presumptively correct and the burden is on the defendant to show either substantial inconvenience or that undue expense requires change for the convenience of the parties or witnesses. *See Government Employees Ins. Co. v. Burns*, 672 So.2d 834 (Fla. 3d DCA 1996); *Vero v. Vero*, 659 So.2d 1348 (Fla. 5th DCA 1995). This court has instructed that when a *forum non conveniens* challenge is raised, it is incumbent upon the parties to submit affidavits or other evidence that will shed necessary light on the issue of the convenience of the parties and witnesses and the interest of justice. *See Ground Improvement Techniques, Inc. v. Merchants Bonding Co.*, 707 So.2d 1138 (Fla. 5th DCA 1998). *See also Hu v. Crockett* (pointing out in *forum non conveniens* challenge that record contained various admissions and a deposition).

[4] [5] Frederick filed a sworn motion to transfer/dismiss and attached affidavits from prospective witnesses indicating they resided in Hillsborough County and that it would be a hardship if they had to travel to Citrus County to testify.[2] Ellen countered with no sworn evidence on the relevant issues. Ellen's unsworn response does not constitute evidence. *See Toyota Tsusho America, Inc. v. Crittenden*, 732 So.2d 472 (Fla. 5th DCA 1999). The trial court had before it only evidence that the more convenient forum is Hillsborough County. Under these circumstances, it was an abuse of discretion to fail to transfer venue to Hillsborough County under section 47.122.

[6] [7] As to the denial of the motion to disqualify attorney Fitzpatrick, that ruling is reviewable by certiorari. *See Double T Corp. v. Jalis Development, Inc.*, 682 So.2d 1160 (Fla. 5th DCA 1996); *Transmark, U.S.A., Inc. v. State, Dep't of Ins.*, 631 So.2d 1112 (Fla. 1st DCA), *rev. denied*, 639 So.2d 983 (Fla.1994).[3] Disqualification of a party's chosen counsel is an extraordinary remedy and should be resorted to sparingly. ***1099** *Abamar Housing and Development, Inc. v. Lisa Daly Lady Decor, Inc.*, 724 So.2d 572 (Fla. 3d DCA 1998); *Lee v. Gadasa Corp.*, 714 So.2d 610 (Fla. 1st DCA 1998).

Frederick's position is that he established the existence of an attorney-client relationship and that under applicable case law an irrefutable presumption arose that confidences were disclosed.[4] *See Russakoff v. Dep't of Ins.*, 724 So.2d 582 (Fla. 1st DCA 1998); *Simon DeBartolo Group, Inc. v. Bratley*, 741 So.2d 1254 (Fla. 1st DCA 1999). The only remaining inquiry is whether the former client has shown that the current subject matter is the same or substantially related to the matter in which the attorney represented the former client. *Russakoff; Simon DeBartolo.*

[8] [9] We find that Frederick's initial premise that he established an attorney-client relationship is weak. Fitzpatrick's client was always Ellen. He advised Frederick on the legal issue of *Ellen's monetary gifts* to Frederick's children *at the request of Ellen.* Fitzpatrick's advice was to have the monies returned to Ellen. Frederick paid Fitzpatrick nothing. No agreement for representation was discussed much less reached between Fitzpatrick and Frederick. In this regard, the instant case is distinguishable from our recent decision in *Key Largo Restaurant, Inc. v. T.H. Old Town Associates, Ltd.*, 759 So.2d 690 (Fla. 5th DCA 2000). Unlike here, in that case, the trial court found an attorney-client relationship existed where the attorney had previously represented both parties, albeit briefly. In *Key Largo*, however, this representation was formally recognized and this court, in affirming an order of disqualification, noted that "The law

does not require a long or complicated attorney-client relationship to fulfill the requirements for disqualification." 759 So.2d at 693.

[10] While the existence of a formal retainer agreement is not essential to the finding of an attorney-client relationship, *Dean v. Dean*, 607 So.2d 494 (Fla. 4th DCA 1992), the trial court here did not find the existence of an attorney-client relationship between Frederick and Fitzpatrick. Even assuming *arguendo* the existence of such a relationship between Frederick and Fitzpatrick, Frederick failed to demonstrate that the instant litigation involves the same subject matter or is substantially related to the matter in which Fitzpatrick counseled Frederick. The advice Fitzpatrick gave to Frederick in 1991 concerned return to Ellen of monies Ellen had previously gifted to Frederick's children. Frederick testified he returned these monies to his mother. Any claim of conversion by Frederick of Ellen's assets is entirely distinct from this earlier advice. *See Bartholomew v. Bartholomew*, 611 So.2d 85 (Fla. 2d DCA 1992) (quashing order disqualifying counsel where evidence was insufficient to establish professional relationship between husband and attorney who had represented wife while couple was married and current claim concerning husband's dissipation of marital asset was distinct from assistance provided by attorney years earlier in acquiring said asset).

We hold that the trial court did not depart from the essential requirements of law in denying disqualification. *See Martin-Johnson, Inc. v. Savage*, 509 So.2d 1097 (Fla.1987). Accordingly, we reverse the portion of the order denying transfer of venue, deny the petition for writ of certiorari, and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

PETERSON and PALMER, JJ., concur.

Parallel Citations

26 Fla. L. Weekly D438

Footnotes

1 Cases such as *Miller v. Southland Ins. Co., Inc.*, 513 So.2d 800 (Fla. 4th DCA 1987) and *Tropicana Products, Inc. v. Shirley*, 501 So.2d 1373 (Fla. 2d DCA 1987) relied upon by Frederick for the proposition that where a defendant files a sworn motion and affidavits challenging venue, the burden shifts to the plaintiff to prove its selection of venue is proper, are thus inapplicable.

2 Ellen claims that these affidavits constitute little more than a laundry list of names and conclusory statements of inconvenience. *See R.C. Storage One, Inc. v. Strand Realty, Inc.*, 714 So.2d 634 (Fla. 4th DCA 1998). However, unlike the affidavits in *R.C. Storage*, the affidavits here reflect the gist of the relevant knowledge of the witnesses.

3 This court by order has allowed Frederick to pursue the disqualification issue by petition for writ of certiorari since the jurisdictional requisites for such review were satisfied. *See* Fla.R.App.P. 9.040(c).

4 There is no evidence that Fitzpatrick actually obtained any confidential information concerning Frederick which he is now in a position to use on behalf of Ellen. Thus, this is not a situation where Fitzpatrick obtained confidential information and then "switched sides." *See Kenn Air Corp. v. Gainesville-Alachua County Regional Airport Authority*, 593 So.2d 1219 (Fla. 1st DCA 1992).

664 So.2d 925
Supreme Court of Florida.

THE FLORIDA BAR, Complainant,
v.
Freeman KING, Respondent.

No. 84623. | Sept. 14, 1995. | Rehearing Denied Dec. 20, 1995.

In attorney discipline action, the Supreme Court held that attorney's failure to file answer to complaint by extension date, failure to appear at hearing on summary judgment motion, failure to notify his client that plaintiff that sued client had scheduled depositions for his clients, failure to attend depositions, failure to initiate communications that would keep his clients adequately informed about his representation, and failure to respond to his clients' requests for status reports about his representation warranted three-year suspension from practice of law.

So ordered.

West Headnotes (5)

[1] **Attorney and Client**
Definite Suspension

Attorney's failure to file answer to complaint by extension date, failure to appear at hearing on summary judgment motion, failure to notify his client that plaintiff that sued client had scheduled depositions for his clients, failure to attend depositions, failure to initiate communications that would keep his clients adequately informed about his representation, and failure to respond to his clients' requests for status reports about his representation warranted three-year suspension from practice of law, in light of disciplinary history that included public reprimand, admonition, and 90-day suspension for misconduct. West's F.S.A. Bar Rules 4-1.1, 4-1.3, 4-1.4(a), 4-1.4(b).

1 Cases that cite this headnote

[2] **Attorney and Client**
Misconduct as to Client

Attorney had entered into attorney-client relationship with alleged client, as required for attorney to be subject to discipline for neglect of alleged client's suit, even if alleged client had not paid attorney cash retainer, where attorney wrote letter to opposing counsel that identified himself as having been retained by alleged client, and filed answer and counterclaim in which he identified himself as attorney for alleged client.

1 Cases that cite this headnote

[3] **Attorney and Client**
What Constitutes a Retainer

Fee is not necessary to form attorney-client relationship.

4 Cases that cite this headnote

[4] **Attorney and Client**
Other Factors

Sanction in bar disciplinary case must be fair to society, fair to attorney, and it must sufficiently deter other attorneys from similar misconduct.

[5] **Attorney and Client**
Factors in Aggravation

In determining appropriate sanction in attorney discipline case, Supreme Court may consider attorney's disciplinary history.

Attorneys and Law Firms

***925** John F. Harkness, Jr., Executive Director and John T. Berry, Staff Counsel, Tallahassee; and Alisa M. Smith, Bar Counsel and David M. Barnovitz, Co-Bar Counsel, Fort Lauderdale, for complainant.

James O. Walker, III of the Law Offices of James O. Walker, III, Pompano Beach, for respondent.

Opinion

PER CURIAM.

This attorney-discipline case is before the Court on petition of attorney Freeman King, who seeks review of a referee's recommendation that he receive a five-year suspension for his handling of a case. We have jurisdiction based on article V, section 15 of the Florida Constitution.

We approve the referee's findings of fact, but find that the referee's recommendation of a five-year suspension cannot stand because Rule Regulating the Florida Bar 3-5.1(e) prohibits suspension for a specific time period of more than three years. We impose a three-year suspension on King because that sanction serves the purposes of attorney discipline.

King was admitted to The Florida Bar in October 1980. In November 1994, the Bar filed a four-count complaint accusing King of misconduct in connection with his representation ***926** of Charles Baldwin. Baldwin had spoken with King in late 1992 about a lawsuit involving Baldwin and his company, CSB Construction, Inc. The suit, which named Baldwin and his company as defendants, was filed on December 3, 1992.

[1] The referee made these findings of fact:

Count 1 concerns an extension of time that King received to file an answer to the complaint. King failed to file an answer by the extension date, January 8, 1993. The court entered a default judgment against the defendants on January 12, 1993, based on King's failure to file any papers in the litigation. (Although not in the referee's findings, the record shows that King filed an answer and a counterclaim on January 13, 1993.)

Count 2 deals with a motion for summary judgment that opposing counsel filed. King did not appear at a hearing on the motion, and the court entered an order of summary final judgment against Baldwin and his company. King later asked the court to excuse his clients from summary judgment, but the court found that King's neglect and failure to attend the noticed hearing were inexcusable.

In Count 3, the referee found that King was notified that the plaintiff had scheduled depositions for his clients. King did not notify his clients of the depositions, and neither they nor King attended.

Count 4 concerns King's failure to initiate communications that would keep his clients adequately informed about his representation and his failure to respond to his clients' requests for status reports about his representation.

In Counts 1, 2, and 3, the referee found King guilty of violating Rule Regulating the Florida Bar 4-1.1 (lawyer shall provide competent representation to a client) and Rule 4-1.3 (lawyer shall act with diligence in representation of a client). In Count 4, the referee found King guilty of violating Rule 4-1.4(a) (lawyer shall inform client of status of representation and promptly comply with reasonable requests for information) and Rule 4-1.4(b) (lawyer shall explain matter to the extent reasonably necessary to permit client to make informed decisions about the case).

King's disciplinary history includes a public reprimand for his indemnification of clients who suffered a monetary loss; a grievance committee admonition for findings including lack of diligence and inadequate client communication; and a ninety-day suspension for misconduct including trust account violations.

Based on King's disciplinary record and the violations in the instant case, the referee recommended a five-year suspension. He also recommended that King be required to pay at least $864.15 in costs and allowed the Bar to file a supplemental statement of costs at a later date.

[2] King has filed a petition challenging the referee's findings, determination of guilt, and recommended sanction. He contends that although he and Baldwin discussed the lawsuit, the two did not have an attorney-client relationship. He asks this Court to remand the case for a determination of when Baldwin paid a cash retainer. King argues that unless the referee finds on remand that Baldwin paid a retainer, there is no attorney-client relationship and no basis for a finding of misconduct and imposition of sanctions.

King argues that a contract for employment as an attorney must be supported by consideration. Baldwin claims to

have paid King a cash retainer in December 1992. King says Baldwin could not have retained him then because he was out of the office during much of December due to illness and hospitalization. King says Baldwin did not pay any retainer until February 1993, when Baldwin gave him an $800 check (for which there were insufficient funds).

King acknowledges that he took actions in connection with the suit against Baldwin and his company, but says they do not support an attorney-client relationship. We disagree. King wrote a letter to opposing counsel on December 7, 1992, that says "this office has been retained by Charles Baldwin." He talked on the phone with opposing counsel about securing an extension of time in which to file an answer. He wrote opposing counsel on January 13, 1993, and thanked him for ***927** agreeing to the extension of time because King could not "file an Answer on behalf of my client" within the appropriate time frame. And King filed an answer and counterclaim in which he identified himself as the attorney for defendants Baldwin and CSB Construction.

We need not resolve any factual disputes over when King and Baldwin met and whether Baldwin paid a cash retainer. The record shows that King took action on behalf of Baldwin and his company and King identified them as his clients.

[3] A fee is not necessary to form an attorney-client relationship. *Dean v. Dean*, 607 So.2d 494, 500 (Fla. 4th DCA 1992) (also explaining that payment of fee is not required to create attorney-client privilege), *review dismissed*, 618 So.2d 208 (Fla.1993). If a fee were required to establish an attorney-client relationship, a lawyer could never perform work pro bono for a client.

Courts have also recognized that while lawyers are entitled to charge for their services, they cannot simply abandon a case once they have provided services without compensation. *Atilus v. United States*, 406 F.2d 694, 696 (5th Cir.1969); *see also Brown v. Vermont Mut. Ins. Co.*, 614 So.2d 574, 579-80 (Fla. 1st DCA 1993) ("Once an attorney has appeared in pending litigation to represent a party, that attorney cannot withdraw from the case pursuant to discharge by the client without leave of court granted by order after due notice to both the attorney and client.").

King's actions establish an attorney-client relationship. Once he began representing Baldwin and his company, he could not simply stop representing his clients without following the procedures for withdrawal described in Rule 4-1.16(d) (requiring withdrawing lawyer to take steps to protect a client's interest). King did not try to protect his clients' interest, as shown, for example, by his failure to respond to notices for depositions and by allowing the entry of summary final judgment.

We find support in the record for the referee's findings and, accordingly, uphold the findings.

Both Baldwin and the Bar agree that the referee's recommended five-year suspension exceeds the length of suspension allowed by Rule 3-5.1(e) ("No suspension shall be ordered for a specific period of time in excess of 3 years."). Thus, we must decide the appropriate sanction for King.

[4] [5] The sanction in a bar disciplinary case must serve three purposes: the judgment must be fair to society, it must be fair to the attorney, and it must sufficiently deter other attorneys from similar misconduct. *Florida Bar v. Wasserman*, 654 So.2d 905, 907 (Fla.1995). In addition, this Court may consider an attorney's disciplinary history. *Id.* at 908.

King has been sanctioned three times since 1990. First, he received a public reprimand and probation for neglect in 1990. Second, he received a grievance committee admonishment for neglect in 1991. Third, he received a ninety-day suspension and three years' probation in 1994 for separate, numerous grievances including lack of diligence, inadequate client communications, incompetent representation, trust account violations, and misrepresentations.

King has shown a pattern of neglecting clients and seriously affecting their interests. In addition, the misconduct in the instant case occurred while he was on probation for the 1994 case. Under the circumstances, a three-year suspension is the appropriate sanction for King. This sanction serves the purposes of attorney discipline and reflects our concern with King's disciplinary history.

King is hereby suspended from the practice of law for three years. The suspension will be effective thirty days from the filing of this opinion so King can close out his practice and protect the interests of existing clients. If King notifies this Court in writing that he is no longer practicing and does not need the thirty days to protect existing clients, this Court will enter an order making the suspension effective immediately. King shall accept no new business from the date this opinion is published until the suspension is completed. The costs of these proceedings are taxed against King and judgment is entered in the ***928** amount of $1,338.92,[1] for which sum let execution issue.

It is so ordered.

Parallel Citations

20 Fla. L. Weekly S471

GRIMES, C.J., and OVERTON, SHAW, KOGAN, HARDING, WELLS and ANSTEAD, JJ., concur.

Footnotes

[1] The costs include $836.65, as listed in the referee's final report, and $502.27, as listed in the Bar's supplemental statement of costs.

152 Fla. 389
Supreme Court of Florida, Division B.

KEIR et al.
v.
STATE.

Feb. 12, 1943.

Viola Mae Keir and another were convicted of perjury and they appeal.

Reversed.

West Headnotes (10)

[1] **Perjury**
Nature and elements of offenses in general

In order to sustain a conviction for perjury, not only must the substance of alleged false testimony be proven but it must be also proven that such testimony was material to issue upon which trial was had and was in fact false testimony and that accused knew of its falsity and wilfully swore to it as true.

3 Cases that cite this headnote

[2] **Perjury**
Elements and evidence requiring corroboration

Falsity of material matter sworn to in order to sustain conviction for perjury must be proved by oaths of two witnesses or by oath of one witness and other independent and corroborating circumstances which are of equal weight with testimony of another witness.

4 Cases that cite this headnote

[3] **Criminal Law**
Corpus delicti

A conviction cannot be upheld upon a naked confession alone without additional proof of the corpus delicti.

6 Cases that cite this headnote

[4] **Criminal Law**
Confessions

Confession should not be received in evidence at all unless there is at least some prima facie proof of the corpus delicti.

9 Cases that cite this headnote

[5] **Perjury**
Weight and Sufficiency in General

In prosecution for perjury based on testimony in divorce action relative to residence of party to divorce proceeding, evidence held insufficient to sustain conviction.

[6] **Privileged Communications and Confidentiality**
Attorney-Client Privilege

Common law rule that attorney could not be compelled to divulge any communication made to him by client nor disclose any advice given by him in course of his professional employment without consent of client is recognized in Florida.

3 Cases that cite this headnote

[7] **Privileged Communications and Confidentiality**

Relation of Attorney and Client

Generally, relation of attorney and client must exist in order for communications between them to be "privileged".

4 Cases that cite this headnote

[8] **Privileged Communications and Confidentiality**
Relation of Attorney and Client

Communications made by a person to an attorney with view to employing him professionally fall within rule that communications between attorney and client are "privileged" although attorney is not subsequently employed.

4 Cases that cite this headnote

[9] **Criminal Law**
Obstructing justice, bribery, and perjury

In prosecution for perjury based on testimony in divorce action respecting residence, extrajudicial confessions were improperly admitted in view of lack of other evidence establishing corpus delicti.

8 Cases that cite this headnote

[10] **Privileged Communications and Confidentiality**
Relation of Attorney and Client

Letters between nonresident and attorney relating to residence requirements for divorce within state and costs thereof were "privileged communications" though attorney was not employed, and should have been excluded as such in subsequent prosecution against nonresident for perjury in connection with divorce obtained by her.

3 Cases that cite this headnote

***390 **887** Appeal from Criminal Court of Record, Hillsborough County; John R. Himes, Judge.

Attorneys and Law Firms

R. G. Tittsworth, of Tampa, for appellants.

J. Tom Watson, Atty. Gen., and Woodrow M. Melvin, and John C. Wynn, Asst. Attys. Gen., for appellee.

Opinion

SEBRING, Justice.

Viola Mae Keir and Anna A. Cramer were convicted of perjury. They are charged with giving false testimony in a divorce suit, to the effect that Viola Mae Keir had been a continuous, bona fide resident of the State of Florida since June 12, 1942. The divorce suit referred to was instituted in the Circuit Court of Hillsborough County on September 18, ***391** 1942. Viola Mae Keir was plaintiff in that suit and Alexander Keir, her husband, was defendant.

A certified copy of the court record was a part of the evidence in the perjury trial. The bill of complaint alleged that Viola Mae Keir was a resident and citizen of the State of Florida and had been such resident for more than 90 days continuously preceding and prior to the filing of suit. Alexander Keir answered, admiting the residence as alleged. At the trial of the divorce suit, on September 29, 1942, Viola Mae Keir and Anna A. Cramer testified under oath to the statements attributed to them in the criminal charge.

The principal questions raised by Anna A. Cramer on her appeal concern the sufficiency of the evidence to support the judgment, and the propriety of admitting an extrajudicial confession in evidence against her. Viola Mae Keir raises the same questions; and also the question whether certain letters admitted at the trial should not have been excluded, as privileged communications.

The testimony is meagre. Mrs. Rufus Riggsbee testified for the prosecution that on June 12, 1942, she had rented some rooms in her home at Tampa, Florida, to Anna A. Cramer. Mrs. Cramer took possession and moved in immediately thereafter. Viola Mae Keir came to live with Mrs. Cramer at the residence about September 1, 1942. Mrs. Keir told Mrs. Riggsbee that she was from New

Jersey; although she did not say that she had come directly from there.

This is all of the pertinent evidence against Mrs. Cramer, with the exception of an extrajudicial confession made by her to the arresting officer shortly after she had been taken into custody on the perjury charge.

In addition to the court record, and Mrs. Riggsbee's testimony, the only testimony against Viola Mae Keir was an extra judicial confession made by her to the arresting officer at the same time that Mrs. Cramer's confession was made; and the testimony of Mr. C. J. Hardee, a Tampa attorney, who identified, and testified about, certain letters exchanged between him and Mrs. Keir, prior to the time that she began her divorce suit in Hillsborough County.

The letters from Mrs. Keir to Mr. Hardee were all postmarked, ***392** 'Maple Shade, New Jersey', and were mailed from that place during the month of July, 1942. One of the letters stated that she was a resident of New Jersey, and had been such a resident for the past twenty years. From the correspondence, it appeared that she was considering coming to Florida to institute a divorce suit against her husband. Mr. Hardee had been recommended to her as an attorney. She would give him the case to handle, if he did not ask too much for his professional services. Such fee as was paid, would have to be taken care of by her out of her own funds. How much would the fee be? What grounds for divorce were recognized in Florida? How long would she be required to live in Florida before she could lawfully institute suit? Such was the gist of her letters.

Mr. Hardee promptly answered, giving full and correct information concerning residence requirements and recognized grounds for divorce in Florida. A minimum attorney's fee was named, with the suggestion that the matter of fee would be gone into more fully upon Mrs. Keir's arrival in Florida.

****888** Mr. Hardee heard nothing further from Mrs. Keir after this exchange of letters. He considered the letters as inquiries from someone who wanted to employ him as an attorney. He never saw, or knew, the person who wrote the letters. He was never employed by her.

On September 18, 1942, Viola Mae Keir instituted suit for divorce in the Circuit Court of Hillsborough County, Florida, through another attorney.

Over objection of defendants' counsel, the letters were allowed to come in as evidence against Viola Mae Keir, but not as evidence against Anna A. Cramer; the trial judge instructing the jury that they were not to consider the letters as evidence against the latter defendant. The ground of objection to the reception of the letters, and to the testimony of Mr. Hardee concerning them, was that they were privileged communications between attorney and client.

On the evidence submitted, the jury found both defendants guilty of perjury, as charged. Motion for new trial was denied. Judgment was entered.

[1] [2] In order to sustain a conviction for perjury, not only must ***393** the substance of the alleged false testimony be proven; but it must also be proven that such testimony was material to the issue upon which the trial was had, that it was in fact false testimony, and that the accused knew of its falsity and wilfully and with deliberation swore to it as true. Miller v. State, 15 Fla. 577; 41 Am.Jur. 7; 48 C.J. 828. Moreover, the falsity of the material matter sworn to must be proved by the oaths of two witnesses, or by the oath of one witness and other independent and corroborating circumstances which are of equal weight with the testimony of another witness. Yarbrough v. State, 79 Fla. 256, 83 So. 873; Tindall v. State, 99 Fla. 1132, 128 So. 494.

Such proof has not been offered, as against Anna A. Cramer. The statement made by her at the divorce trial is proven. Her testimony was material to the issue upon which the trial was had, as it was to a jurisdictional fact without proof of which the divorce proceeding was not maintainable. But there is no evidence in the record that the statement made by Mrs. Cramer was false, or was known to her to be false; unless the extrajudicial confession made to the arresting officer can come in as proof of that fact.

[3] [4] A conviction cannot be upheld upon a naked confession alone, without additional proof of the corpus delicti. Parrish v. State, 90 Fla. 25, 105 So. 130. Indeed, such confession should not be received in evidence at all, unless there is at least some prima facie proof of the corpus delicti. Holland v. State, 39 Fla. 178, 22 So. 298; Smith v. State, 93 Fla. 238, 112 So. 70.

[5] Mrs. Riggsbee's testimony does not supply that proof. And if it is not found there, it is nowhere in the record. All that Mrs. Riggsbee knew about the matter was that Viola Mae Keir had come to live with Mrs. Cramer at Tampa in September, 1942. It does not follow from this, that Mrs. Keir may not have resided elsewhere in Florida (or in Tampa for that matter) for a sufficient length of time prior to the time she came to the Riggsbee residence to have lawfully entitled her to maintain her suit for divorce in Hillsborough County.

***394** The judgment against Anna A. Cramer must fall, therefore, because there is insufficient evidence to support it.

The judgment against Viola Mae Keir must be disposed of in the same manner, if the letters exchanged between her and Mr. Hardee are privileged communications, and inadmissible in evidence.

[6] At common law, an attorney could not be compelled to divulge any communication made to him by a client; nor would he be allowed to disclose any advice given by him in the course of his professional employment, without the consent of his client. Wigmore on Evidence 3rd Ed., §§ 2290–2295. That rule is recognized in this jurisdiction. See Code of Ethics, Rule B, § 1, Par. 37, adopted by the Supreme Court of Florida, January 27, 1941.

[7] [8] Generally speaking, the relation of attorney and client must exist in order for such communications to be privileged. However, communications made by a person to an attorney with the view to employing him professionally fall within the rule, although the attorney is not subsequently employed. 28 R.C.L. 556; 70 C.J. 406; Whart. Crim.Ev. 11th Ed., § 1229.

[9] [10] We think that the letters between Mrs. Keir and Mr. Hardee come ****889** within the rule, and that they should have been excluded as privileged communications. Without them there is no basis for the admission of the extrajudicial confession.

For the reasons stated, the judgments against Viola Mae Keir, and Anna A. Cramer, must be reversed.

It is so ordered.

BUFORD, C. J., and BROWN and THOMAS, JJ., concur.

Parallel Citations

11 So.2d 886

716 So.2d 831
District Court of Appeal of Florida,
Fourth District.

William Bryan KING, M.D., Appellant,
v.
Priscilla BYRD, individually and as Guardian, Friend and Natural Parent of Kenan A. Byrd, a minor, Appellee.

No. 97-1384. | Aug. 26, 1998. | Clarification, Certification and Stay of Mandate Denied Sept. 11, 1998.

Mother whose son was brain damaged during birth brought medical malpractice action against doctor. The Circuit Court, St. Lucie County, Rupert Jasen Smith, Senior Judge, entered judgment on jury verdict for mother. Doctor appealed. The District Court of Appeal, Warner, J., held that: (1) record supported trial court's finding that reason for seeking to exercise peremptory challenge against black veniremember was pretextual, and (2) defense counsel opened door to attacks on his ethics by seeking to impeach experts with details regarding cases in which he had represented them.

Affirmed.

West Headnotes (4)

[1] **Jury**
Peremptory Challenges

Record supported trial court's finding that doctor's reason was pretextual for seeking to exercise peremptory challenge against black veniremember in medical malpractice action brought by mother whose son was brain damaged during birth, where reason was that veniremember was single mother of two young children; counsel began explanation by stating that he could strike someone if he didn't like their haircut, which may have evinced to court a lack of credibility, and veniremember responded during questioning that she could put aside sympathy.

10 Cases that cite this headnote

[2] **Evidence**
Admission of Similar Evidence When First Evidence Was Inadmissible

Defense counsel opened door to attacks on his ethics by expert witness in medical malpractice action when defense counsel sought to impeach plaintiff's experts with details regarding cases in which he had represented them, including grievance filed against one expert alleging that he had committed act constituting sexual battery on a patient.

1 Cases that cite this headnote

[3] **Evidence**
Irrelevant, Collateral, or Immaterial Matters

Defense counsel's cross-examination of plaintiff's expert in medical malpractice case, about matters in which counsel had represented expert in unrelated procedure, was irrelevant and should not have been allowed, as it was not a proper attack on expert's credibility. West's F.S.A. §§ 90.608-90.610.

2 Cases that cite this headnote

[4] **Appeal and Error**
Arguments and Conduct of Counsel
Trial
Remarks Reflecting on Credibility of Witnesses

Plaintiff's counsel's use of the term "hired gun" to refer to defense expert during closing argument was improper but did not rise to level of fundamental error.

7 Cases that cite this headnote

Attorneys and Law Firms

***832** Mark Hicks and David J. Maher of Hicks & Anderson, P.A., Miami and David Spicer of Bobo Spicer Ciotoli Fulford, West Palm Beach, for appellant.

Edna L. Caruso of Caruso, Burlington, Bohn & Compiani, P.A., West Palm Beach and Willie E. Gary and Paul Mark Lucas of Gary, Williams, Parenti, Finney, Lewis, McManus, Watson & Sperando, Ft. Pierce, for appellee.

Opinion

ON MOTION FOR REHEARING

WARNER, Judge.

We deny the appellant's motion for rehearing, grant appellee's motion, grant the motion for clarification and withdraw our previously issued opinion and substitute the following in its place.

After a heated trial in this medical malpractice case, the jury awarded appellee/Priscilla Byrd $7,633,000 as compensation for brain damage to her son which occurred during his birth. Appellant, Dr. William King, contends that the trial was flawed because the trial court: (1) refused to permit the exercise of a peremptory challenge as to one juror, (2) permitted counsel to attack defense counsel's ethics during the examination of two witnesses, (3) permitted improper closing argument, and (4) erred in the application of its ruling on the statute of limitations. We affirm on all issues.

[1] In voir dire, the defense sought to exercise a peremptory challenge on the first juror, Tisha Williams. Upon initial questioning, Ms. Byrd's attorney asked for Ms. Williams's background, and she revealed that she worked for the sheriff's department, had twin five-year-old girls, and was single. Defense counsel's voir dire was very short. In fact, he individually questioned only Ms. Williams and one other juror. He prefaced ***833** his questioning with a statement to the jury regarding the case and specifically questioned whether the jurors could lay aside sympathy for Ms. Byrd's six-year-old brain damaged son. As to Ms. Williams, he asked her whether, after having seen Ms. Byrd's little son, she could determine that Ms. Byrd was not entitled to any money if the evidence showed that the doctor didn't do anything wrong. Ms. Williams responded that she could do that. He asked her how she generally felt about medical malpractice, to which she replied that she had never dealt with anything like it. Finally, he asked her whether she could listen to complicated medical testimony in a week and one-half long case and render a verdict. Ms. Williams stated that she could.

During the jury selection process, defense counsel exercised a peremptory challenge as to Ms. Williams. Plaintiff's counsel objected, stating that Ms. Williams was a black woman who had said she could be fair. In response, defense counsel stated that:

> I'm entitled to strike anybody, if I don't like the way they cut their hair. But this is a single mother, virtually the same age, with two young children. She's going to identify, whether she's black, white or anything else. She's a single mother with young children, that's the last person I would want on the jury, regardless of their color.

The court responded that:

> Well, the computer picks these jurors and you've got to give me a better reason to excuse her than she's a single mother with two children.
>
> MR. GARY (plaintiff's counsel): If I may, your Honor, she's the one that said, when he asked her, gave her the microphone, she was one of the few, could you walk out of here and find for the defendant against this lady. She said, yes, I could do it.
>
> MR. SPICER (defense counsel): I don't believe it, Your Honor. And I've given you my reasons. If you took twenty lawyers and you didn't say what color she was, they would tell you they don't want a single mother with two young children on this jury. There would not be a defense attorney that would want this juror on their trial.

Defense counsel renewed his request to exercise a peremptory strike as to Ms. Williams at the end of jury selection, but the court again denied the motion.

Melbourne v. State, 679 So.2d 759, 764 (Fla.1996), clarified the process for challenging peremptory strikes of jurors on the grounds of racial bias:

> A party objecting to the other side's use of a peremptory challenge on racial grounds must: a) make a timely objection on that basis, b) show that the venireperson is a member of a distinct racial group, and c) request that the court ask the striking party its reason for the strike. If these initial requirements are met (step

> 1), the court must ask the proponent of the strike to explain the reason for the strike.
>
> At this point, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If the explanation is facially race-neutral and the court believes that, given all the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained (step 3). The court's focus in step 3 is not on the reasonableness of the explanation but rather its genuineness.

(footnotes omitted). The supreme court pointedly limited the review of appellate courts in such determinations on challenges to peremptory strikes:

> Accordingly, reviewing courts should keep in mind two principles when enforcing the above guidelines. First, peremptories are presumed to be exercised in a nondiscriminatory manner. Second, *the trial court's decision turns primarily on an assessment of credibility and will be affirmed on appeal unless clearly erroneous.* The right to an impartial jury guaranteed by article I, section 16, is best safeguarded not by an arcane maze of reversible error traps, but by reason and common sense.

Id. at 764-65 (footnotes omitted)(emphasis added). Applying the principles of *Melbourne* to this case, we find that plaintiff's attorney adequately complied with step one ***834** by objecting that Ms. Williams was an African-American woman. Without really waiting for the court to request an explanation, in accordance with step two, the defense offered that its reason for striking Ms. Williams was because she was a single mother with two small children who might identify with the plaintiff. That is a race-neutral reason for the challenge (even though it is not gender-neutral). *See Smith v. State*, 662 So.2d 1336, 1338 (Fla. 2d DCA 1995). The court responded by stating that the reason was insufficient to justify excusing her. We interpret this as a determination that the reason was not genuine and was a pretext, thereby fulfilling step three of the analysis.

Having reviewed the record, we cannot conclude that the decision was clearly erroneous. Defense counsel began his explanation of the reason for striking by stating that he could strike anyone even if he didn't like the cut of their hair. This may have evinced to the court a lack of credibility of any of the following explanations. In addition, the defense questioned Ms. Williams regarding her ability to put aside sympathy, to which she responded that she could. In questioning, the defense seemed more interested in Ms. Williams's ability to understand the trial proceedings than her sympathy for Ms. Byrd.

As appellate judges, we were not at the trial. We did not see the expressions, hear the tones of voices, or observe the general dynamics of the courtroom. That is why *Melbourne* left decisions with respect to peremptory challenges to the trial court. Because those decisions turn on credibility determinations which encompass the assessment of all the circumstances and dynamics of the trial setting, appellate review is very narrow indeed. We must respect that discretion. Since we cannot find that the decision is clearly erroneous, we affirm.

[2] The next point raised is more troubling to us from the standpoint of attorney conduct. Appellant complains of attacks on defense counsel's ethics during the trial. Defense counsel opened the door to such attacks because of what we perceive to be highly questionable conduct at trial. Two of plaintiff's experts were former clients of defense counsel and he sought to impeach these experts with details regarding the cases in which he had represented them. When plaintiff's counsel objected, particularly with respect to the ethics of such an attack, defense counsel informed the court that he had been in contact with the Florida Bar and had received an opinion over the phone that this type of questioning was not unethical as long as privileged information was not brought up.[1] The court allowed general questions as to the first doctor.

Later, another medical expert for the plaintiff, a neuropsychologist, testified to the injuries sustained by Ms. Byrd's son. During cross-examination, defense counsel went into questions about his background, ability and competence:

> Q. Doctor, is there anything about your background that Mr. Lucas did not talk about that reflects upon your credibility and your ability?
>
> A. Maybe you need to refresh my memory.
>
> Q. I'll be glad to do so if you can't think of anything.

Plaintiff's counsel objected, and during a bench conference, it became known that defense counsel had represented this doctor in a grievance proceeding filed by a patient. The doctor had been put on probation, was not allowed to see female patients without supervision, and

was charged with incompetence. He was on probation at the time of the examination conducted on Ms. Byrd's son. At the bench conference, plaintiff's counsel objected to this line of questioning and maintained that it was conduct unbecoming of a lawyer. Defense counsel replied that the grievance was "public record," and that any lawyer in the state could use any public record. Plaintiff's counsel objected that the grievance was irrelevant and immaterial. Nevertheless, the court decided to let it in.

***835** Defense counsel then questioned the doctor extensively about the charges filed by the State Board of Psychological Examiners, alleging that he was incompetent and had committed an act constituting sexual battery on a patient. The doctor admitted that he was charged but stated that he was acquitted or put on probation. When pressed, he said "I was put on probation. They didn't find me guilty. There's no proof of it. *Your firm represented me, you should know."* Defense counsel persisted in going through the entire grievance, including the fact that, as part of his probation, the doctor had to put letters in female patients' files regarding the charges. The doctor protested that what was done was pursuant to defense counsel's firm's advice. The doctor questioned what this had to do with the diagnosis he offered in connection with this case, which is a question we also ask.

On redirect, plaintiff's counsel asked the doctor for the name of the law firm which had represented him in the grievance proceeding, to which the doctor replied, "I will be in contact with them today; Bobo Spicer." At that point, defense counsel objected and maintained that the doctor had no right to accuse him of anything since the Bar had said that the questioning was permissible. The court allowed plaintiff's counsel to ask a few additional questions to clarify that the doctor acted on the advice of his lawyers in the grievance proceeding. On recross, defense counsel showed the doctor a copy of the State of Florida file on his license and asked whether anything he questioned him on was not contained in this public document. To that, the doctor replied, "I don't know. I would have to sit here for an hour and read this public record. I think it's highly unethical you bring these things up to harm a child and discredit me." After a few more questions and similar answers, the questioning concluded. Despite this highly extraordinary cross-examination with matters involving the doctor's handling of female patients, the defense never put on any evidence of its own to impeach his opinions with respect to the condition of Ms. Byrd's son. That testimony went unchallenged.

[3] We agree with the appellee that the court should never have allowed such cross-examination in the first place. It was entirely irrelevant as it was not a proper attack on the witness's credibility. *See* §§ 90.608 - .610, Fla. Stat. (1997); *Farinas v. State*, 569 So.2d 425, 429 (Fla.1990); *Miles v. Allstate Ins. Co.*, 564 So.2d 583, 584 (Fla. 4th DCA 1990). But having let it in, defense counsel's cross-examination of the doctor on the incident opened the door to the doctor's claims of unethical conduct.[2] We ourselves have substantial concerns as to the ethics of defense counsel's attacks on his former client. *See* R.Regulating Fla.Bar 4-1.6, 4-1.9. While defense counsel claimed that anything in a public document can be revealed, even against a former client, the rule states that an attorney may not use information relating to the representation of a former client to the disadvantage of that client except as rule 4-1.6 would permit with respect to a client or "when the information has become generally known." R.Regulating Fla.Bar 4-1.9(b). We are not prepared to state that all information contained in any public document is "generally known" within the meaning of the rule. It seems to us highly questionable that an attorney could attack, embarrass, and malign a former client with matters on which he represented and counseled that client, where such matters have no relevance to the proceeding in which the client is a witness and are not proper impeachment. We are aware that on the criminal side of the bench, public defenders frequently withdraw from representation of a current client when a former client may be required to be impeached on matters involving the public defender's representation of that client. We do not think the standards of ethics on the civil side should be any less. However, it is not our responsibility to interpret the rule of professional conduct in this case. Suffice it to say that, given this extraordinary and uncalled for attack on a former client, defense counsel opened the door about as wide as he could to ***836** the counter charge of ethical violations. We find no error.

[4] Appellant also challenges comments by the plaintiff's attorney in closing argument. Since defense counsel made no objections, the issue is not preserved. *See Murphy v. International Robotics Sys., Inc.*, 710 So.2d 587, 587-88 (Fla. 4th DCA 1998). Although some of counsel's remarks in closing argument were improper,[3] we do not deem the unobjected comments to rise to the level of fundamental error. *Id.*

Finally, we find no error in the trial court's order determining the date when Ms. Byrd became aware of the possibility of medical negligence. Based on Dr. King's own argument at the summary judgment hearing, the court determined that she did not have knowledge of any actual medical malpractice prior to 1992. While the appellant argues on appeal that the court erred because there was evidence that she could have discovered it at an

earlier time, this was not the argument presented to the trial court and appears to us to be made for the first time on appeal.

For these reasons, we affirm the final judgment of the trial court.

GLICKSTEIN and SHAHOOD, JJ., concur.

Parallel Citations

23 Fla. L. Weekly D1980

Footnotes

1 We are unaware of any rule that allows admissibility of evidence to be determined by a telephone call to the Florida Bar.

2 The charges of unethical behavior made in front of the jury were made by the doctor-witness, not the lawyers for the plaintiff.

3 We specifically condemn counsel's use of the term "hired gun" to refer to a defense expert. *See Budget Rent A Car v. Jana*, 600 So.2d 466, 468 (Fla. 4th DCA 1992).

889 So.2d 93
District Court of Appeal of Florida,
Fifth District.

BANKERS SECURITY INSURANCE CO.,
Petitioner,
v.
Helene SYMONS and Chris Symons, Respondents.

No. 5D04-1. | Nov. 19, 2004.

Synopsis
Background: Insurer petitioned for certiorari review of order of the Circuit Court, Brevard County, John Dean Moxley, Jr., J., that it waived work-product privilege.

[Holding:] The District Court of Appeal, Griffin, J., held that implied waiver of work-product privilege was an unduly harsh sanction for insurer's delay of several months in serving the privilege log.

Petition granted; order quashed.

West Headnotes (4)

[1] **Pretrial Procedure**
Objections and protective orders

The failure to submit a privilege log by the due date for the response to the request to produce does not automatically waive the right not to disclose work-product. West's F.S.A. RCP Rule 1.280(b)(5).

2 Cases that cite this headnote

[2] **Pretrial Procedure**
Objections and protective orders

Finding an implied waiver of work-product privilege was an unduly harsh sanction for defendant's delay of several months in serving the privilege log; it provided the log well before the hearing at which the judge found a waiver. West's F.S.A. RCP Rule 1.280(b)(5).

2 Cases that cite this headnote

[3] **Pretrial Procedure**
Objections and protective orders

If a party does not submit a privilege log within a reasonable time before a hearing on the motion to compel in response to claim of work-product privilege, then the trial court can be justified in finding a waiver of the claim of immunity from discovery because there is no basis on which to assess the claim. West's F.S.A. RCP Rule 1.280(b)(5).

6 Cases that cite this headnote

[4] **Appeal and Error**
Relating to witnesses, depositions, affidavits or discovery

The District Court of Appeal will not review a privilege log for its sufficiency until the trial court has done so.

2 Cases that cite this headnote

Attorneys and Law Firms

***93** Celene Humphries, of Casagrande and Associates, P.A., St. Petersburg, for Petitioner.

James Pacitti, of Morgan, Colling & Gilbert, P.A., Orlando, for Respondents.

Opinion

GRIFFIN, J.

Petitioner, Bankers Security Insurance Co. ["Bankers"], seeks certiorari review of an order compelling discovery. The underlying case involves a dispute over the homeowners' insurance policy of respondents, Helene and Chris Symons ["Symons"]. Bankers tendered $104,000 in insurance benefits under the policy to cover the cost of repairing Symons' home. Symons later filed suit against Bankers for breach of the policy, alleging that the home repair reimbursement was inadequate.

On November 13, 2002, along with the summons and complaint, Symons served a request to produce on Bankers. The request sought disclosure of several items:

> 2. The entire file maintained by Defendant or anyone on Defendant's behalf with regard to Plaintiffs, cover to cover, including original jackets and everything contained within the file, including but not limited to:
>
> (a) all notations regarding notice of the loss prior to the filing of the suit;
>
> ***94** (b) all telephone messages to or from Defendant regarding Plaintiffs, or any of Defendant's agents on Defendant's behalf regarding Plaintiffs;
>
> (c) all reports prepared by Defendant, or any entities or persons regarding Plaintiffs water damage and/or mold contamination and the subsequent remediation;
>
> (d) all interoffice memoranda regarding Plaintiffs;
>
> (e) all correspondence to or from anyone, including any insurance agencies, any contractors, any employers, any agencies hired to select contractors or companies to remediate the mold contamination and/or water damage in Plaintiffs' home;

The request specifically asked for a log of any document claimed to be privileged and cited *TIG Insurance Corp. v. Johnson*, 799 So.2d 339 (Fla. 4th DCA 2001). On December 24, 2002, Bankers asserted that the request sought materials that were work product. As to subparagraph b, Bankers also objected that the request was overbroad and burdensome.

Immediately thereafter, on January 9, 2003, Symons filed a motion to compel. This motion, in reliance in *TIG Insurance*, was based solely on the contention that Bankers had failed to comply with Florida Rule of Civil Procedure 1.280(b)(5) by failing to serve a privilege log and, therefore, had waived all work product or attorney/client privilege claims. Oddly, the record fails to reflect that Bankers reacted to this motion for a period of several months. The record also fails to show what steps, if any, Symons took either to obtain a log or a ruling on their motion. Finally, on July 15, 2003, Bankers, through new counsel, filed a privilege log. On July 23, 2003, Symons filed an amended motion to compel, citing the several month delay in supplying the log and adding the claim that the log was deficient. The trial court heard argument on the motion to compel and ruled that pursuant to *TIG Insurance*, Bankers' untimely submission of the privilege log waived its right to assert work product immunity.

Florida Rule of Civil Procedure 1.280(b)(5) states the following with regard to a claim of privilege or work product immunity during discovery:

> When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

The committee notes say that subdivision (b)(5) was derived from Federal Rule of Civil Procedure 26(b)(5).

The "leading" Florida case on this issue does appear to be *TIG Insurance*. In *TIG Insurance*, an insured who had been sued for slander brought a third party action against his own liability insurer, alleging that the insurer had breached its duty to defend. The trial court compelled the insurer to produce documents which were claimed to be privileged, and the insurer petitioned for a writ of certiorari. The Fourth District Court of Appeal, relying on several cited federal decisions, held that the insurer's failure to prepare a privilege log resulted in a waiver of the attorney-client privilege and work-product immunity. 799 So.2d at 341-42.

This court also has said that the failure to provide a privilege log waives the protection afforded by the attorney-client privilege or work-product doctrine, citing ***95** *TIG Insurance*. *See, e.g.*, *Allstate Ins. Co. v. McClusky*, 836 So.2d 1068 (Fla. 5th DCA 2002); *Nationwide Mut. Fire Ins. Co. v. Hess*, 814 So.2d 1240 (Fla. 5th DCA 2002). However, in *Hess* and *McClusky* (as in *TIG Insurance*), no log was *ever* served. Moreover, in *Hess* discovery was not allowed without *in camera* inspection of documents covered by requests that on their face called for

attorney-client communications.

[1] Bankers argues that although it did not submit a privilege log at the time it objected to the discovery requests, it did submit a privilege log well before the hearing on the motion to compel production of the documents. Bankers urges that failure to submit a privilege log by the due date for the response to the request to produce does not automatically constitute a waiver of its right not to disclose their work-product. We agree.

Attorney-client privilege and work-product immunity are important protections in the adversarial legal system, and any breach of these privileges can give one party an undue advantage over the other party. Florida's courts generally recognize that an implicit waiver of an important privilege as a sanction for a discovery violation should not be favored, but resorted to only when the violation is serious. *Cf. Liberty Mutual Insurance Co. v. Lease America, Inc.*, 735 So.2d 560 (Fla. 4th DCA 1999) (the judiciary of this state should protect communications which Floridians recognize as privileged, without being hobbled by less important considerations); *Insurance Co. v. Noya*, 398 So.2d 836 (Fla. 5th DCA 1981) (failure to file timely motion for protective order or written objections does not bar party from asserting privilege for matters outside scope of discovery).

[2] Florida Rule of Civil Procedure 1.280(b)(5) does not detail the procedure to follow for service of privilege logs and does not specifically address the appropriate sanction to be imposed if a party is tardy in filing a privilege log. Although there was a delay of several months beyond the service of the response in serving the privilege log in this case, the privilege log was provided well before the hearing at which the judge found a waiver of the work-product immunity. *See Magical Cruise Co. v. Dragovich*, 876 So.2d 1281 (Fla. 5th DCA 2004), (Griffin, J., concurring). Finding an implied waiver of work product was an unduly harsh sanction given the facts of this case and not well supported by federal decisions applying the federal rule counterpart.

In contrast to the federal cases relied on by *TIG Insurance*, there are many federal decisions that recognize the narrow reach of "implied waiver." For example, in *Boca Investerings Partnership v. United States*, 1998 WL 426567, *2 (D.D.C. Jan. 20, 1998), the defendant put forth the same argument made here: that a party responding to a request to produce waives any privilege or immunity if the privilege log is not supplied when the response is served. The judge rejected that argument, pointing out that no federal rule requires production of the log along with the response or dictates waiver as a sanction. The judge further observed cogently that the privilege log is a "means to an end and not an end in itself; the ultimate question is whether the documents are protected by the privilege." *Id.* at 3.[1] *See Tyne v. Time* ***96** *Warner Entertainment Co., L.P.*, 212 F.R.D. 596 (M.D.Fla.2002) (where privilege log was not filed until almost one year after discovery request, and did not sufficiently describe documents, federal court in interpreting federal discovery rule found that privilege log was untimely, but nevertheless declined to compel production, finding that sanction would be too harsh); *EEOC v. Safeway Store, Inc.*, 2002 WL 31947153 (N.D.Cal. Sept.16, 2002) (the filing of a privilege log six months late would not constitute a waiver of the work-product claim, where defendant had already given plaintiff notice of the privilege claim, defendant produced a privilege log before the hearing on plaintiff's motion to compel, and there was no evidence that the delay prejudiced the plaintiff); *Anderson v. Hale*, 202 F.R.D. 548 (N.D.Ill.2001) (previous notice of the work-product doctrine claim precluded the imposition of the waiver sanction). *See also United States v. Philip Morris, Inc.*, 347 F.3d 951, 954 (D.C.Cir.2003); *In the matter of the Complaint of Yugo Marine, Inc.*, 1997 WL 610878 (E.D.La. Oct.1, 1997).

[3] Here, Bankers did provide notice of its work-product claim when it objected to the discovery requests. If a party does not thereafter submit a privilege log within a reasonable time before a hearing on the motion to compel, then the trial court can be justified in finding a waiver of the claim of immunity from discovery because there is no basis on which to assess the claim. *See Hess.* Under the circumstances of this case, however, the trial court departed from the essential requirements of law in compelling discovery of the alleged privileged documents as a sanction for the delay in submitting a privilege log.

[4] Symons alternatively urges that the privilege log submitted by Bankers was too general and therefore insufficient to show that the documents were privileged. However, from reading the transcript of the hearing on the motion to compel, it does not appear that the trial court considered the sufficiency of the privilege log. We decline to review the privilege log for its sufficiency until the trial court has done so. To aid in this process, we observe that the rule requires adequate identification of each document. This usually includes, at a minimum, sender, recipients, title or type, date and subject matter. *See also EEOC v. Safeway Store, Inc.*, 2002 WL 31947153. In many instances, this level of identification will make the applicability of the immunity from discovery clear. Any doubt after this level of disclosure would give rise to an *in camera* inspection. Identification of documents in bulk or as a class such as "claims file" should be the exception.

Even if the court agrees that a "claims file" is work product, it is not necessarily true that *every* document in a claim file is work product. Putting a document in a claim file doesn't make it immune; it is only immune if it *is* work product. Bankers may file an amended log prior to the next hearing, if it wishes, in light of this opinion.

PETITION GRANTED; ORDER QUASHED.

SAWAYA, C.J., and THOMPSON, J., concur.

Parallel Citations

29 Fla. L. Weekly D2638

Footnotes

1 In *Jackson v. County of Sacramento*, 175 F.R.D. 653, 655 (E.D.Cal.1997), the court observed:

> Rule **26(b)(5)** also requires the party asserting the privilege to describe the nature of the documents withheld in a manner that enables the requesting party to assess the claim but the rule does not specify *when* the required description must be provided.

2010 WL 4386826
Only the Westlaw citation is currently available.
United States District Court, M.D. Florida,
Fort Myers Division.

Elita BOZEMAN, Mother and Guardian of the person and property of Kenneth Bozeman, an incapacitated person; as Guardian of Bridgett Bozeman, a minor; as Guardian of Alyssa Bozeman, a minor; and as Assignee of Karen Bonagua, Assignor, Plaintiff,
v.
CHARTIS CASUALTY COMPANY, f/k/a American International South Insurance Company, Defendant.

No. 2:10–cv–102–FtM–36SPC. | Oct. 29, 2010.

Attorneys and Law Firms

Fred A. Cunningham, Slawson, Cunningham, Whalen, & Stewart, PL, Palm Beach Gardens, FL, for Plaintiff.

Opinion

ORDER

SHERI POLSTER CHAPPELL, United States Magistrate Judge.

***1** This matter comes before the Court on Motion to Quash or Modify Subpoena Duces Tecum Served on Non–Party Ken Ward, Esquire by Defendant, or Alternatively, Motion for Protective Order (Doc. # 18) filed on October 5, 2010. Defendant filed its Response (Doc. # 19) on October 19, 2010. The Motion is now ripe for review.

BACKGROUND

This case involves a claim for insurer bad faith brought by the Plaintiff, ELITA BOZEMAN, Mother and Guardian of the person and property of KENNETH BOZEMAN, an incapacitated person; as Guardian of BRIDGETT BOZEMAN, a minor; as Guardian of ALYSSA BOZEMAN, a minor; and as Assignee of KAREN BONAGUA, Assignor against CHARTIS. Chartis insured Karen Bonagua under an automobile liability policy with coverage limits of $100,000 per person and $300,000 per occurrence. On October 23, 2006, Karen Bonagua's son, Matthew McQueary, was involved in a catastrophic automobile accident while operating a vehicle owned by her, and insured under the Chartis policy. Mr. McQueary's vehicle collided with a work van containing seven occupants. The automobile accident resulted in the deaths of Matthew McQueary, Arnal Smallwood, Nathan Simpson, Benito Zacharias, and Courtney Smallwood, as well as the serious bodily injuries of Kenneth Bozeman, Teodulo Garcia, and Alberto Sanchez.

Representatives for each of the seven occupants of the work van presented separate claims against Karen Bonagua's policy with Chartis. Non-party Ken Ward, Esquire, to whom the subpoena at issue in the instant Motion is directed, represented Tammy Gilley, individually and as personal representative of the Estate of Courtney Smallwood, in a wrongful death suit against Bonagua. Chartis ultimately settled the wrongful death claims of the Estates of Arnal Smallwood, Nathan Simpson, Benito Zacharias, and Courtney Smallwood for the policy limits of $300,000. Having exhausted the policy limits, the remaining bodily injury claims were not settled. Bozeman then filed suit against Bonagua, individually and as personal representative of the Estate of Matthew McQueary, and, subsequently, the parties entered into a consent judgment in the amount of $9,000,000.

Karen Bonagua assigned her rights to Bozeman, who has sued Chartis to recover on the excess judgment. This lawsuit was brought by Bozeman and is a claim for insurer bad faith, alleging that Defendant Chartis failed to settle a bodily injury claim brought against the insured, Bonagua, individually and as a personal representative of the Estate of Matthew McQueary. In discovery, Chartis issued a subpoena *duces tecum* to attorney Ken Ward, which requested:

> Any and all materials and documents in your possession, custody or control concerning your representation of Tammy Gilley, individually and as personal representative of the Estate of Courtney Smallwood, in connection with any claims for damages and/or injuries arising out of a motor vehicle accident that occurred on October 23, 2006 in Arcadia, DeSoto County, Florida.

***2** Attorney Ward responded with the instant Motion to Quash or Modify Subpoena Duces Tecum or Alternatively, Motion for Protective Order, objecting to the subpoena and alleging that the subpoena should be quashed as it imposes an undue burden upon counsel and that the documents requested are protected by the work-product and attorney-client privilege. The Court will address each of Ward's objections below.

DISCUSSION

1. Work–Product Privilege

Like the attorney-client privilege, the party asserting the work-product privilege has the burden to prove that the documents sought are protected work product. *Palmer v. Westfield Insurance Company*, 2006 WL 2612168 (M.D.Fla. June 30, 2006). "While Rule 501, Fed.R.Evid., provides that Florida law of privilege governs diversity cases, the work-product doctrine is a limitation on discovery in federal cases and federal law provides the primary decisional framework." *Kemm v. Allstate Property and Cas. Ins. Co.*, 2009 WL 1954146, *2 (M.D.Fla. July 7, 2009). The work-product privilege "typically applies only to documents prepared principally or exclusively to assist in anticipation or ongoing litigation." *Palmer*, at * 3. Unlike the attorney-client privilege, which is controlled by state law in diversity cases, the work product privilege is controlled by Rule 26 of the Federal Rules of Civil Procedure. *Id.* at * 2. The Rule states in pertinent part:

> Ordinarily, a party may not discover documents and tangible things that are prepare in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if: (i) they are otherwise discoverable under Rule 26(b)(1); and (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

Fed R.Civ. P. 26(b)(3). A non-party is not entitled to claim work product protection. *See Tambourine Comercio Internacional SA v. Solowsky*, 2009 WL 378644, *16 (11th Cir. Feb.17, 2009) (noting that "[b]y its plain text, Rule 26(b)(3) applies to documents or things prepared by or for another party or its representatives"). Thus, the work-product doctrine does not apply to documents that were not prepared by or for a party to the suit in which production is sought and there is no evidence that the information was prepared for the Plaintiff in this case (or for assignor Bonagua). Neither Ken Ward, Esq., nor Tammy Gilley, individually and as personal representative of the Estate of Courtney Smallwood (deceased) are parties to the current bad-faith lawsuit. Thus, Ward's claim of work-product privilege is not well taken.

2. Attorney–Client Privilege

Ward argues that Chartis made a blanket request for his entire file regarding his representation of Tammy Gilley, including information that is protected by the attorney-client privilege. He further argues that the communications were intended to be confidential and privileged, and any such privilege has not been waived by Gilley. He asserts that it would take him significant time, effort, and expense to generate a privilege log of communications, which are not discoverable. Chartis concedes that any documents contained in attorney Ward's file which constitute communications with his client would not be subject to production and that any such documents would be protected by the attorney-client privilege.

***3** The attorney-client privilege is only available when all the elements are present. *Universal City Development Partners, Ltd. v. Ride & Show Engineering, Inc.*, 230 F.R.D. 688, 690 (M.D.Fla.2005) (citing *Provenzano v. Singletary*, 3 F. Supp 2d 1353, 1366 (M.D.Fla.1999) *aff'd*, 148 F.3d 1327 (11th Cir.1998)). The elements of the attorney-client privilege are: (1) Where legal service advice of any kind is sought, (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected, (7) from disclosure by himself or by the legal advisor, (8) except the protection may be waived. *Universal City Development Partners, Ltd.*, 230 F.R.D. at 690 (quoting *International Telephone and Telegraph Corp. v. United Telephone Co.*, 60 F.R.D. 177, 184–185 (M.D.Fla.1973)). The party asserting the privilege has the burden of proving the existence of the privilege. *United States v. Schaltenbrand*, 930 F.2d 1554, 1562 (11th Cir.1991). Under Florida law, the attorney-client privilege only protects confidential communications between a lawyer and a client. *Geico Cas. Co. v. Beauford*, 2006 WL 2990454, *1 (M.D.Fla. Oct.19, 2006) (citing Fla. Stat. § 90.502(1)). "The burden is on the party claiming the privilege to establish that each communication or document sought to be protected falls within the privilege

protection." *Id.*

In this case, Ward has not met his burden to show that all materials contained in the Gilley file involve confidential communications between himself and his client. It is likely that there are other materials in the file such as correspondence with opposing counsel and Chartis that would not be privileged. These materials would be subject to production. Thus, Ward's refusal to provide the entire Gilley file on the basis of attorney-client privilege is not well taken. Ward shall produce a privilege log of all materials for which he believes are privileged and produce all non-privileged documents responsive to Chartis' subpoena *duces tecum.* Typically, the privilege log will identify each document and the individuals who were parties to the communications with sufficient detail to permit the compelling party or court to determine if the privilege is properly claimed. *CSX Transportation, Inc., v. Admiral Insurance Co.,* 1995 WL 855421, *3 (M.D.Fla. July 20, 1995). More specifically, a proper privilege log should contain the following information:

> (1) the name and job title or capacity of the author of the document;
>
> (2) the name and job title or capacity of each recipient of the document;
>
> (3) the date the document was prepared and if different, the date(s) on which it was sent to or shared with persons other than the author(s);
>
> (4) the title and description of the document;
>
> (5) the subject matter addressed in the document;
>
> (6) the purpose(s) for which it was prepared or communicated; and
>
> ***4** (7) the specific basis for the claim that it is privileged.

See Roger Kennedy Construction, Inc. v. Amerisure Insurance Co., 2007 WL 1362746, * 1 (M.D.Fla. May 7, 2007) (detailing the information needed in a proper privilege log).

3. Undue Burden and Attorney's Fees

Non-party Ward argues that the subpoena *duces tecum* subjects him to undue burden. With regard to the burden imposed on non-parties in responding to discovery requests, courts consider the following factors: relevance, the requesting party's need for the documents, the breadth of the document request, and the time period covered by the request." *erinMedia, LLC v. Nielsen Media Research, Inc.,* WL 1970860 *1–2 (M.D.Fla. July 3, 2007) (citing *Cytodyne Tech., Inc. v. Biogenic Tech., Inc.,* 216 F.R.D. 533, 535 (M.D.Fla.2003); *Farnsworth v. Proctor & Gamble Co.,* 758 F.2d 1545 (11th Cir.1985)).

As discussed above, the Court has found that documents in the Gilley file are relevant to the instant suit, and could be used to support Chartis' defenses. Further, Chartis' request is specifically limited to the litigation file for Ward's representation of Tammy Gilley, individually and as personal representative of the Estate of Courtney Smallwood. Attorney Ward apparently represented Gilley for a relatively short amount of time, and the claim settled short of litigation. Thus, Ward's undue burden objection is not well taken as Chartis has shown a need for the documents that cannot be obtained from any other source.

Rule 45 requires the Court to protect non-parties from "significant expense resulting from compliance" with a subpoena. *Horn v. Volusia County, Florida,* 2008 WL 3050416, *1 (M.D.Fla. Aug.5, 2008). "However, the required protection from significant expense does not mean that the requesting party necessarily must bear the entire cost of compliance. A non-party can be required to bear some or all of its expense where the equities of a particular case demand it." *Id.* (internal quotations omitted). A district court has "substantial discretion in the allocation of costs in discovery." *Klay v. All Defendants,* 425 F.3d 977, 982 (11th Cir.2005). The Court is mindful that attorney Ward is a non-party and his compliance with this Court's Order would require him and/or his staff to go through the Gilley file to determine which documents Ward believes would be subject to privilege and create a privilege log. Thus, the Court finds that the equities in this case balance in favor of Defendant covering some of the costs associated with the production. Defendant shall cover the cost of copies at fifteen (.15) cents a page and up to five hours of attorney and/or paralegal time in responding to the subpoena. Payment is not required until after the production is made. The Court will also allow Ward 30 days within which to produce the documents and privilege log.

Accordingly, it is now

ORDERED:

Motion to Quash or Modify Subpoena Duces Tecum Served on Ken Ward, Esquire by Defendant, or Alternatively, Motion for Protective Order (Doc. # 18) is **DENIED.** The subpoena is not quashed and Ward shall produce all non-privileged documents responsive to Defendant's subpoena *duces tecum* and a privilege log on

or before **November 29, 2010.** Defendant shall cover the cost of copies at fifteen (.15) cents a page and up to five hours of attorney and/or paralegal time in responding to the subpoena. Payment is not required until after the production is made.

***5 DONE AND ORDERED.**

End of Document

73 So.3d 850
District Court of Appeal of Florida,
Fifth District.

FIFTH THIRD BANK, etc., Petitioner,
v.
ACA PLUS, INC., Ronald J. Thurston, et al.,
Respondents.

No. 5D11–64. | Nov. 4, 2011.

Synopsis

Background: Action was brought involving bank. After bank produced documents and a privilege log, the Circuit Court, Seminole County, Nancy F. Alley, J., ordered production of six documents listed on the privilege log, finding that four of the documents were not privileged, and that bank had waived any privilege with respect to the others by filing an untimely privilege log. Bank filed petition for writ of certiorari.

[Holding:] The District Court of Appeal, Evander, J., held that bank did not waive its claim of privilege by filing an untimely privilege log.

Petition granted in part and denied in part.

West Headnotes (3)

[1] **Certiorari**
Inadequacy of remedy by appeal or writ of error
Certiorari
Particular proceedings in civil actions

Review by certiorari is appropriate when a discovery order departs from the essential requirements of law, causing material injury to the petitioner throughout the remainder of the proceedings and effectively leaving no adequate remedy on appeal.

1 Cases that cite this headnote

[2] **Certiorari**
Particular proceedings in civil actions

Certiorari is particularly appropriate to review a discovery order which improperly requires a party to produce documents or disclose information for which a privilege is asserted, because disclosure of privileged or protected material may cause irreparable injury.

[3] **Pretrial Procedure**
Work product privilege; trial preparation materials
Privileged Communications and Confidentiality
Privilege logs

Bank that sought to withhold from its document production to adversary a document that was attorney work product and a document that was a privileged attorney-client communication did not waive its claim of privilege by filing an untimely privilege log, even though privilege log was not filed within 30 days after service of adversary's discovery request; procedural rule requiring creation of a privilege log did not set forth a time by which it had to be filed, and bank complied with trial court's discovery order requiring the documents and privilege log to be produced within two days after entry of the order. West's F.S.A. RCP Rule 1.280(b)(5).

Attorneys and Law Firms

***851** W. Glenn Jensen, Mychal J. Katz and Christopher D. Donovan of Roetzel & Andress, LPA, Orlando, for Petitioner.

John A. Baldwin of Baldwin & Morrison, P.A., Fern Park,

for Respondents.

Opinion

EVANDER, J.

Petitioner, Fifth Third Bank, seeks review of an order compelling disclosure of six documents for which it asserted a claim of either attorney-client privilege or work product. One of the documents was properly found by the trial court to constitute work product and another document was properly determined to be a privileged attorney-client communication. The trial court, nonetheless, ordered production of these documents after determining that Petitioner waived its objections by filing an "untimely" privilege log. We conclude that no waiver occurred and that the trial court's order constituted a departure from the essential requirements of law. We further determine that Petitioner should not have been required to produce three of the other four documents at issue and that it was improper for the trial court to impose sanctions against Petitioner.

On May 26, 2010, Respondents served their Second Request to Produce on Petitioner. Petitioner timely responded, raising numerous objections to some of the requests but agreeing to produce other documents at a mutually-agreed upon time and place. Demand for payment of copying costs was also made. Respondents' counsel ignored Petitioner's counsel's attempts to arrange a mutually convenient time and place for production of documents, instead filing a Motion to Compel and to Impose Sanctions. After hearing the motion on August 4, 2010, the trial court ordered Petitioner to deliver copies of all documents responsive to the request to produce, along with a corresponding privilege log, to the office of Respondent's counsel no later than August 6, 2010. Respondents were directed to reimburse Petitioner for the cost of copies at a rate of $.03/page. The trial court did not rule on Petitioner's various objections at this hearing. On August 6, 2010, Petitioner produced the privilege log as well as hundreds of pages of requested documents.

The trial court subsequently held a hearing on December 1, 2010, to determine the propriety of Petitioner's objections to the Second Request to Produce. It also conducted an *in camera* review of the documents for which a claim of work product or attorney-client privilege had been asserted. The trial court ultimately determined that the document found at Produced Documents Page Numbers 247–49 ***852** was work product and that the document found at Produced Documents Page Number 597 was a privileged attorney-client communication. However, the trial court ruled that Petitioner's privilege log was untimely filed and therefore its objections were waived. The four other documents at issue were also ordered to be disclosed and attorney's fees were imposed against Petitioner as a sanction.

[1] [2] Review by certiorari is appropriate when a discovery order departs from the essential requirements of law, causing material injury to the petitioner throughout the remainder of the proceedings and effectively leaving no adequate remedy on appeal. *Allstate Ins. Co. v. Langston*, 655 So.2d 91, 94 (Fla.1995). Certiorari is particularly appropriate to review an order which improperly requires a party to produce documents or disclose information for which a privilege is asserted because disclosure of privileged or protected material may cause irreparable injury. *See Martin–Johnson, Inc. v. Savage*, 509 So.2d 1097, 1100 (Fla.1987); *Beverly Enters.-Fla., Inc. v. Ives*, 832 So.2d 161, 162 (Fla. 5th DCA 2002), *Wooten, Honeywell & Kest, P.A. v. Posner*, 556 So.2d 1245, 1246–47 (Fla. 5th DCA 1990).

[3] Here, the trial court's finding of waiver was erroneous. Florida Rule of Civil Procedure 1.280(b)(5) provides that when a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial preparation material, the parties shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information that is itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection. This rule does not set forth a time by which a privilege log must be filed.

In *Bankers Security Insurance Co. v. Symons*, 889 So.2d 93, 95–96 (Fla. 5th DCA 2004), this court held that failure to submit a privilege log by the due date for the response to the request to produce did not automatically constitute a waiver of the right to assert privilege or work-product immunity. In doing so, this court observed that the attorney-client privilege and work product immunity are important protections in the adversarial legal system and that finding an implicit waiver of these protections should not be favored, but resorted to only when the violation is serious. *See also Gosman v. Luzinski*, 937 So.2d 293, 296 (Fla. 4th DCA 2006).

In the instant case, the trial court resolved the parties' disputes regarding copying costs and the time and location of document production at the August 4, 2010 hearing. At such time, the trial court ordered Petitioner to produce its privilege log within two days. Petitioner timely complied with that order. The trial court's subsequent finding of an implicit waiver, based on a failure to file a privilege log

within thirty days of the date of service of the Second Request to Produce, constituted a departure from the essential requirements of law.

We further determine that three of the other four documents (found at Produced Documents Page Numbers 250–56, 391, and 403) also constituted either protected work product or privileged attorney-client communication for which disclosure should not have been ordered. We find no error in the trial court's decision requiring the production of the remaining document at issue.

Finally, based on our decision and our review of the record, we find no basis for the trial court's imposition of sanctions against Petitioner.

***853** PETITION GRANTED, in part; DENIED, in part.

SAWAYA and LAWSON, JJ., concur.

Parallel Citations

36 Fla. L. Weekly D2409

2011 WL 2682958
Only the Westlaw citation is currently available.
United States District Court,
S.D. Florida.

MITSUI SUMITOMO INSURANCE CO. a/s/o Sony Corporation of America and Sony Corporation of Latin America, Plaintiff,
v.
CARBEL, LLC, Defendant.

No. 09–21208–CIV. | July 11, 2011.

Attorneys and Law Firms

Stephen Lawrence Barker, Jon Dale Derrevere, Derrevere, Hawkes, Black & Cozad, West Palm Beach, FL, Michael S. Munger, Nelson Levine De Luca & Horst, Blue Bell, PA, for Plaintiff.

Blake S. Sando, Richard Phillip Cole, Cole Scott & Kissane, Ramon A. Abadin, Abadin Jaramillo Cook et al., Miami, FL, for Defendant.

Opinion

ORDER ON DEFENDANT'S MOTION TO COMPEL

JONATHAN GOODMAN, United States Magistrate Judge.

***1** This matter is before the Court on Defendant, Carbel, LLC's motion to compel Plaintiff, Mitsui Sumitomo Insurance Company, as subrogee of Sony Corporation of America and Sony Corporation of Latin America, to comply with Rule 26(a)(1)(A) of the Federal Rules of Civil Procedure, by producing all mandatory disclosures [DE# 71]. The Court has considered the motion and associated briefing of the parties, and has independently reviewed the withheld documents *in camera*. For the reasons set forth below, the Court will **deny** the motion.

BACKGROUND

This discovery dispute arises out of a subrogation action, filed by Plaintiff on May 5, 2009 [DE# 1]. According to the allegations in the complaint, the underlying litigation is the result of a cargo theft of Sony's property from Defendant Carbel's commercial warehouse. Plaintiff Mitsui reimbursed Sony pursuant to their insurance contract, and then subrogated itself to Sony's claims. Mitsui seeks to hold Carbel liable for damages and replacement costs of Sony's goods.

Pursuant to Rule 26(a)(1)(A), a party must, without awaiting a discovery request, provide to the opposing parties certain initial disclosures that are "needed in most cases to prepare for trial or make an informed decision about settlement."

On March 25, 2011, the parties submitted to the Court a proposed joint discovery plan, requiring initial disclosures by April 1, 2011 [DE# 68]. On April 20, 2011, the Court issued an amended order requiring the parties to make the disclosures required by Rule 26(a) (1) by April 1, 2011 [DE# 70]. Defendant filed a motion to compel on May 13, 2011, contending that Plaintiff had failed to produce certain outstanding documents required under Rule 26 [DE# 71]. After a hearing on the motion, and at the Court's instruction, Defendant then filed a supplemental brief, contending that Plaintiff waived its right to claim privilege over the withheld documents.[1] Plaintiff submitted the withheld documents to the Court for *in camera* review, and, in its own supplemental brief, contends that the withheld documents are non-discoverable work product and/or subject to the attorney-client privilege, and that it has *not* waived its right to claim privilege [DE# 76].

By way of additional background, Plaintiff Mitsui and Tokio Marine, a non-party to this suit, **shared** coverage on Sony's insurance policy, which is at issue in this case. Plaintiff Mitsui enlisted a third party administrator, Vericlaim, to adjust the claim. Plaintiff Mitsui provided coverage to Sony for unnamed goods in transit, and AIG provided coverage to Defendant pursuant to a Marine Open Cargo Policy. Consequently, Sony made claims against both Plaintiff Mitsui's and AIG's policies, which created a question regarding the respective coverage among the insurers. Plaintiff Mitsui then filed this action against Defendant for subrogation. Plaintiff claims that the redacted documents "specifically relate to insurance coverage/contribution issues and the impact of 'other insurance' on the claim ... and the possibility of litigation between AIG and Plaintiff Mitsui for contribution and the authors' mental impressions related to that possibility" [DE# 76, at 3].

ANALYSIS

1. Applicability of Work Product Privilege

***2** Plaintiff asserts that many of the documents submitted for *in camera* review are covered by the work product privilege. Work product protection operates to "remov[e] counsel's fears that his thoughts and information will be invaded by his adversary." *Jordan v. United States Dep't of Justice,* 591 F.2d 753, 775 (D.C.Cir.1978). The proponent of the privilege has the burden of proving its applicability. *Logan v. Commercial Union Ins. Co.,* 96 F.3d 971, 976 (7th Cir.1996).

Fed.R.Civ.P. 26(b)(3) provides specific protection for work product:

> (A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, **consultant,** surety, **indemnitor,** insurer, or **agent)** ...
>
> (B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning litigation. (emphasis added).

The Court reviewed the withheld documents, and concludes that the documents are entitled to protection under either the work product doctrine, or the attorney-client privilege, or both.[2] Although not all portions of each document have been prepared by or for Plaintiff in anticipation of *this* litigation—some documents were prepared with the anticipation of litigation for contribution between Plaintiffs and AIG, Defendant's insurer—it is widely recognized that the "work product doctrine would be attenuated if it were limited to documents that were prepared [only] in the [very] case for which discovery is sought." *In re Murphy,* 560 F.2d 326, 334 (8th Cir.1977); *cf. Duplan Corp. v. Moulinage et Retorderie de Chavanoz,* 487 F.2d 480, 484, n. 15 (4th Cir.1973) (rejecting any requirement that the litigation for which work product was prepared be "closely related" to the litigation actually anticipated).

The Supreme Court has articulated that the purpose of work product protection is to immunize the work product of the attorney *or his agents* from discovery, so that they can analyze and prepare their client's case for litigation. *See United States v. Nobles,* 422 U.S. 225, 238–39, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975). Work product extends beyond the lawyer's own preparation; it may be protected as long as it has been prepared in anticipation of litigation by *any* representative or agent of the party asserting the privilege. *See, e.g., Martin v. Bally's Park Place Hotel & Casino,* 983 F.2d 1252, 1260–62 (3d Cir.1993) (holding that work-product protection applied to documents prepared by an environmental consultant).

Therefore, it is immaterial that certain documents have been prepared by parties other than Plaintiff's counsel, because the withheld documents were indeed prepared by Plaintiff or Plaintiff's agents with an eye toward litigation, as contemplated by Rule 26(b) (3)(A). The contents of communications between Plaintiff Mitsui and its insured, Sony, and the communications between Plaintiff Mitsui and Vericlaim, its third party administrator, are protected because Sony is the insured and the party from whom the subrogation right flows in this case and because Vericlaim is Plaintiff Mitsui's agent, responsible for adjusting the claim at issue. The content of communications between Plaintiff Mitsui and Tokio Marine (two insurers sharing the Sony insurance coverage here) are also privileged because they contain Plaintiff's mental impressions and legal theories prepared in anticipation of litigation. As such, Plaintiff properly asserted the work product privilege over the withheld documents, because they contain the mental impressions and legal theories of Plaintiff and were prepared in anticipation of litigation by Plaintiff and its agents.

2. Applicability of Attorney–Client Privilege

***3** Plaintiff contends that a portion of the withheld documents are protected by the attorney-client privilege. The purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients," and exists "to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Upjohn Co. v. United States,* 449 U.S. 383, 389, 391, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981).

Defendant does not contest that that there are privileged documents among those that Plaintiff has withheld, (i.e., those strictly concerning communications between Plaintiff Mitsui and its counsel), but Defendant asserts that Plaintiff should be compelled to produce these documents as well because Plaintiff waived the privilege through both subject matter waiver and voluntary disclosure [DE# 75].

3. Alleged Waiver of Privileges

The Court has concluded through its *in camera* review of

the documents that the documents fall under one or both of two privileges: communications between Plaintiffs and Plaintiff's counsel that are shielded by the attorney-client privilege or communications that contain content reflecting Plaintiff's (or Plaintiff's representatives') mental impressions and legal theories about Plaintiff Mitsui's coverage of the claim at issue, prepared in anticipation of litigation, which are protected as work product. Because Plaintiff has established the applicability of the privileges, the burden now shifts to the Defendant, as the party asserting waiver, to show that the party claiming the privilege has waived its right to do so. *See Rhoads Indus. v. Bldg. Materials Corp. of Am.,* 254 F.R.D. 216, 223 (E.D.Pa.2008).

Defendant maintains that withholding certain documents while disclosing others allows Plaintiff to improperly "hide behind the privilege" and use it as both a "shield and a sword." *See In re Lott,* 424 F.3d 446, 454 (6th Cir.2005); *see also United States v. Bilzerian,* 926 F.2d 1285, 1292 (2d Cir.1991). Defendant contends that Plaintiff waived the privilege pursuant to the subject matter waiver, which operates when a party "injects into the case an issue that in fairness requires an examination of otherwise protected communications," and in the event of trial, "the party holding the privilege will be forced to draw upon the privileged material ... in order to prevail [on the issue]." *Cox v. Administrator U.S. Steel & Carnegie,* 17 F.3d 1386, 1422 (11th Cir.1994); *In re Lott,* 424 F.3d at 453. Defendant further contends that as a result of "[letting the cat] out of the bag," the waiver extends "to all such communications regarding the same subject matter." *In re von Bulow,* 828 F.2d 94, 103 (2d Cir.1987); *In re EchoStar Commc'ns Corp.,* 448 F.3d 1294, 1301 (Fed.Cir.2006).

Subject matter waiver through issue injection applies only when the disclosing party attempts "to prove a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney client communication." *Rhone–Poulenc Rorer Inc. v. Home Indem. Co.,* 32 F.3d 851, 863 (3d Cir.1994) (citing *North River Ins. Co. v. Philadelphia Reinsurance Corp.,* 797 F.Supp. 363, 370 (D.N.J.1992)). As such, courts have found waiver by implication in scenarios where a client (1) testifies concerning portions of the attorney-client communication, (2) places the attorney-client relationship directly at issue, (i.e., in a malpractice suit,) or (3) asserts reliance on an attorney's advice as an element of the claim or defense. *In re Keeper of the Records,* 348 F.3d 16, 24 (1st Cir.2003) (citing *Sedco Int'l, S.A. v. Cory,* 683 F.2d 1201, 1206 (8th Cir.1982)).

***4** Here, although Plaintiff has disclosed certain documents to Defendant in the course of discovery, these disclosures do not amount to issue injection. Defendant has not demonstrated that Plaintiff injected any issue into its claims for subrogation or defense regarding contribution that would require Plaintiff to prove such claims or defenses by relying on the contents of the privileged communications. Defendant has also failed to show that Plaintiff intends to do so at some later juncture in this action. Accordingly, the Court finds no subject matter waiver through issue injection.

Defendant also contends that Plaintiff waived the privilege by voluntarily disclosing communications between persons from separate entities. It is well-established that once a party asserting privilege makes disclosures of privileged information to third parties, the communications are no longer confidential. *See United States v. Suarez,* 820 F.2d 1158, 1160 (11th Cir.1987) (justification for privilege ceases once disclosed to third parties). Although disclosure of confidential communications to third parties vitiates the attorney-client privilege, work product protection is analyzed differently due to the policies that give rise to the protection. In the context of work product, the question is not, as in the case of the attorney-client privilege, *whether* confidential communications were disclosed, but *to whom* the disclosure is made—because the protection is designed to protect an attorney's mental processes from discovery by *adverse* parties. *See generally Jordan,* 591 F.2d at 775.

Under the "common interest" exception to waiver, a party may share its work product with another party without waiving the right to assert the privilege when the parties have a shared interest in actual or potential litigation against a common adversary, and the nature of their common interest is legal, and not solely commercial. *See Net2Phone, Inc. v. eBay, Inc.,* No. 06–2469, 2008 U.S. Dist. LEXIS 50451, at * 23, 2008 WL 8183817 (D.N.J. June 25, 2008) (citing *Thompson v. Glenmede Trust Co.,* Civ. No. 92–5233, 1995 U.S. Dist. LEXIS 18780, at *15 (E.D.Pa. Dec. 18, 1995); *Duplan Corp. v. Deering Milliken, Inc.,* 397 F.Supp. 1146, 1172 (D.S.C.1974)); *see also Weber v. FujiFilm Med. Sys. U.S.A.,* No. 3:10cv401, 2011 U.S. Dist. LEXIS 6199, at *5 (D.Conn. Jan. 21, 2011); *Gulf Islands Leasing, Inc. v. Bombardier Capital, Inc.,* 215 F.R.D. 466, 474 (S.D.N.Y.2003); *Medinol v. Boston Sci. Corp.,* 214 F.R.D. 113, 115 (S.D.N.Y.2002). Courts differ on the degree of commonality required to satisfy the common interest exception. *Compare Hoffmann La Roche, Inc. v. Roxane Labs., Inc.,* No. 09–6335, 2011 U.S. Dist. LEXIS 50404, at *15 (D.N.J. May 11, 2011) (substantially similar legal interests sufficient) *with Duplan,* 397 F.Supp. at 1172 (identical interests required).

Additionally, the common interest exception to waiver also applies to the disclosure of privileged communications

shared between a parent corporation and a subsidiary, where the parent and subsidiary companies share a legal interest. *See In re Grand Jury Subpoena # 06–1,* 274 Fed. Appx. 306, 311 (4th Cir.2008) (adopting the Third Circuit's holding that privileged communications are subject to the common interest exception when the parties' interests are "identical (or nearly so) in order that an attorney can represent them all with the candor, vigor, and loyalty that our ethics require") (quoting *In re Teleglobe Communs. Corp.,* 493 F.3d 345, 366 (3d Cir.2007)).

***5** Although Plaintiff shared some of its work product with various non-parties to the litigation, it appears that Plaintiff did not waive the privilege under the common interest exception to waiver. Plaintiff shares legal interests with the parties to whom it made disclosures of privileged communications. With regard to Plaintiff's disclosures to its co-insurer, Tokio Marine, the company shared half of Sony's insurance policy, and was required to indemnify Sony for the stolen goods. As such, Tokio Marine had an identical (or almost identical) legal interest to Plaintiff Mitsui, as a potential co-party to litigation against Defendant for subrogation (i.e., a party who could be liable to the same extent as Plaintiff). Similarly, various Sony entities were also potential co-parties to the litigation, and shared legal interests with their parent companies, Sony Corporation of America and Sony of Latin America.

Finally, Defendant argues that the privilege should be deemed waived because Plaintiff did not timely file a privilege log. In response, Plaintiff correctly notes that no federal rule requires production of a privilege log (much less filing it with the court) or mandating waiver as the sanction for non-production or untimely production of a log.[3] *See Bankers Sec. Ins. Co. v. Symons,* 889 So.2d 93, 95 (Fla. 5th DCA 2004) ("no federal rule requires production of the log along with the response or dictates waiver as a sanction"). Courts have observed that a "privilege log is a 'means to an end and not an end in itself; the ultimate question is whether the documents are protected by the privilege.' " *Id.* (quoting *Boca Investerings Pshp. v. United States,* No. 97–602, 1998 U.S. Dist. LEXIS 11840 (D.D.C. Jan. 20, 1998

Courts in this Circuit have generally followed the Ninth Circuit's approach to waiver articulated in *Burlington Northern & Santa Fe Ry. v. United States Dist. Court,* 408 F.3d 1142, 1149 (9th Cir.2005), which adopted a "holistic reasonableness analysis, intended to forestall needless waste of time and resources, as well as tactical manipulation of the rules and the discovery process." "The Ninth Circuit rejected a per se rule that the failure to produce a privilege log within Rule 34's 30–day time limit results in waiver of the privilege." *Universal City Dev. Ptnrs, Ltd. v. Ride & Show Eng'g, Inc.,* 230 F.R.D. 688, 695 (M.D.Fla.2005). "Instead, the Ninth Circuit enumerated several factors that should be applied 'in the context of a holistic reasonableness analysis,' and there should not be a mechanistic determination of whether information is provided in a particular format." *Id.* The relevant factors, according to the Ninth Circuit, are:

> the degree to which the objection or assertion of privilege enables the litigant seeking discovery and the court to evaluate whether each of the withheld documents is privileged ... the timeliness of the objection and accompanying information about the withheld documents (where service within 30 days, as a default guideline, is sufficient); the magnitude of the document production; and other particular circumstances of the litigation that make responding to discovery unusually easy ... or unusually hard.

***6** *Burlington Northern & Santa Fe Ry.,* 408 F.3d at 1149.

In this case, Judge Gold issued an amended scheduling order that required initial disclosures to be made by April 1, 2011 (D.E.70) based on a proposed joint discovery plan agreed to by Defendant Carbel (D.E.68). Plaintiff then produced a privilege log on May 20, 2011, which Defendant refers to as a "draft privilege log" and argues that the log is insufficiently detailed under Local Rule 26.1(g)(3). The privilege log accurately identifies the withheld documents. Although the log does not list the authors of the claim log notes, that information was provided to Defendant through the redacted production. Defendant was not prejudiced by any informational deficiency because of the Court's *in camera* review confirming the privileged nature of these documents. Additionally, while the May 20, 2011 production was 20 days over the Ninth Circuit's 30–day guideline, it would be an unduly harsh sanction to deem waived inarguably privileged documents in this instance absent a showing of bad faith or intentional dilatoriness. *Compare Pensacola Firefighters' Relief Pension Fund Bd. of Trs. v. Merrill Lynch Pierce Fenner & Smith, Inc.,* 265 F.R.D. 589, 594 (N.D.Fla.2010) (deeming privilege waived where party failed to follow court orders) *and Universal City,* 230 F.R.D. at 696 (finding waiver where log was produced eight months late and party failed to take precautions to prevent disclosure of privileged documents) *with EEOC v. Safeway Store, Inc.,* No. 00–3155, 2002 U.S. Dist. LEXIS 25200, 2002 WL 31947153 (N.D.Cal. Sept. 16, 2002) (no

waiver found when privilege log was produced six months late, defendant had already given plaintiff notice of the privilege claim, and there was no evidence that the delay prejudiced the plaintiff) *and Bankers Sec. Ins. Co.*, 889 So.2d at 95–96 (no waiver found after five-month delay where party seeking waiver was not prejudiced and party claiming waiver gave notice of work-product claim). It was no secret to Defendant that Plaintiff deemed the documents in question to be privileged, as is evidenced by the fact that Defendant appeared at the initial hearing on the motion to compel with its waiver argument in-hand. Although the level of specificity of the privilege log (i.e., generally categorizing documents as "Claim Log Notes") is open to question, Plaintiff knew at the time it provided its privilege log that the Court would be reviewing the documents *in camera*. The Court will not find waiver under these circumstances.

CONCLUSION

Accordingly, after independently reviewing the withheld documents *in camera*, the Court concludes the documents were properly withheld as privileged, and that Defendant has failed to make an adequate showing that Plaintiff has waived any privileges.

It is therefore ORDERED AND ADJUDGED that the motion to compel [DE# 71] is DENIED.

DONE AND ORDERED.

Footnotes

1 Sony bate-stamped documents00460; 00461; 00463; 00470; 00471; 00475; 00535; 00547; 00591; 00611; 00612; 00616; 00629; 00630; 00635; 00636; 00644; 00646; 00647; 00670; 00679; 00680; 00681; 00682; 00711; 00712; 00715; 00716; 00717; 00718; 00719; and 00720 [DE# 75].

2 For purposes of resolving this motion, it is not necessary to enumerate which documents fall under which privilege.

3 Local Rule 26.1(g), however, does require production of a privilege log but does not set a timetable for its production or specify sanctions for tardy production.

937 So.2d 293
District Court of Appeal of Florida,
Fourth District.

Lin Castre GOSMAN, an individual, Petitioner,
v.
Joseph J. LUZINSKI, as Trustee of the Bankruptcy Estate of Abraham David Gosman, Respondent.

No. 4D06-1896. | Sept. 20, 2006.

Synopsis
Background: Bankruptcy trustee brought action seeking to set aside transfers from debtor to his wife. The Circuit Court, Fifteenth Judicial Circuit, Palm Beach County, Karen Miller, J., issued order compelling production of documents and determining that wife waived her attorney-client privilege. Wife filed petition for writ of certiorari review.

[Holding:] The District Court of Appeal, Warner, J., held that wife's objection to the discovery request tolled the obligation to file a privilege log.

Writ granted.

West Headnotes (7)

[1] **Certiorari**
Particular Proceedings in Civil Actions

Certiorari review is proper when a discovery order compels production of privileged materials.

1 Cases that cite this headnote

[2] **Certiorari**
Particular Proceedings in Civil Actions

An order which improperly compels discovery of attorney-client privileged documents is reviewable by certiorari.

[3] **Pretrial Procedure**
Work-Product Privilege
Pretrial Procedure
Objections and Protective Orders
Privileged Communications and Confidentiality
Privilege Logs

Although waiver of the attorney-client privilege and work-product privileges is not favored in Florida, the rule requiring creation of a privilege log is mandatory and a waiver can be found by failure to file a privilege log. West's F.S.A. RCP Rule 1.380(a)(2).

3 Cases that cite this headnote

[4] **Pretrial Procedure**
Work-Product Privilege
Pretrial Procedure
Failure to Disclose; Sanctions
Privileged Communications and Confidentiality
Waiver of Privilege

Attorney-client privilege and work-product immunity are important protections in the adversarial legal system, and any breach of these privileges can give one party an undue advantage over the other party; Florida's courts generally recognize that an implicit waiver of an important privilege as a sanction for a discovery violation should not be favored, but resorted to only when the violation is serious.

2 Cases that cite this headnote

[5] **Privileged Communications and Confidentiality**
Privilege Logs

A party is required to file a privilege log only if the information is otherwise discoverable.

3 Cases that cite this headnote

[6] **Privileged Communications and Confidentiality**
Privilege Logs

Debtor's wife's failure to file a privilege log, and her failure to secure a ruling on her motion for an extension to file privilege log prior to issuance of ruling on her objection to bankruptcy trustee's discovery request, did not constitute waiver of her attorney-client privilege; wife's objection to the discovery as burdensome essentially tolled the obligation to file a privilege log until that objection was ruled upon. West's F.S.A. RCP Rule 1.350(b).

1 Cases that cite this headnote

[7] **Privileged Communications and Confidentiality**
Privilege Logs

Before a written objection to a request for production of documents is ruled upon, the documents are not otherwise discoverable and thus the obligation to file a privilege log does not arise; once the objection is ruled upon and the court determines what information is "otherwise discoverable," then the party must file a privilege log reciting which documents are privileged.

4 Cases that cite this headnote

Attorneys and Law Firms

***294** Stephen Rakusin of The Rakusin Law Firm, Fort Lauderdale, for petitioner.

Craig S. Barnett of Greenberg Traurig, P.A., Fort Lauderdale, and Mark D. Bloom, Elliot H. Scherker, Elliot B. Kula, and Daniel M. Samson, Miami, for respondent.

Opinion

WARNER, J.

The petitioner seeks certiorari review of an order of the circuit court compelling the production of documents and determining that petitioner waived her attorney-client privilege by failing to file a privilege log, even though she moved for an extension of time to file one. We grant the petition.

In connection with an action by a bankruptcy trustee seeking to set aside transfers from the debtor to his wife, the trustee served a discovery request on the wife seeking documents relating to her ownership and residence at various properties. The request demanded documents regarding ownership and use over a ten-year period. The wife timely filed a response to the request, in which she objected to its overbreadth and burdensomeness as beyond any relevant time frame for the underlying litigation. Subject to that objection, the wife stated that she would produce the requested documents, except those that violated the attorney-client privilege, accountant-client privilege, work-product privilege, and Fifth Amendment right against self-incrimination. Within that response and objection the wife also objected to the preparation of a privilege log as demanded in the request to produce, because the request required more identifying information as to each ***295** document of claimed privilege than was required by the rule. However, if the court determined that a privilege log would be required under the request, the wife requested a thirty day extension to prepare it.

Shortly thereafter, the wife filed a motion to dismiss the complaint against her, and the court denied the motion approximately five months later. Four days after the denial of the wife's motion, the trustee moved to compel production of documents and claimed that the wife had waived any privilege by failing to file a privilege log. At the hearing on the motion to compel, the trustee agreed to limit the request for production to a year-and-a-half prior to the request but continued to insist that the wife had waived any claim of privilege by failing to file a privilege log and not obtaining an extension. The trial court entered an order granting the motion to compel but limiting the document production to the year-and-a-half prior to the request. However, it also determined that the wife had waived any privilege by failing to file a privilege log or requesting an extension.

[1] [2] Certiorari review is proper when a discovery order compels production of privileged materials. *See Martin-Johnson, Inc. v. Savage,* 509 So.2d 1097 (Fla.1987). An order which improperly compels discovery

of attorney-client privileged documents is reviewable by certiorari. *See United Servs. Auto. Ass'n v. Crews*, 614 So.2d 1213 (Fla. 4th DCA 1993).

Florida Rule of Civil Procedure 1.350(b) provides as follows with respect to requests for production:

> (b) Procedure. Without leave of court the request may be served on the plaintiff after commencement of the action and on any other party with or after service of the process and initial pleading on that party.... The party to whom the request is directed shall serve a written response within 30 days after service of the request, except that a defendant may serve a response within 45 days after service of the process and initial pleading on that defendant.... For each item or category the response shall state that inspection and related activities will be permitted as requested unless the request is objected to, in which event the reasons for the objection shall be stated.... *The party submitting the request may move for an order under rule 1.380 concerning any objection, failure to respond to the request, or any part of it, or failure to permit inspection as requested.*

(emphasis added). Rule 1.380(a)(2) provides that where a party fails to permit inspection, the party requesting the production of documents may move for an order compelling inspection.

[3] [4] Rule 1.280(b)(5) requires the creation of a privilege log as to materials sought to be protected from production:

> *Claims of Privilege or Protection of Trial Preparation Materials.* When a party withholds information *otherwise discoverable* under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(emphasis added). Although waiver of the attorney-client privilege and work-product privileges is not favored in Florida, the rule is mandatory and a waiver can be found by failure to file a privilege log. *See TIG Ins. Corp. of Am. v. Johnson*, 799 So.2d 339 (Fla. 4th DCA 2001). Nevertheless, ***296** as noted in *Bankers Security Insurance Co. v. Symons*, 889 So.2d 93, 95 (Fla. 5th DCA 2004),

> Attorney-client privilege and work-product immunity are important protections in the adversarial legal system, and any breach of these privileges can give one party an undue advantage over the other party. Florida's courts generally recognize that an implicit waiver of an important privilege as a sanction for a discovery violation should not be favored, but resorted to only when the violation is serious.

[5] A party is required to file a log only if the information is "otherwise discoverable." Where a party claims that the production of documents is burdensome and harassing, such as was done here, the scope of the discovery is at issue.[1] Until the court rules on the request, the party responding to the discovery does not know what will fall into the category of discoverable documents. If the party is correct in her assertion that the documents requested are burdensome to produce, why should she still go through all the requested documents to determine which ones are privileged, even though none of them may be required to be produced because the request is burdensome?

[6] Here, the trustee requested ten years worth of documents which the wife objected to as burdensome and irrelevant. She also asserted various privileges. She did not ignore her obligation to file a privilege log but affirmatively recognized it by requesting an extension of time in which to file it once the court determined the proper scope of the production. By filing her objection, she complied with rule 1.350(b), permitting the trustee to bring a motion to compel the production and then allowing the court to determine the validity of the objection. In fact, her objection was well-taken, because at the hearing the trustee essentially conceded its overbreadth by agreeing to production of only a year-and-a-half of documents.

[7] Before a written objection to a request for production of documents is ruled upon, the documents are not "otherwise discoverable" and thus the obligation to file a privilege log does not arise. Once the objection is ruled upon and the court determines what information is "otherwise discoverable," then the party must file a privilege log

reciting which documents are privileged. If it is not done in that order, then the party faced with an unduly burdensome document request still has to obtain and review all the documents to determine which are privileged, even though the court may later limit the scope of the request if it was unduly burdensome.

The trustee faults the wife for failing to secure a ruling on her motion for extension of time at an earlier time. However, such an argument assumes that without such an extension, the wife was required to file a privilege log. In our view, the objection to the discovery as burdensome essentially "tolled" the obligation to file a privilege log until that objection was ruled upon. Therefore, the wife did not have to seek an extension of time independent of her previously filed objection to the scope of discovery.

Because the wife followed the procedural rules, the court departed from the essential requirements of law in concluding that failure to file a privilege log in these ***297** circumstances constituted a waiver of the privileges. We grant the writ.

STEVENSON, C.J., and HAZOURI, J., concur.

Parallel Citations

31 Fla. L. Weekly D2402

Footnotes

[1] Obviously, if the sole objection to discovery were that it sought privileged documents, then compliance with Rule 1.280(b)(5) would be required prior to any hearing on the objection as the information contained in the privilege log would be necessary to "assess the applicability of the privilege or protection."

630 F.Supp.2d 1332
United States District Court,
M.D. Florida,
Orlando Division.

UNITED STATES FIDELITY & GUARANTY COMPANY, Plaintiff,
v.
LIBERTY SURPLUS INSURANCE CORPORATION and United States Fire Insurance Company, Defendants.
Liberty Surplus Insurance Corporation, Third Party Plaintiff,
v.
Allen Ironworks, Inc., Aeicor Metal Products, Inc., Mendoza Painting LLC, Mel Hayes Painting, Inc., Moss Waterproofing & Painting Co., Inc., Farris Gypsum Floors of Florida Inc., St. Paul Travelers, Commercial Union Insurance Company, Amerisure Insurance Company and Auto-Owners Insurance Company, Third Party Defendants.

Case No. 6:06-cv-1180-Orl-31UAM. | Oct. 12, 2007.

Synopsis
Background: Surety sued two of general contractor's primary and excess insurers to recoup monies it had paid in settlement of construction-related claims. Primary insurer brought third-party claims seeking contribution against subcontractors and additional insurers that either covered general contractor directly or as additional insured under policies issued to subcontractors. Insurer moved for return or destruction of inadvertently disclosed privileged documents.

Holdings: The District Court, Donald P. Dietrich, United States Magistrate Judge, held that:

[1] documents reflecting communications between insurance company's claims specialist and claims manager regarding claim were not protected by attorney work product doctrine;

[2] report prepared by law firm for insurance company in connection with insured's claim were not protected by attorney-client privilege; and

[3] firm waived attorney-client privilege by sending documents to opposing counsel.

Motion denied.

West Headnotes (9)

[1] **Privileged Communications and Confidentiality**
Waiver of Privilege

Under Florida and Massachusetts law, in determining whether inadvertent disclosure results in waiver of attorney-client privilege, court should consider: (1) reasonableness of precautions taken to prevent inadvertent disclosure, (2) amount of time it took producing party to recognize its error, (3) scope of production, (4) extent of inadvertent disclosure, and (5) overriding interest of fairness and justice.

2 Cases that cite this headnote

[2] **Federal Courts**
Evidence Law

Attorney work product doctrine is determined based on federal law. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

[3] **Privileged Communications and Confidentiality**
Presumptions and Burden of Proof

Party asserting privilege has burden of proving its existence.

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

Mere possibility that certain event might lead to future litigation does not render privileged, pursuant to work product doctrine, all documents prepared subsequent to that event. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

1 Cases that cite this headnote

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

Work product doctrine was not intended to protect from general discovery materials prepared in ordinary course of business, such as factual investigations prepared by insurance companies. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

1 Cases that cite this headnote

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

Documents reflecting communications between insurance company's claims specialist and claims manager regarding claim were not protected by attorney work product doctrine, even though specialist suggested in one document that issue be forwarded to counsel, where insurer was defending claim under reservation of rights, and there was no indication that litigation was likely at that time. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

[7] **Privileged Communications and Confidentiality**
Insurers and Insureds

Under Florida and Massachusetts law, report prepared by law firm for insurance company in connection with insured's claim were not protected by attorney-client privilege, where firm was initially retained while insurer was defending insured under reservation of rights, insurer retained firm to investigate factual circumstances behind claim, insurer directed firm to contact insured's counsel, and report was submitted to insurer before it finally denied coverage.

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

Responding party's failure to make timely and specific objection to discovery request waives any objection based on privilege.

1 Cases that cite this headnote

[9] **Privileged Communications and Confidentiality**
Waiver of Privilege

Law firm failed to take reasonable precautions to prevent inadvertent disclosure of privileged documents, and thus firm waived attorney-client privilege by sending documents to opposing counsel, even if paralegal did not follow attorney's instructions with regard to documents, where firm did not provide written objections based on privilege, inadvertently produced documents were spread out on attorney's desk, paralegal brought cover letter that she prepared listing documents to be produced to another firm attorney, who signed it without looking at documents, and firm was unaware of inadvertent disclosure until opposing counsel brought it to firm's attention. Fed.Rules Civ.Proc.Rules 26(b)(5), 34(b), 28 U.S.C.A.

4 Cases that cite this headnote

Attorneys and Law Firms

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Opinion

ORDER

DONALD P. DIETRICH, United States Magistrate Judge.

This cause came on for consideration without oral argument on the following motion:

> **MOTION: MOTION FOR THE RETURN OR DESTRUCTION OF INADVERTENTLY DISCLOSED PRIVILEGED DOCUMENTS (Doc. No. 176)**
>
> **FILED: July 12, 2007**

THEREON it is **ORDERED** that the motion is **DENIED.**

I. STATEMENT OF FACTS

On May 14, 2007, Plaintiff, United States Fidelity & Guaranty Company ("USFG") propounded its request for production of documents to Defendant Liberty Surplus Insurance Corp. ("Liberty"). On May 17, 2007, Liberty's counsel, Dorothy Venable DiFiore, requested a thirty day extension of time "to respond to the discovery." Doc. 204-2 at 1. USFG agreed to extend Liberty's deadline to July 1, 2007. *Id.* DiFiore stated that she thought the extension "would be more than adequate." *Id.*

Subsequent to securing the extension of time, DiFiore claims that she had multiple ***1335** e-mail communications with USFG's counsel, Alberta ("Ali") Adams, in which she discussed "issues of privileged communications regarding claims handling matters and privileges related to the contents of the claims file...." Doc. 204-3 at ¶ 9. DiFiore has not produced any of these communications for the Court's review. USFG, however, produced to the Court an e-mail dated June 22, 2007, from DiFiore to Adams in which DiFiore states Liberty will produce some of the materials from the claims file as they are not privileged, and that she will provide a privilege log "in the next few days" as to the documents withheld from production. Doc. 229-2. DiFiore further claims that she had a telephone conversation with Adams on June 27, 2007, in which she discussed the issue of privileges related to claims file material and claims handling activities, although she is unable to state the "exact content" of that conversation. Doc. 204-3 at ¶¶ 10, 11.

On June 29, 2007, Liberty produced documents in response to USFG's request. Doc. 179 at ¶ 18. The documents were accompanied by a letter stating what was being produced. Doc. 179 at ¶ 19. The production, however, was not accompanied by the written response required by Fed.R.Civ.P. 34(b), or a privilege log. Liberty served a privilege log on July 3, 2007. Doc. 178 ¶ 17. Liberty served the written response required by Fed.R.Civ.P. 34(b) on July 6, 2007. Doc. 180 at 5.

After receiving the privilege log, on July 5, 2007, USFG informed Liberty that it appeared that Liberty had produced documents that were listed on the log. Doc. 178 at ¶ 5. Liberty's counsel immediately asserted that any production of any of the documents on the privilege log was unintentional. Doc. 178 at ¶ 20. The following day, Liberty's counsel met with USFG's counsel and specifically identified the erroneously produced documents. Doc. 178 at ¶ 22. USFG has sequestered those documents from the others and has not reviewed the documents. On July 12, 2007, Liberty filed its motion for the return or destruction of the inadvertently disclosed privileged documents.

II. THE LAW

A. *Attorney-Client Privilege*

Pursuant to Fed.R.Evid. 501, "the privilege of a witness, person ... shall be determined in accordance with State law." Precedential authority in the Eleventh Circuit has interpreted Fed.R.Evid. 501 to require application of the law of the "forum state" when assessing the availability of a privilege in a diversity case. *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 724 (5th Cir.1980).

Liberty initially stated that it was unclear whether Massachusetts law, Florida law or federal law governed the analysis of attorney-client privilege in this case. Doc. 176 at 9 n. 3. When the Court ordered supplemental briefing to address *inter alia* what is the applicable law for determining privilege, Liberty argued that the underlying contract is governed by Massachusetts law and, therefore, Massachusetts' privilege law should be used. Doc. 204 at 7-9. USFG contends that Florida substantive law applies and that Florida's law applies to determine attorney-client privilege. Doc. 229 at 8-9.

While USFG contests whether certain documents are privileged under the attorney work product doctrine, USFG does not make the same argument regarding the attorney-client privilege. Doc. 180 at 7-10. As the Court understands USFG's arguments, USFG does not claim that the documents are not subject to the attorney-client privileged, but rather claims that the privilege has been waived. Doc. 180 at 10-15. USFG argues that the law of waiver ***1336** of privilege is the same under both Massachusetts and Florida law. Doc. 229 at 9.

[1] The Court finds that in cases involving inadvertent disclosure of privileged communications, both Florida and Massachusetts apply standards that require the Court to assess the reasonableness of precautions taken to preserve the privilege. *See, In the Matter of the Reorganization of Elec. Mut. Liab. Ins. Co. Ltd. (Bermuda)*, 425 Mass.419, 422, 681 N.E.2d 838, 841 (Mass.1997); *Abamar Housing & Dev. v. Lisa Daly Lady Decor, Inc.*, 698 So.2d 276, 278-79 (Fla.3d App. Dist.1997).[1] The Court, therefore, does not need to engage in a choice of law analysis to resolve this motion. Under the modern approach followed by Florida and Massachusetts courts, the Court should consider the following circumstances in determining whether inadvertent disclosure results in a waiver of the attorney-client privilege:

> (1) the reasonableness of the precautions taken to prevent inadvertent disclosure, (2) the amount of time it took the producing party to recognize its error, (3) the scope of the production, (4) the extent of the inadvertent disclosure, and (5) the overriding interest of fairness and justice.
> *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 190 F.R.D. 287, 291 (D.Mass.2000).

B. *Attorney Work Product*

[2] [3] The attorney work product doctrine is determined based on federal law. *Auto Owners Ins. Co. v. Totaltape, Inc.*, 135 F.R.D. 199, 201 (M.D.Fla.1990). The attorney work product doctrine protects trial preparation materials that reveal an attorney's strategy, intended lines of proof, evaluation of strengths and weaknesses, and inferences drawn from interviews. Fed.R.Civ.P. 26(b)(3); *Hickman v. Taylor*, 329 U.S. 495, 511, 67 S.Ct. 385, 91 L.Ed. 451 (1947). Work product protection applies to "documents and tangible things ... prepared in anticipation of litigation or for trial" by or on behalf of a party. Fed.R.Civ.P. 26(b)(3). If documents and materials are produced in the ordinary course of business or other non-litigation purposes, they do not qualify as work product. *See, Advisory Committee Notes to Rule 26(b)(3).* The party asserting the privilege has the burden of proving the existence of the privilege. *See, United States v. Schaltenbrand*, 930 F.2d 1554, 1562 (11th Cir.1991) (attorney-client privilege); *Grand Jury Proceedings v. United States*, 156 F.3d 1038, 1042 (10th Cir.1998) ("the party asserting work product privilege has the burden of showing the applicability of the doctrine"); *Binks Mfg. Co. v. Nat'l Presto Indus.*, 709 F.2d 1109, 1119 (7th Cir.1983) ***1337** ("the party seeking to assert the work product privilege has the burden of proving that 'at the very least some articulable claim, likely to lead to litigation, [has] arisen.' " (citations omitted)); *Conoco Inc. v. U.S. Dep't of Justice*, 687 F.2d 724, 730 (3d Cir.1982) ("the party asserting work product protection has the burden of demonstrating that the documents were 'prepared in anticipation of litigation' ").

III. ANALYSIS

A. Whether Challenged Communications Constitute Work Product

USFG argues that communications between Patrice Williams and Jamie Moray do not qualify as work product as neither person is an attorney, and the communications pre-date Liberty's revocation of its defense of Callahan's claim. USFG also argues that the report prepared by Engle Martin, the adjusting firm that Liberty hired to investigate Callahan's claim and to represent Liberty in the mediation, does not qualify as work product.

[4] The mere possibility that a certain event might lead to future litigation does not render privileged all documents prepared subsequent to that event. *City of Worcester v. HCA Mgmt. Co., Inc.*, 839 F.Supp. 86, 88 (D.Mass.1993). The determinative question is whether the prospect of litigation was the primary motivating purpose behind the creation of a particular document. *Id.*

[5] The work product doctrine was not intended to protect from general discovery materials prepared in the ordinary course of business such as factual investigations prepared by insurance companies. *Cutrale Citrus Juices USA, Inc. v. Zurich Am. Ins. Group*, 2004 WL 5215191 *2 (M.D.Fla. September 10, 2004) (citing *Pete Rinaldi's Fast Foods, Inc. v. Great Am. Ins. Co.*, 123 F.R.D. 198, 202 (M.D.N.C.1988)). Most courts have held that documents constituting any part of a factual inquiry into or evaluation of a claim, undertaken in order to arrive at a claim decision, are produced in the ordinary course of an insurer's business and, therefore, are not work product. *Harper v. Auto-Owners Ins. Co.*, 138 F.R.D. 655, 662 (S.D.Ind.1991). While there is no bright line rule in the insurance context marking the boundary between documents protected under the work product privilege and documents produced in the ordinary course of business, the date coverage is denied by the insurer has been recognized by a number of courts as the proper date after which it is fairly certain there is an anticipation of litigation and thus documents generated after that date would be protected as work product. *Id.*

Liberty argues that at the time of the communications with Engle Martin, it had denied coverage. Doc. 176 at 14. Liberty then contradicts itself and states that they were defending the claim under a reservation of rights. *Id.* As shown by the attachments to USFG's response, Liberty has altered its position several times regarding coverage. From January 10, 2005, to March 3, 2005, Liberty agreed to defend the claim pursuant to a reservation of rights. Doc. 180, Ex. A, B. From March 4, 2005, to August 1, 2005, Liberty revoked the defense and denied coverage. Doc. 180, Ex. B, C. On August 2, 2005, Liberty again agreed to defend the case under a reservation of rights. Doc. 180-4, Exh. C. Liberty did not finally deny coverage until February 9, 2006. Doc. 180-5, Exh. D.

Defending a claim under a reservation of rights is not the same as denying coverage. *Cf., Steadfast Ins. Co. v. Sheridan Children's Healthcare Services, Inc.*, 34 F.Supp.2d 1364, 1366 (S.D.Fla.1998) (insurer "may investigate the claim under a reservation of rights and then withdraw its defense and deny coverage, if its investigation reflects a good faith basis for doing ***1338** so"). During those time periods when Liberty was defending under a reservation of rights, any documents were presumptively prepared in the ordinary course of business. It was not until Liberty finally denied coverage on February 9, 2006, that it can be said that litigation was anticipated.

1. *Williams/Moray Communications*

There are two communications between Williams and Moray to which Liberty asserted only a work product objection, one e-mail dated January 11, 2006 and another dated February 13, 2006.[2] Liberty's privilege log does not identify either of these individuals, nor does its motion. A review of the documents submitted under seal reveal that Williams is a claims specialist with Liberty and Moray is a Claims Manager. Liberty 0402, 0408. The January 11, 2006, e-mail is authored by Williams and describes her goals regarding settlement, including the amount she intended to seek in settlement authority and timing of any settlement. Liberty 0402. She also suggests forwarding a particular issue to coverage counsel "for handling." Liberty 0402. The February 13, 2006, e-mail chain purports to forward an opinion letter dated February 3, 2006 (which was not attached to the document submitted under seal), and includes Williams' request from her manager for a copy of a document and question of her manager about what information she should include when disclaiming. Liberty 0416.

[6] Liberty presents no argument in its motion why these particular documents are protected by attorney work product. There is no showing that the documents reflect the work product of any attorney. At best, the January 11, 2006 email reflects an inquiry by a subordinate employee of her manager whether a legal opinion should be obtained. In January 2006, Liberty was still defending the claim under a reservation of rights and Williams' question whether legal advice should be obtained on a particular issue does not demonstrate that litigation was likely at this time. Further, although Williams' email to her manager was after the date that Liberty declined coverage, nothing in the document reflects attorney work product. The Court concludes that the two documents reflecting communications between Williams and Moray are not protected by the attorney work product doctrine.

2. *Engle Martin Report*

As to the "Engle Martin report," the privilege log identifies

a nine page "email with report attached" between Williams and Engle Martin dated December 7, 2005, to which Liberty asserts both attorney-client and work product privileges. The accuracy and adequacy of Liberty's privilege log is clearly an issue, notably as Liberty states it voluntarily disclosed correspondence dated December 7, 2005, from Matthew Lohmann (of Engle Martin) to Williams. Doc. 176 at 14 n. 4.[3] After reviewing the documents submitted under seal, the Court has been unable to identify Engle Martin's report. There is an e-mail dated December 7, 2005, from John Luna, Administrative Support with Engle Martin to Patrice Williams that references an attached ***1339** report dated November 30, 2005 (Liberty0393), but the report itself does not follow,[4] nor did the Court locate it elsewhere in the sealed documents.

Liberty's motion asserts that Engle Martin was retained to attend mediation and investigate the claim on behalf of Liberty. Doc. 176. Liberty further contends that Engle Martin was not retained to investigate on behalf of John T. Callahan (the insured), because "Callahan was adequately represented by the law firm of Rubin and Rudman." Doc. 176. Liberty contends that Engle Martin was retained as part of the coverage investigation and, therefore, the communications were developed in anticipation of litigation concerning the denial for the Westlake claim. Doc. 176.

The documents submitted under seal, however, show that Liberty has blurred the lines of its relationship with Engle Martin. Liberty's initial contact with Engle Martin on August 25, 2005, included direction to contact "Rubin & Rudman attorney, Scott Aftuck." Liberty 0374, Liberty 0376. At this time, Liberty was defending Callahan under a reservation of rights. In Liberty's initial communications to Engle Martin, it is clear that Liberty sought to investigate the factual circumstances behind the claim. Further, given Liberty's directives regarding contacting the insured's attorney, it does not appear that Liberty intended the factual report to remain confidential.

Based on an e-mail dated November 22, 2005, by Patrice Williams to Engle Martin, Engle Martin had not yet provided the report and results of their investigation. Liberty0389. Nevertheless, at this time, Liberty altered the scope of services requested from Engle Martin to include representation of Liberty at the mediation on November 29, 2005, and to report to Liberty on their opinion regarding liability. *Id.*

As the only Engle Martin report provided was after the mediation, it is unclear whether the report includes both the factual investigation and the liability analysis. The Court notes that Engle Martin separately reported to Patrice Williams regarding the mediation in an e-mail dated December 1, 2005, stating that they are working on a "full report." Liberty 0390. At this time, however, Liberty still had not finally denied coverage and the communications were presumptively prepared in the ordinary course of business.

[7] It is Liberty's burden to establish that the applicability of any privilege. Liberty has not produced the Engle Martin report to the Court for *in camera* review, nor does its motion or privilege log provide a sufficiently detailed explanation to establish that litigation was anticipated prior to the final denial of coverage. Nor does Liberty provide any information to sustain its claim of attorney-client privilege as to the Engle Martin report. The Court, therefore, finds that because Liberty has failed to sustain its burden of establishing privilege, the Engle Martin report is discoverable.

B. Waiver of Privileges

Liberty argues that because it took adequate precautionary steps to protect the privilege, the inadvertent disclosure of documents did not result in a waiver of the privilege. USFG contends that Liberty's actions were insufficient and that waiver of the privilege has occurred. Using the five factors set forth in *Amgen,* the Court analyzes the waiver issue below.

1340 1.** ***The reasonableness of the precautions taken to prevent inadvertent disclosure

Liberty had 48 days from the time when USFG served its request for production until the due date of July 1, 2007. Liberty admits the amount of time was adequate. On June 29, 2007, Liberty produced 1911 pages of documents, about 3/4 of a standard banker's box. Doc. 180 at 4. Within the production are 94 pages that Liberty claims are privileged and were inadvertently disclosed. Doc. 180 at 6.

DiFiore, the attorney primarily responsible for the production of Liberty's documents, states that she had segregated documents by category, such as "arbitration materials," "expert reports," and underwriting file. Doc. 178 at ¶ 11. DiFiore states that she instructed her paralegal to send out these materials for copying and delivery to USFG's counsel. *Id.* at ¶¶ 8-9. DiFiore further states that she told her paralegal that the correspondence, which was spread out on DiFiore's desk, would not be produced until after she had the opportunity to review it. *Id.* at ¶¶ 10, 12.

The paralegal misunderstood DiFiore's instructions and included "a loose stack of documents containing correspondence and emails" with the materials sent for copying. Doc. 179 at ¶ 15.

As DiFiore and the other attorney responsible for the case were absent from the office when the production was due, the paralegal brought the cover letter that she prepared listing the documents to be produced to another firm attorney, Michael B. Stein. Doc. 179 at ¶ 20, 21. Stein had not previously worked on the case and had no knowledge about who the firm represented or the names of any persons involved in the litigation. Doc. 177 at ¶ 4. Stein nevertheless signed the cover letter. Doc. 177 at ¶ 5. The documents were served with the cover letter, but without a written response asserting any privilege or a privilege log.

[8] [9] As a general rule, a responding party's failure to make a timely and specific objection to a discovery request waives any objection based on privilege. *See, Krewson v. City of Quincy,* 120 F.R.D. 6, 7 (D.Mass.1988). Fed.R.Civ.P. 34(b) requires the responding party to provide a *written* response, and Rule 26(b)(5) requires a party withholding information on the basis of privilege to make the claim expressly and to describe the nature of the documents sufficiently to enable other parties to assess the applicability of the privilege. Liberty's verbal objections and statements do not fulfill the Rules' requirements. Even if the Court does not apply an automatic waiver rule, Liberty's failure to object timely in writing is strong evidence of a failure to take adequate precautions to protect the privilege.

As further evidence of its precautions, DiFiore states that the inadvertently produced documents were "spread out on the desk," unlike the documents to be produced, which were in labeled file folders. Doc. 178 at ¶¶ 11-12. In *Amgen,* the court found that segregation of privileged documents by placing them on a separate shelf from those to be produced falls short of demonstrating precautions intended to prevent inadvertent disclosure. *Amgen,* 190 F.R.D. at 292. In this case, leaving documents spread out on a desk risks disclosure to persons who are not privileged to see the documents, such as a janitorial employees. Leaving documents in the open is inconsistent with taking reasonable precautions to protect the privilege.

Even though the paralegal may have misunderstood DiFiore's instructions, the paralegal brought the cover letter listing the documents to be produced to Stein. It is no excuse that Stein had not previously worked on the file and did not know who ***1341** was the firm's client. It is clear that Stein did not even look at the documents that were being produced before he signed the letter. Doc. 177. Had he done so, he would have seen that some of the documents state on their face that they are "privileged and confidential." See Liberty 0322-0335; 0356-0361; 0362-0365; 0387-0388. Other documents state that the document is an opinion letter. See Liberty 0315-0321; 0337-0341; 0410-0414. Seeing these phrases on a document would have placed any attorney on notice that production of the documents may constitute waiver of a privilege. *See, Amgen,* 190 F.R.D. at 292 (having a knowledgeable attorney or paralegal review documents copied by an outside vendor before production is an "easily-accomplished additional precaution" that should be taken).

The Court finds that Liberty's counsel did not take reasonable precautions to prevent inadvertent disclosure of privileged documents.

2. *Amount of Time Taken to Discover the Error*

Although DiFiore had the opportunity to discover the disclosure when she returned to her office on July 2, 2007, DiFiore did not review the paralegal's work done in her absence. Doc. 178 at ¶ 16. Liberty was unaware of the inadvertent disclosure until USFG's counsel brought it to counsel's attention on July 5, 2007. Doc. 178 at ¶¶ 18-19. This situation is similar to that in *Amgen,* where the producing party was unaware of its disclosure until five days later when the receiving party brought the disclosure to the attention of the producing party. *Amgen,* 190 F.R.D. at 293.

3. *Scope of the Production and the Extent of the Inadvertent Disclosure*

As stated above, 34 documents consisting of 94 pages of the 1911 pages produced are allegedly privileged. Thus, approximately 5% of the volume of documents produced are allegedly privileged. In *Amgen,* the court found that a production of 200 privileged documents out of 3821 (approximately 5%) was "dramatic" in number. *Amgen,* 190 F.R.D. at 293. *See also, Ray v. Cutter Labs., Div. of Miles, Inc.,* 746 F.Supp. 86, 88-89 (M.D.Fla.1990) (the privilege was waived when a single document was included in a 157-page production). It is not only the volume of documents that is a concern, but also the nature of the documents disclosed. By producing opinion letters from coverage counsel, a significant disclosure has occurred.

4. *Overriding Interests of Fairness and Justice*

The Court finds that the overriding interests of fairness and justice support a finding of waiver. Given the conduct of Liberty's counsel as it relates to the protection of the privilege, the Court finds it would be improper to relieve Liberty of the waiver. *See, Amgen*, 190 F.R.D. at 290 ("it would be unjust to reward such gross negligence [of counsel] by providing relief from waiver. In fact, if the Court does not hold that a waiver has occurred under the egregious circumstances here presented, it might as well adopt the 'never waived' rule").

The Court denies Liberty's motion for return or destruction of documents inadvertently produced. Further, although the Engle Martin report was not actually produced, it was identified on the privilege log as having been produced and the parties have had a full and fair opportunity to address the issue of privilege. The Court finds that it would be a waste of resources to require USFG to file a motion to compel production of the report under these circumstances. Liberty has failed to sustain its burden that the Engle Martin report is ***1342** privileged and USFG is entitled to receive the report.

No later than **November 1, 2007,** Liberty shall produce to USFG a copy of the Engle Martin report. Additionally, provided there is no appeal of this ruling, the Court orders the Clerk to return to USFG's counsel the documents that they filed under seal.

CONCLUSION

Footnotes

1 USFG cites among its authorities *Ray v. Cutter Labs., Div. of Miles, Inc.*, 746 F.Supp. 86, 88-89 (M.D.Fla.1990), which concluded that Florida follows the traditional rule of waiver. This Court respectfully disagrees with that particular conclusion. The *Ray* court relied on the statement in *Hamilton v. Hamilton Steel Corp.*, 409 So.2d 1111, 1114 (Fla.1982), that "[i]t is black letter law that once the privilege is waived, and the horse is out of the barn, it cannot be reinvoked." *Ray*, 746 F.Supp. at 88. The *Hamilton* case, however, involved an attorney's intentional statement in open court regarding a settlement and then an attempt to claim privilege to avoid explaining inconsistencies regarding the settlement. 409 So.2d at 1114. This Court finds that it stretches *Hamilton* too far to find that the traditional rule of waiver applies to a case of inadvertent disclosure. *See, Kusch v. Ballard*, 645 So.2d 1035, 1039 (Fla. 4th App. Dist.1994) (Stevenson J., concurring in part, dissenting in part) ("I believe that the federal district court reads far too much in *Hamilton* to reach its conclusion that under Florida law, and inadvertent disclosure, by someone other than the client, amounts to a waiver of the attorney-client privilege.... [I]t is quite apparent that *Hamilton* does not address the specific issue of inadvertent disclosure by counsel of attorney-client information because the disclosure by counsel in *Hamilton* was clearly voluntary and intentional.").

2 Although the documents filed under seal are numbered, the privilege log does not set forth the number of the documents at issue.

3 Indeed, the privilege log typically fails to identify the specific individual with Engle Martin who is the author or recipient of communications. This is simply inadequate. *See, e.g., Harper v. Auto-Owners Ins. Co.*, 138 F.R.D. 655, 664 (S.D.Ind.1991) (requiring the log to list, for each separate document, the authors and their capacities, the recipients (including copy recipients) and their capacities, the subject matter of the document, the purpose for its production, and a detailed, specific explanation of why the document is privileged or immune from discovery).

4 The Court notes a gap in the sequence of numbers of sealed documents produced, with numbers Liberty0394-0401 missing.

818 So.2d 477
Supreme Court of Florida.

THE FLORIDA BAR, Complainant,
v.
Geneva Carol FORRESTER, Respondent.

No. SC00-813. | May 16, 2002.

In an attorney disciplinary proceeding, the Supreme Court held that 60-day suspension, followed by one year of probation, was warranted as sanction for concealing a document during deposition and making an intentional misrepresentation regarding the document's whereabouts.

Attorney suspended.

West Headnotes (10)

[1] **Attorney and Client**
Deception of Court or Obstruction of Administration of Justice

Attorney for general contractor violated the rule prohibiting an attorney from concealing relevant evidence, where the general contractor's president removed the original copy of the subcontract while subcontractor's attorney was not looking and handed it to general contractor's attorney, under the table, at deposition in civil litigation, and general contractor's attorney placed it near her briefcase, though the concealment lasted for only a short time and copies of the subcontract may have been available. West's F.S.A. Bar Rule 4-3.4(a).

1 Cases that cite this headnote

[2] **Attorney and Client**
Deception of Court or Obstruction of Administration of Justice

The rule prohibiting an attorney from concealing evidence may apply, even if copies of a concealed document are available to the opposing party and even if the concealment lasts for only a short period of time. West's F.S.A. Bar Rule 4-3.4(a).

1 Cases that cite this headnote

[3] **Attorney and Client**
Deception of Court or Obstruction of Administration of Justice

A trial need not occur before a document is considered "relevant" evidence, under the rule prohibiting a lawyer from concealing a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding. West's F.S.A. Bar Rule 4-3.4(a).

2 Cases that cite this headnote

[4] **Attorney and Client**
Review

A referee's factual findings in an attorney disciplinary proceeding carry a presumption of correctness and should be upheld unless they are clearly erroneous or there is no evidence in the record to support them.

1 Cases that cite this headnote

[5] **Attorney and Client**
Deception of Court or Obstruction of Administration of Justice

The truthful response of general contractor's attorney, "I'm not seeing it," in response to the question from subcontractor's attorney as to whether general contractor's attorney knew the location of the original copy of the subcontract, was intended to be misleading, as element for violating the rule prohibiting an attorney from

engaging in dishonest conduct; general contractor's president had removed the original copy of the subcontract from the table during the deposition and had handed it to general contractor's attorney, who had placed it near her briefcase. West's F.S.A. Bar Rule 4-8.4(c).

2 Cases that cite this headnote

[6] **Attorney and Client**
Grounds for Discipline

A finding of intent, as element of the rule prohibiting an attorney from engaging in dishonest conduct, is a factual finding that must be upheld if there is evidence in the record below to support such a finding. West's F.S.A. Bar Rule 4-8.4(c).

2 Cases that cite this headnote

[7] **Attorney and Client**
Definite Suspension
Attorney and Client
Probation; Conditional Disposition; Stay

Suspension for 60 days, followed by one year of probation, was warranted as sanction for the misconduct of general contractor's attorney in concealing an original copy of the subcontract during deposition in subcontractor's civil action and in making an intentional misrepresentation to subcontractor's counsel that the attorney did not know the location of the document, which the attorney had placed near her briefcase after the general contractor's president had removed the document from the table and handed it to the attorney; attorney's conduct was intentional, and attorney's disciplinary history included admonishment, 24 months' probation, and a 90-day suspension. West's F.S.A. Bar Rules 4-3.4(a), 4-8.4(c).

2 Cases that cite this headnote

[8] **Attorney and Client**
Review

Generally speaking, the Supreme Court will not second-guess a referee's recommended attorney discipline, as long as that discipline has a reasonable basis in existing case law.

1 Cases that cite this headnote

[9] **Attorney and Client**
Standards and Guidelines
Attorney and Client
Comparable Disposition Within Jurisdiction

In determining the appropriate sanction, the Supreme Court considers not only case law but also the Florida Standards for Imposing Lawyer Sanctions.

1 Cases that cite this headnote

[10] **Attorney and Client**
Factors in Aggravation

In assessing attorney discipline, the Supreme Court considers prior misconduct and cumulative misconduct as relevant factors, and deals more severely with cumulative misconduct than with isolated misconduct.

Attorneys and Law Firms

***479** John F. Harkness, Jr., Executive Director, and John Anthony Boggs, Staff Counsel, Tallahassee, FL; and Susan V. Bloemendaal, Chief Branch Discipline Counsel and Susan Gralla Zemankiewicz, Assistant Staff Counsel, Tampa, FL, for Complainant.

Henry P. Trawick, Sarasota, FL, for Respondent.

Opinion

PER CURIAM.

Geneva Carol Forrester, a member of The Florida Bar, petitions this Court to review a referee's report recommending that she be found guilty of ethical breaches. We have jurisdiction. *See* art. V, § 15, Fla. Const. For the reasons that follow, we approve the referee's findings of guilt and recommended discipline.

FACTS

The Bar filed a complaint against Forrester alleging that she violated Rules Regulating the Florida Bar 4-3.4(a) ("A lawyer shall not ... unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding; nor counsel or assist another person to do any such act."), and 4-8.4(c) ("A lawyer shall not ... engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.") in the context of her representation of a construction company in civil litigation. The referee held a hearing and issued a report making the following findings:

> [Forrester] represented Caladesi Construction Company, Inc., as one of the defendants in civil litigation initiated by Timothy Rice (Rice) d/b/a Palm Marsh Landscaping, (Plaintiff). Donald Hinrichs (Hinrichs) was the President of Defendant corporation, Caladesi Construction Company, Inc. Michael C. Berry, Sr. (Berry) was the attorney for the Plaintiff in the matter. On March 13, 1998, Berry conducted a deposition of Hinrichs, during which Berry showed Hinrichs Deposition Exhibit 5, a two (2) page document printed on green paper. [Florida Bar Exhibit No. 2] Exhibit 5 was an original copy of a Subcontract Agreement between Caladesi and Rice, with original signatures. During this deposition, both Hinrichs and [Forrester] expressed concern that Exhibit 5 belonged to Hinrichs, and [Forrester] indicated that they wanted the document. Later during the deposition, [Forrester] asked Berry to locate certain documents. When Berry turned around to retrieve the documents from behind his seat, Hinrichs removed Exhibit 5 from the table and handed it to [Forrester]. After Hinrichs handed Exhibit 5 to [Forrester], she moved it below the table and placed it to her right, either in or near her briefcase on the floor. The court reporter, Kaylynn Boyer (Boyer), observed the removal of Exhibit 5 from the table, and during a break, communicated this information to Berry's secretary, who shortly thereafter ***480** advised Berry. Berry attempted to schedule an emergency hearing, but when unable to do so, he ordered a second court reporter to come to the deposition. After ordering the second court reporter, Berry returned to the deposition room, resumed questioning Hinrichs, and attempted to locate Exhibit 5. The deposition transcript, reflects the following discourse:
>
> Berry: Let's see, I had his contract here, where is that contract?
>
> [Forrester]: I have a copy here. I don't know that I have all the discovery with me. Let me see.
>
> Berry: I'm looking for the Palm Marsh contract, the green one.
>
> [Forrester]: Hm-mm.
>
> Berry: That was exhibit, I'll tell you which one it was.
>
> [Forrester]: I didn't bring my box with me so I don't know that I have a copy right now. I'm seeing if I did.
>
> * * *
>
> Berry: Exhibit five. All right. So you don't have it?
>
> [Forrester]: I'm not seeing it. I had a copy but I know when you filed the complaint didn't you attach it? That would be the easiest way.
>
> Berry: All right.
>
> [Forrester]: Let me look back there. Yeah, that's it, isn't it, a copy of it?
>
> After the second court reporter, Beth Ann Erickson (Erickson) arrived, Berry asked Erickson to take over for the first court reporter, and inquired of [Forrester] as follows:
>
> Berry: I would like to ask Geneva Forrester if she could show me the contract, Exhibit 5, that she has with her documents, please.
>
> [Forrester]: I have this one, which is a copy, and I have the original.
>
> Berry: Okay. Do you have the green original Exhibit 5?
>
> [Forrester]: Yes. Sure.
>
> Berry: Okay. Where is it?

> [Forrester]: Right here.
>
> [Forrester] retrieved Exhibit 5 from beside or near her briefcase, which was located on the floor to her right, and handed it to Berry.
>
> Subsequent to the March 13, 1998 deposition, a Motion for Sanction, based in part upon [Forrester's] conduct at the deposition, was heard by Judge James R. Case, Sixth Judicial Circuit. After a hearing, Judge Case signed a July 27, 1998 Order Denying Defendant's Motion to Strike and Granting in Part and Denying in Part Plaintiff's Motion for Sanctions. [Florida Bar Exhibit No. 3] This order included the following finding: "Ms. Forrester has not presented a satisfactory explanation to the Court for her conduct; therefore, the Court must refer the matter to the Florida Bar."

Based upon the evidence presented at the hearing in this matter, the referee found that Forrester knowingly and intentionally removed and concealed evidence (exhibit 5) for a period of time at the March 13, 1998, deposition. The referee further found that Forrester was given more than one opportunity to return exhibit 5, but did not do so until she was confronted by opposing counsel. Although Forrester expressed the belief that exhibit 5 belonged originally to her client, the referee found that Forrester's belief did not constitute a defense to her taking of the document, as lawful remedies were available for the retrieval of the document. Likewise, the referee found that the availability of copies to the parties did not constitute a defense for Forrester's taking exhibit 5, as it was documentary evidence in a deposition. Accordingly, the referee recommended that Forrester be ***481** found guilty of violating rule 4-3.4(a) ("A lawyer shall not ... unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding; nor counsel or assist another person to do any such act."). Additionally, the referee found that Forrester made an intentional misrepresentation concerning the location of exhibit 5 when asked whether she had it. The referee found that, although Forrester truthfully replied, "I'm not seeing it," Forrester's answer was intended to mislead because she in fact knew where the document was located and failed to disclose that information to Berry. As such, the referee recommended that Forrester be found guilty of violating rule 4-8.4(c) ("A lawyer shall not ... engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.").

The referee recommended that Forrester be suspended for sixty days to be followed by one year of probation during which Forrester must attend, and successfully complete, The Florida Bar's ethics school. The referee found no mitigating factors. In aggravation, the referee found a prior disciplinary history,[1] dishonest or selfish motive, and substantial experience in the practice of law. The referee also recommended that the Bar be awarded $1,335.15 in costs.

Forrester has petitioned this Court to review the referee's report, challenging the referee's recommendations as to guilt, the referee's recommended discipline, and various procedural rulings made or actions taken by the referee.[2]

ANALYSIS

[1] Forrester first challenges the referee's finding that her conduct violated rule 4-3.4(a). Forrester raises three claims that rule 4-3.4(a) does not apply to her conduct at the deposition. We find each of her arguments to be without merit, and address them individually.

[2] First, Forrester argues that rule 4-3.4(a) was not intended to proscribe the concealment of evidence where multiple copies are available or when the concealment lasts for only a short period of time. However, rule 4-3.4(a) specifically prohibits the concealment of a document that "the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding." The rule does not distinguish the situations where multiple copies of documents are available or when the concealment lasts for only a short duration. The comment to rule 4-3.4(a), although not binding authority, supports our finding that the availability of copies of evidence is irrelevant to whether concealment of an original violates the rule. The comment provides, in pertinent part:

> The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.
>
> Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary ***482** privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be

frustrated if relevant material is altered, concealed, or destroyed.

R. Regulating Fla. Bar 4-3.4(a), cmt. The comment notes that one of the purposes of rule 4-3.4(a) is to secure fair competition in the adversary system. Fair competition is secured by ensuring that a party's right to obtain relevant evidence is not frustrated by the concealment of such evidence. We see no reason to distinguish the situation where multiple copies of a document are available or when the concealment lasts for only a short period of time. Thus, we conclude that in the interest of promoting fair competition both the availability of multiple copies and the duration of such concealment do not, under the circumstances of this case, negate the specifically prohibited conduct of concealing a relevant document. Further, we conclude that availability of multiple copies in the instant case does not provide a substitute for the original document that Forrester was found to have concealed.

[3] Secondly, Forrester argues that rule 4-3.4(a) does not apply to her conduct at the deposition because exhibit 5 was not actual evidence because no trial had occurred. She argues that exhibit 5 was merely relevant to the case. We find that this argument supports, rather than negates, a finding that Forrester violated rule 4-3.4(a). Under the rule, a lawyer may be disciplined for wrongfully concealing a document that "the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding." R. Regulating Fla. Bar 4-3.4(a). The comment to the rule speaks in terms of "marshalling evidence" and "obtaining evidence through discovery," terms generally associated with pre-trial procedures. Therefore, a trial need not occur before a document is considered relevant evidence under the rule. Forrester admits that exhibit 5 was a relevant document in this case and was foreseeable as trial evidence.[3] We conclude that Forrester is subject to discipline under the rule for concealing exhibit 5.

[4] Lastly, Forrester argues the referee erred in finding that she "removed" exhibit 5. She claims that exhibit 5 was handed to her by Hinrichs and thus, she did not remove it from the table. The referee's determination that Forrester removed exhibit 5 is a finding of fact. Such findings carry a presumption of correctness and should be upheld unless they are clearly erroneous or there is no evidence in the record to support them. *See Florida Bar v. Roberts,* 789 So.2d 284, 287 (Fla.2001). We conclude that although Forrester may not have physically removed exhibit 5 from the table, she did participate in its removal. Kaylynn Boyer, the court reporter who saw the removal, described the incident as follows:

> And as I turned back around to wait, I see Mr. Heinrich [sic] reach with his left hand, put it in his right hand, and hand it over to Ms. Forrester who then took it, sat it in her lap, scooted the chair forward and bent down, and I couldn't see because she was under the table-see what she was doing with it and when she came up it was not in her lap nor in her hand or on the table.

We conclude that this testimony represents competent, substantial evidence that ***483** Forrester removed exhibit 5, placing it within her possession.

Regardless of how Forrester defines the way she received the document, a violation of rule 4-3.4(a) depends on whether the attorney concealed, not removed, the relevant evidence. We conclude that competent, substantial evidence exists in the record below to support the referee's finding that Forrester concealed exhibit 5. Therefore, we approve the referee's recommendation that Forrester be found guilty of a rule 4-3.4(a) violation.

[5] [6] Forrester next challenges the referee's finding that she violated rule 4-8.4(c). This rule provides that "[a] lawyer shall not ... engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." This Court has held that "[i]n order to find that an attorney acted with dishonesty, misrepresentation, deceit, or fraud, the Bar must show the necessary element of intent." *Florida Bar v. Fredericks,* 731 So.2d 1249, 1252 (Fla.1999). Further, this Court has held that "in order to satisfy the element of intent it must only be shown that the conduct was deliberate or knowing." *Id.* A finding of intent is a factual finding that must be upheld if there is evidence in the record below to support such a finding. *See Roberts,* 789 So.2d at 287.

In the present case, the referee found that Forrester made an intentional misrepresentation concerning the location of exhibit 5, when asked whether she had it. The referee found that, although Forrester truthfully replied, "I'm not seeing it," Forrester's answer was intended to mislead because she in fact knew where the document was located and failed to disclose that information to attorney Berry. The court reporter witnessed Forrester take exhibit 5 from Hinrichs, place it on her lap, and put it somewhere under the table. Forrester denied "seeing" where exhibit 5 was located until Berry brought in a second court reporter and directly asked Forrester to show him the document. Forrester testified that she immediately gave Berry the document at that time. We conclude that the record supports the referee's finding that Forrester intentionally misrepresented to Berry her knowledge of the whereabouts

of exhibit 5. Accordingly, we approve the referee's recommendation that Forrester be found guilty of violating rule 4-8.4(c).

[7] [8] [9] Finally, Forrester challenges the referee's recommendation that she be suspended for sixty days to be followed by one year of probation. Forrester argues that her conduct warrants no more than a public reprimand. This Court has held that "[i]n reviewing a referee's recommendation of discipline, this Court's scope of review is somewhat broader than that afforded to findings of facts because, ultimately, it is [the Court's] responsibility to order an appropriate punishment." *Florida Bar v. Maier*, 784 So.2d 411, 413 (Fla.2001). Generally speaking, however, this Court "will not second-guess a referee's recommended discipline as long as that discipline has a reasonable basis in existing caselaw." *Florida Bar v. Temmer*, 753 So.2d 555, 558 (Fla.1999). In making this determination, this Court considers not only caselaw but also the Florida Standards for Imposing Lawyer Sanctions. *See id.*

Under the Florida Standards for Imposing Lawyer Sanctions, we conclude that suspension is appropriate in this case. *See* Fla. Stds. Imposing Law. Sancs. 6.12 ("Suspension is appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action."); Fla. Stds. Imposing Law. Sancs. 7.2 ("Suspension is appropriate when a lawyer ***484** knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.").

Although Forrester argues that a suspension is too harsh and that a public reprimand should be imposed, we conclude that the applicable standards do not support her argument. Under standard 6.13, a public reprimand is appropriate only when an attorney engages in negligent conduct. *See* Fla. Stds. Imposing Law. Sancs. 6.13 ("Public Reprimand is appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld."). However, the referee found Forrester's misconduct to be intentional, and, as previously discussed, there is competent, substantial evidence in the record to support this finding. Thus, Forrester's intentional misconduct does not fall within the scope of conduct justifying a public reprimand under standard 6.13. Further, this Court has held that a "public reprimand should be reserved for isolated instances of neglect, lapses of judgment, or technical violations of trust accounting rules without willful intent." *Florida Bar v. Schultz*, 712 So.2d 386, 388 (Fla.1998); *see also Florida Bar v. Rogers*, 583 So.2d 1379, 1382 (Fla.1991). We find that Forrester's misconduct was neither an isolated instance of neglect nor a lapse of judgment because she intentionally concealed exhibit 5 and misrepresented its whereabouts when asked.

[10] Further, we conclude a sanction harsher than a public reprimand should be imposed based on the fact that Forrester has three prior disciplinary actions. In 1994, Forrester received an admonishment for violating rule 4-1.7(a) (Representing Adverse Interests). *See Florida Bar v. Forrester*, No. 80,442 (unpublished order) (Fla. Apr. 21, 1994). In 1994, Forrester received twenty-four months' probation for violating rule 4-1.16(d) (Protection of Client's Interest). *See Florida Bar v. Forrester*, 659 So.2d 273 (Fla.1995) (table). Finally, in 1995 Forrester received a ninety-day suspension for violating rule 4-1.5(a) (Illegal, Prohibited, or Clearly Excessive Fees) and a public reprimand for violating rules 5-1.1(g) (Disbursement Against Uncollected Funds) and 5-1.2(c)(1)(A)(B) (Minimum Trust Accounting Procedures). *See Florida Bar v. Forrester*, 656 So.2d 1273 (Fla.1995). In assessing discipline, "this Court also considers prior misconduct and cumulative misconduct as relevant factors, and deals more severely with cumulative misconduct than with isolated misconduct." *Florida Bar v. Williams*, 753 So.2d 1258, 1262 (Fla.2000).

Forrester cites this Court's opinion in *Florida Bar v. Burkich-Burrell*, 659 So.2d 1082 (Fla.1995), to support her argument that a sixty-day suspension is too severe. In *Burkich-Burrell*, the Court imposed a thirty-day suspension for attorney Burkich's failure to disclose material facts to opposing counsel where she represented her husband, Burrell, in a personal injury action. *See id.* at 1084. The Court found that Burkich had firsthand knowledge of the nondisclosed material facts which contradicted the responses made in the interrogatories by her husband. *See id.* Burkich never reviewed or amended her husband's interrogatories. *See id.*

Although the conduct in *Burkich-Burrell* is somewhat analogous to the present case, we conclude that there are some important distinguishing characteristics between these two cases. In imposing discipline, this Court in *Burkich-Burrell* stated that "while Burkich is guilty of serious misconduct, in light of the unique facts of this case and the mitigating factors ***485** present, a thirty-day suspension is sufficient discipline." *Id.* In mitigation, the referee had found (1) Burrell's alcohol abuse, (2) Burrell's physical and mental abuse of attorney Burkich, (3) Burkich's lack of prior misconduct, and (4) Burkich's lack of experience in personal injury litigation. *See id.* at 1083. On the other hand, in the instant case the referee did not

find any mitigating factors. Further, in the present case, the referee found the aggravating factor of a prior disciplinary history, which was not present in *Burkich-Burrell*. We conclude that in light of Forrester's history of misconduct and the lack of mitigation found by the referee, the instant case is distinguishable from *Burkich-Burrell* and imposition of a harsher sanction is thus appropriate. *See generally Williams*, 753 So.2d at 1262. Therefore, based on the Standards for Imposing Lawyer Sanctions and Forrester's cumulative misconduct, we approve the referee's recommendation of a sixty-day suspension, to be followed by one year of probation.

CONCLUSION

Accordingly, we approve the referee's report in full. Geneva Carol Forrester is hereby suspended from the practice of law for sixty days followed by probation for one year. The suspension will be effective thirty days from the filing of this opinion so that Forrester can close out her practice and protect the interests of existing clients. If Forrester notifies this Court in writing that she is no longer practicing and does not need the thirty days to protect existing clients, this Court will enter an order making the suspension effective immediately. Forrester shall accept no new business from the date this opinion is filed until the suspension is completed. Judgment for costs in the amount of $1,335.15 is entered against Forrester and in favor of The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399, for which sum let execution issue.[4]

Parallel Citations

27 Fla. L. Weekly S485

Footnotes

1 The referee found that Forrester had been subject to disciplinary action on three prior occasions.

2 We have considered Forrester's procedural challenges, and we reject them without further discussion.

3 In her reply brief, Forrester stated:

> Certainly, the exhibit could have been admitted into evidence in due course. That eventuality did not occur. It was certainly relevant, but it was not the only available copy.

4 We find no merit to Forrester's challenge to the referee's award of costs to the Bar.

56 So.3d 808
District Court of Appeal of Florida,
Second District.

LEE MEMORIAL HEALTH SYSTEM, d/b/a Healthpark Medical Center, Petitioner,
v.
Jeffrey SMITH and Melissa Smith, individually, and as Parents and Natural Guardians of Kiarra Summer Smith, a minor, Respondents.

No. 2D10–1887. | Jan. 28, 2011.

Synopsis
Background: Parents filed an action against hospital for alleged medical malpractice in the care and treatment of their child. Hospital sought a protective order to prohibit parents' counsel from having communications outside the presence of hospital's counsel with the child's treating physicians who were employed by hospital. The Circuit Court, Lee County, Michael T. McHugh, J., denied the requested protective order, and hospital petitioned for a writ of certiorari to quash the circuit court's order.

Holdings: The District Court of Appeal, Wallace, J., held that:

[1] review by certiorari was appropriate; and

[2] professional conduct rule, governing communications with persons represented by counsel, did not limit parents' attorneys from communicating with child's treating physicians.

Petition denied.

West Headnotes (5)

[1] **Certiorari**
Inadequacy of remedy by appeal or writ of error
Certiorari
Particular proceedings in civil actions

In order to merit certiorari relief, a discovery order must depart from the essential requirements of law, causing material injury to a petitioner throughout the remainder of the proceedings below and effectively leaving no adequate remedy on appeal.

[2] **Certiorari**
Existence of Remedy by Appeal or Writ of Error
Certiorari
Finality of determination

On petition for writ of certiorari of nonfinal order, petitioner must establish that an interlocutory order creates material harm irreparable by postjudgment appeal before appellate court has power to determine whether the order departs from the essential requirements of the law.

[3] **Certiorari**
Particular proceedings in civil actions

Review by certiorari was appropriate with respect to trial court's denial of hospital's request for protective order to prohibit parents' counsel from having communications outside the presence of hospital's counsel with the child's treating physicians, who were employed by hospital, given that orders of the type under review had the potential to result in the disclosure of privileged information and an interference with the attorney-client relationship.

[4] **Attorney and Client**
Relations, dealings, or communications with

witness, juror, judge, or opponent
Certiorari
Particular proceedings in civil actions

Professional conduct rule, governing communications with persons represented by counsel, did not limit parents' attorneys from communicating with child's treating physicians in malpractice case against hospital, despite treating physicians' employment by hospital, and as such, circuit court did not depart from essential requirements of law, so as to merit certiorari relief, when it declined to enter hospital's requested protective order, seeking to prohibit parents' counsel from having communications outside presence of hospital's counsel with child's physicians; informal contacts by parents' counsel with child's physicians did not pose threat that counsel would overreach, interfere with hospital's relationship with its attorneys, or result in uncounselled disclosure of information relating to representation of hospital by its attorneys. West's F.S.A. Bar Rule 4–4.2.

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

Professional conduct rule's prohibition against communicating with members of a represented organization is applicable only to three categories of persons or employees: (1) those who supervise, direct, or regularly consult with the organization's lawyer concerning the matter; (2) those who have the authority to obligate the organization with respect to the matter; or (3) those whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. West's F.S.A. Bar Rule 4–4.2.

Attorneys and Law Firms

***809** Richard R. Garland and R. Lainie Wilson Harris of Dickinson & Gibbons, P.A., Sarasota, for Petitioner.

Craig R. Stevens and Chad T. Brazzeal of Morgan & Morgan, P.A., Fort Myers, for Respondents.

Opinion

WALLACE, Judge.

Jeffrey Smith and Melissa Smith filed an action against Lee Memorial Health System, d/b/a HealthPark Medical Center, for alleged medical malpractice in the care and treatment of their minor child. Lee Memorial sought a protective order to prohibit the Smiths' counsel from having communications outside the presence of Lee Memorial's counsel with the child's treating physicians who are employed by Lee Memorial. The circuit court entered an order denying the requested protective order, and Lee Memorial petitions for a writ of certiorari to quash the circuit court's order. We conclude that Florida Rule of Professional Conduct 4–4.2 does not limit the Smiths' attorneys from communicating with the child's treating physicians despite ***810** the treating physicians' employment by Lee Memorial. It follows that the circuit court did not depart from the essential requirements of the law in declining to enter the requested protective order. Accordingly, we deny the petition for writ of certiorari.

I. THE FACTS AND PROCEDURAL BACKGROUND

In July 2007, the Smiths' daughter was born prematurely in a hospital operated by Lee Memorial. The child was immediately admitted to the hospital's Neonatal Intensive Care Unit (NICU). While in the NICU, the child received neonatal parenteral nutrition through a central venous line.

On August 31, 2009, the Smiths filed a medical malpractice action on behalf of their daughter against Lee Memorial. In their complaint, the Smiths alleged that on or about July 25, 2007, the amount of vitamins and trace elements in the nutritional solution given to their daughter was improperly calculated. The Smiths alleged that as a result of this improper calculation, their daughter received an overdose of trace elements that caused her to suffer a variety of serious, permanent injuries. The injuries alleged in the complaint included permanent neurological damage, lack of normal head growth, developmental delay, spastic quadriparetic cerebral palsy, and visual inattentiveness.

In its answer to the complaint, Lee Memorial admitted that

it had fallen below the standard of care in the preparation of the nutritional solution. But Lee Memorial also denied that its failure to comply with the standard of care had caused any injury to the Smiths' daughter. Lee Memorial also asserted eighteen affirmative defenses.

The child receives care and treatment from a pediatric neurologist and several other physicians who are employed by Lee Memorial.[1] In November 2009, the Smiths moved for a protective order precluding counsel for Lee Memorial "from having ex parte communication[s] with [the child's] current treating healthcare providers [that are] employed by Lee Memorial Health System." On January 20, 2010, the circuit court granted the protective order sought by the Smiths. Subsequently, this court granted Lee Memorial's petition for writ of certiorari and quashed the protective order. *Lee Mem'l Health Sys. v. Smith,* 40 So.3d 106 (Fla. 2d DCA 2010).

Shortly after the circuit court granted the Smiths' requested protective order, Lee Memorial filed its own motion for protective order. Lee Memorial sought "an [o]rder prohibiting legal counsel for the [Smiths] from having ex parte communications with [the child's] current treating healthcare providers that are employed by Lee Memorial Health System." In support of its motion, Lee Memorial argued that rule 4–4.2 prohibited the Smiths' counsel from communicating with any of the child's treating physicians who are also employed by Lee Memorial without its counsel's consent. After a hearing, the circuit court denied the motion. Lee Memorial's petition for writ of certiorari followed.

II. THE STANDARD OF REVIEW

[1] [2] "In order to merit certiorari relief, a discovery order must 'depart [ ] from the essential requirements of law, causing material injury to a petitioner throughout the remainder of the proceedings below and effectively leaving no adequate remedy on appeal.' " *Lee Mem'l* ***811** *Health Sys.,* 40 So.3d at 107 (alteration in original) (quoting *Allstate Ins. Co. v. Langston,* 655 So.2d 91, 94 (Fla.1995)). The second and third parts of this test are jurisdictional:

> [A] petitioner must establish that an interlocutory order creates material harm irreparable by postjudgment appeal before this court has power to determine whether the order departs from the essential requirements of the law. If the jurisdictional prongs of the standard three-part test are not fulfilled, then the petition should be dismissed rather than denied.

Parkway Bank v. Fort Myers Armature Works, Inc., 658 So.2d 646, 649 (Fla. 2d DCA 1995).

III. DISCUSSION

On the issue of irreparable harm, Lee Memorial argues that the circuit court's "order has the effect of allowing release of unauthorized and potentially damaging statements, including in the nature of 'cat-out-of-the-bag' material that cannot be remedied by appeal following trial." Lee Memorial also points to its admission of a failure to meet the applicable standard of care as a factor rendering the prejudice of unguarded communications by its employees with the Smiths' counsel as especially acute. Finally, Lee Memorial suggests that the circuit court's refusal to enter the protective order has frustrated Lee Memorial's effort "to protect itself from the danger of unfair exposure to potential additional liability, which protection is embodied in Florida Rule of Professional Conduct 4–4.2."

[3] The Smiths do not make a persuasive response to Lee Memorial's arguments on the issue of irreparable harm. It is difficult for this court to assess the potential prejudice to Lee Memorial—if any—that may result if it is unable to limit and monitor all communications between its employee physicians and the Smiths' counsel. Nevertheless, we conclude that review by certiorari is appropriate here because orders of the type under review have the potential to result in the disclosure of privileged information and an interference with the attorney-client relationship. *See AlliedSignal Recovery Trust v. AlliedSignal, Inc.,* 934 So.2d 675, 677 (Fla. 2d DCA 2006); *Estate of Stephens v. Galen Health Care, Inc.,* 911 So.2d 277, 279 (Fla. 2d DCA 2005); *Lemieux v. Tandem Health Care of Fla., Inc.,* 862 So.2d 745, 747–48 (Fla. 2d DCA 2003); *Hasan v. Garvar,* 34 So.3d 785, 786–87 (Fla. 4th DCA 2010).

[4] We turn now to the question of whether the circuit court's order departs from the essential requirements of the law. Neither of the parties has directed us to any cases directly on point, and our independent research has not disclosed any. The absence of any authority on point requires an examination of the question presented in light of both the text and the rationale of rule 4–4.2.

Rule 4–4.2(a) provides, in pertinent part, as follows: "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." Here, Lee Memorial asserted "that [the Smiths'] counsel will attempt to communicate with [the child's] treating physicians employed by [Lee Memorial] and represented by counsel for [Lee Memorial] outside the presence of [its] counsel." It argued that because the treating physicians were employees of Lee Memorial, they were persons represented by Lee Memorial's counsel within the meaning of the rule 4–4.2. Thus communications by the Smiths' counsel with the employee ***812** treating physicians—absent consent from Lee Memorial's attorneys—would be a violation of the rule.

The Smiths respond that rule 4–4.2 does not apply here because their counsel are not seeking to communicate with any Lee Memorial employees involved in the incident that is alleged to have resulted in the child's injuries. Instead, counsel propose to communicate only with Lee Memorial employee health care providers involved in the treatment of the child. The Smiths conclude that to prohibit such contacts absent consent from Lee Memorial would have two deleterious consequences. First, it would improperly undermine the relationship between the Smiths and their counsel by making it impossible for counsel to speak with the child's treating physicians. Second, it creates a legal paradox whereby the Smiths can speak to their child's treating physicians, but counsel—their duly authorized legal representatives—cannot.

[5] Lee Memorial replies that "rule 4–4.2 does not contain any exceptions relating to the substance of what a current employee may communicate." Instead, Lee Memorial argues that the rule requires that counsel be present during the communication unless consent of opposing counsel is obtained. But the scope of the rule is not as broad as Lee Memorial would have it. First, as the comment to rule 4–4.2 explains, the prohibition against communicating with members of a represented organization is applicable only to three categories of persons or employees: (1) those who supervise, direct, or regularly consult with the organization's lawyer *concerning the matter;* (2) those who have the authority to obligate the organization *with respect to the matter;* or (3) those whose act or omission *in connection with the matter* may be imputed to the organization for purposes of civil or criminal liability. *See also Barfuss v. Diversicare Corp. of Am.,* 656 So.2d 486, 488 n. 4 (Fla. 2d DCA 1995), *disapproved on other grounds by H.B.A. Mgmt., Inc. v. Estate of Schwartz,* 693 So.2d 541 (Fla.1997); *Browning v. AT & T Paradyne,* 838 F.Supp. 1564, 1567 (M.D.Fla.1993).[2] Here, Lee Memorial has not shown (nor has it argued) (1) that any of the child's treating physicians supervise, direct, or consult with the lawyers *concerning the lawsuit;* (2) that they have the authority to obligate the organization *with respect to the lawsuit;* or (3) that the treating physicians' acts or omissions could in any way be imputed to Lee Memorial in *connection with the lawsuit.* In addition, there is no evidence that these physicians are "represented by counsel *concerning the matter to which the communication relates.*" *See* Fla. Rule of Prof'l Conduct 4–4.2 cmt. (emphasis added).

In *H.B.A. Management* the supreme court explained the rule:

> [I]t means an attorney cannot ethically communicate with an employee whose *actions* may impute negligence or criminal liability to the corporation or whose *statements* may constitute admissions at that time, i.e., at the time the current employee is acting or speaking. These categories clearly identify certain persons whose statements or actions, by ***813** virtue of their present status as employees or agents, may directly affect their employer's legal position.

693 So.2d at 545. This is so because "the purpose of the communication rule is not to protect a corporate party from revelation of prejudicial facts, but rather to preclude interviewing of employees who have authority to bind the corporation." *Id.* at 544 (citing Fla. Bar Prof'l Ethics Comm., Formal Op. 88–14 at 3 (1989)).

Furthermore, in considering Lee Memorial's arguments, it is appropriate to look at the broader picture. Today, physicians in a variety of specialties are employed by hospitals instead of in stand-alone, independent medical practices. *See, e.g., Tarpon Springs Hosp. Found., Inc. v. Anderson,* 34 So.3d 742, 744 (Fla. 2d DCA 2010) (obstetrician/gynecologist and nurse midwife were employed by the hospital where the plaintiff delivered her baby). And the fact of the hospital's ownership of the medical practice and employment of the physicians and others working there may not be readily apparent to the physicians' patients and the general public. The early to mid–1990s saw a surge in the acquisition of physician practices by hospitals. This trend accelerated again in the latter half of the past decade.[3] Thus, in many communities today, a significant number of the practicing physicians may be employed by a local hospital. This is precisely the situation that the Smiths' attorneys encountered in this

case. Some—if not all—of the child's treating physicians are Lee Memorial employees.

It is extremely important—if not essential—for plaintiff's counsel in a medical malpractice case to interview and consult with his or her client's treating physicians. Such informal contacts enable plaintiff's counsel to discover the facts, formulate legal theories, and develop strategies for the case. *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, 1278–83 (1988). Although formal depositions may be used to accomplish the same ends, depositions are arguably an inferior means to obtain information necessary for plaintiff's counsel to prepare the case. *See id.* at 1279–80, 1283. The practical effect of the rule contended for by Lee Memorial would be to eliminate informal contacts when the client's treating physician or physicians are employed by a defendant hospital. In that event, counsel's contacts with the client's treating physicians who are so employed would be limited to formal depositions. Thus the broader question posed by Lee Memorial's petition is whether such a limitation on informal communications is consistent with the purpose of rule 4–4.2.

The comment to rule 4–4.2 summarizes the rule's rationale as follows:

> This rule contributes to the proper functioning of the legal system by protecting ***814** 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 uncounseled disclosure of information relating to the representation.

Rule 4–4.2 cmt.[4] We conclude that the stated purposes of rule 4–4.2 would not be served by an interpretation that would prohibit plaintiff's counsel from informal communication with his or her client's treating physicians—absent consent—simply because of the physicians' adventitious employment by a defendant hospital.

We seriously doubt that the drafters of rule 4–4.2 and (ABA) Model Rule 4.2 on which it is based anticipated the relatively recent trend toward the employment of physicians by hospitals. This trend is driven by economic and financial forces affecting the medical profession and our health care system. The argument for the application of the rule under the circumstances of this case is based on happenstance—the accident that Lee Memorial happens to employ some or all of the child's treating physicians. Here, informal contacts by plaintiffs' counsel with the child's treating physicians do not pose a threat that plaintiffs' counsel will overreach, interfere with Lee Memorial's relationship with its attorneys, or result in the uncounseled disclosure of information relating to the representation of Lee Memorial by its attorneys.

For these reasons, we conclude that the circuit court's order under review does not depart from the essential requirements of the law. The circuit court correctly saw that the interest requiring protection here is the Smiths' right to communicate with their child's doctors through their duly authorized representatives, not the protection of a client-lawyer relationship. Accordingly, we deny the petition.

Petition denied.

MORRIS and BLACK, JJ., Concur.

Parallel Citations

36 Fla. L. Weekly D212

Footnotes

1 The Smiths do not appear to dispute Lee Memorial's claim that the pediatric neurologist and several other of the child's treating physicians are Lee Memorial employees.

2 Along the same lines, an ethics opinion interpreting the comparable (ABA) Rule 4.2, Model Rules of Professional Conduct, states: "When a corporation or other organization is known to be represented with respect to a particular matter, the bar applies only to communications with those employees who have managerial responsibility, those whose act or omission may be imputed to the organization, and those whose statements may constitute admissions by the organization with respect to the matter in question." ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95–396 at 1 (1995).

[3] For information on the acquisition of physician practices by hospitals and the economic factors driving this trend, see generally, Randy Bauman, *Why Hospitals Are Buying Physician Practices ... Again*, Delta Health Care, http://www.deltahealthcare.com/pdf/Why-Hospitals-Buy.pdf (last visited Nov. 29, 2010); Pamela Lewis Dolan, *EMR courtship: Hospitals wooing doctors to stay afloat*, amednews.com (Aug. 23, 2010), http://www.ama-assn.org/amednews/2010/08/23/bica0823.htm; Steven A. Eisenberg, *The Boomerang Effect: Hospital Employment of Physicians Coming Back Around*, Physicians News Digest Online Edition (Feb. 4, 2009), http://www.physiciansnews.com/2009/02/04/the-boomerang-effect-hospitalemployment-of-physicians-coming-back-around; Peter A. Pavarini, *Why Hospitals are Employing Physicians (Again)*, Stout Risius Ross (www.srr.com), http://www.szd. com/media/news/media.1487.pdf (last visited Nov. 29, 2010).

[4] For a discussion of the purposes of the rule, see generally, Geoffrey C. Hazard, Jr. & Dana Remus Irwin, *Toward a Revised 4.2 No–Contact Rule*, 60 Hastings L.J. 797, 801–06 (March 2009) (discussing (ABA) Model Rules of Prof'l Conduct R. 4.2 (2008)).

End of Document

West's Florida Statutes Annotated
Florida Rules of Civil Procedure (Refs & Annos)

Fla.R.Civ.P. Rule 1.285

Rule 1.285. Inadvertent Disclosure of Privileged Materials

Currentness

(a) Assertion of Privilege as to Inadvertently Disclosed Materials. Any party, person, or entity, after inadvertent disclosure of any materials pursuant to these rules, may thereafter assert any privilege recognized by law as to those materials. This right exists without regard to whether the disclosure was made pursuant to formal demand or informal request. In order to assert the privilege, the party, person, or entity shall, within 10 days of actually discovering the inadvertent disclosure, serve written notice of the assertion of privilege on the party to whom the materials were disclosed. The notice shall specify with particularity the materials as to which the privilege is asserted, the nature of the privilege asserted, and the date on which the inadvertent disclosure was actually discovered.

(b) Duty of the Party Receiving Notice of an Assertion of Privilege. A party receiving notice of an assertion of privilege under subdivision (a) shall promptly return, sequester, or destroy the materials specified in the notice, as well as any copies of the material. The party receiving the notice shall also promptly notify any other party, person, or entity to whom it has disclosed the materials of the fact that the notice has been served and of the effect of this rule. That party shall also take reasonable steps to retrieve the materials disclosed. Nothing herein affects any obligation pursuant to R. Regulating Fla. Bar 4-4.4(b).

(c) Right to Challenge Assertion of Privilege. Any party receiving a notice made under subdivision (a) has the right to challenge the assertion of privilege. The grounds for the challenge may include, but are not limited to, the following:

(1) The materials in question are not privileged.

(2) The disclosing party, person, or entity lacks standing to assert the privilege.

(3) The disclosing party, person, or entity has failed to serve timely notice under this rule.

(4) The circumstances surrounding the production or disclosure of the materials warrant a finding that the disclosing party, person, or entity has waived its assertion that the material is protected by a privilege.

Any party seeking to challenge the assertion of privilege shall do so by serving notice of its challenge on the party, person, or entity asserting the privilege. Notice of the challenge shall be served within 20 days of service of the original notice given by the disclosing party, person, or entity. The notice of the recipient's challenge shall specify the grounds for the challenge. Failure to serve timely notice of challenge is a waiver of the right to challenge.

(d) Effect of Determination that Privilege Applies. When an order is entered determining that materials are privileged or that

the right to challenge the privilege has been waived, the court shall direct what shall be done with the materials and any copies so as to preserve all rights of appellate review. The recipient of the materials shall also give prompt notice of the court's determination to any other party, person, or entity to whom it had disclosed the materials.

Credits
Added Sept. 8, 2010, effective. Jan. 1, 2011 (52 So.3d 579).

West's F.S.A. RCP Rule 1.285, FL ST RCP Rule 1.285
Current with Amendments received through 2/15/2013

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