

STATE OF MAINE
Cumberland, ss

BUSINESS AND CONSUMER COURT
Location: Portland
Docket No.: BCD-CV-11-28

KAILE R. WARREN, JR. et als.)
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 Plaintiffs)
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 v.)
)
)
 PRETI, FLAHERTY, BELIVEAU &)
 PACHIOS, LLC, et als.)
)
 Defendants)

**ORDER ON DEFENDANTS' JOINT MOTION TO COMPEL AND
PLAINTIFFS' MOTION FOR PROTECTIVE ORDER**

Defendants' Joint Motion to Compel Documents Reflecting Communications Between Attorney Lilley and Assistant Attorney General Colleran, and Plaintiffs' Motion for Protection are before the court. The court elects to decide both motions without oral argument, *see* M.R. Civ. P. 7(b)(7).

The subject matter of both motions is a series of communications between Plaintiffs' counsel and one or more attorneys in the Office of the Maine Attorney General in the context of now-concluded criminal and civil cases instituted by the State against Plaintiffs in the Cumberland County Unified Criminal Docket and the Cumberland County Superior Court. *State v. Warren*, Docket No. CUMCD-09-9716; *State v. Rent-A-Husband et als.*, Docket No. CUMSC-CV-11-07.

The materials at issue are listed in a "privilege log" attached as Exhibit A to the Plaintiffs' Motion for Protection. In that log, the disputed materials are listed by Bates number, all with the prefix of KWC.¹

¹ The privilege log also includes documents withheld on the ground of attorney-client privilege—all assigned Bates numbers with a KWE prefix—that are not at issue and therefore are excluded from the scope of this Order.

The following points are clearly established:

- All of the materials are communications between Plaintiffs' counsel and the counsel for the State in the two cases²
- The State and the Plaintiffs were adverse parties (parties on opposite sides of the claims or charges at issue in the cases), as opposed to being co-parties with similar or identical interests
- All of the communications were prepared in anticipation of, or in the course of litigation or for trial, in the civil and criminal cases between the State and the Plaintiffs
- The sole ground asserted by Plaintiffs in their Motion for Protection for objecting to disclosure of the communications and related materials is the provision in Rule 26(b)(3) of the Maine Rules of Civil Procedure that affords protection against disclosure of an attorney's work product

Plaintiffs contend that because all of the materials at issue were prepared in anticipation of litigation or trial in one or both of the two prior cases within the meaning of Rule 26(b)(3), the Defendants are required to make a showing of "substantial need" for them, within the meaning of the rule. Plaintiffs contend Defendants have failed to make the required showing and that, in any case, the court should preclude discovery because the requested materials contain "mental impressions, conclusions, opinions or legal theories" of Plaintiffs' counsel and therefore constitute attorney work product.

Defendants counter that the "substantial need" and work product provisions of Rule 26(b)(3) do not apply because all of the disputed materials were disclosed by Plaintiffs' counsel to counsel for an adverse party. They also contend that the attorney work product does not apply in

² The court agrees with the Defendants that Plaintiffs cannot assert an attorney work product objection as to work product of the State's counsel, so only the work product of Plaintiffs' own counsel is at issue.

any event because the disputed material was all prepared in connection with litigation other than the present case.

Neither side has identified any Law Court or other Maine court precedent directly on point, but both rely on federal court precedent addressing the counterpart federal rule, Fed. R. Civ. P. 26(b)(3). The Law Court as well has relied on federal authority as guidance in analyzing Rule 26(b)(3). See *Boccaleri v. Maine Medical Center*, 534 A.2d 671, 672-73 (Me. 1987). This court likewise looks to federal authority for guidance.

“The work-product doctrine, codified for the federal courts in Fed. R. Civ. P. 26(b)(3), is intended to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy “with an eye toward litigation,” free from unnecessary intrusion by his adversaries. Analysis of one’s case “in anticipation of litigation” is a classic example of work product and receives heightened protection under Fed. R. Civ. P. 26(b)(3).

United States v. Adlman, 134 F.3d 1194, 1196 (2d Cir. 1998), quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154(1975); *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947).

However, as the United States Supreme Court has held, “[t]he privilege derived from the work-product doctrine is not absolute. Like other qualified privileges, it may be waived.” *United States v. Nobles*, 422 U.S. 225, 239 (1975).

Based on logic as well as the clear weight of authority, this court concludes that when an attorney voluntarily communicates the attorney’s “mental impressions, conclusions, opinions or legal theories” to opposing counsel in litigation, that disclosure operates to waive whatever Rule 26(b)(3) protection might otherwise attach to that communication. See, e.g., *United States v. Massachusetts Institute of Technology*, 129 F.3d 681, 687 (1st Cir. 1997), citing *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1428-29 (3d Cir.1991); *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 235 (2d Cir.1993); *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1371-75 (D.C.Cir.1984); *In re Martin Marietta Corp.*, 856 F.2d 619, 625 (4th Cir.1988), cert.

denied, 490 U.S. 1011 (1989); *In re Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 860 F.2d 844, 846-47 (8th Cir.1988). *See also* 8 C. Wright, A. Miller & R. Marcus, FEDERAL PRACTICE AND PROCEDURE § 2024, at 368-69 (1994) (citing cases).

"Disclosure to an adversary waives the work product protection as to items actually disclosed, even where disclosure occurs in settlement." *Grumman Aerospace Corp. v. Titanium Metals Corp. of America*, 91 F.R.D. 84, 90 (E.D.N.Y.1981); *see also Chubb Integrated Systems Ltd. v. National Bank*, 103 F.R.D. 52, 67 (D.D.C.1984).

Here, all of the materials at issue either were, or were included in, communications between Plaintiffs' counsel and opposing counsel in two cases in which the State and the Plaintiffs were plainly adverse. The court concludes that such disclosure operates to waive any basis for objection to discovery under the Rule 26(b)(3) "substantial need" and attorney work product provisions and in fact removes the materials in question from within the ambit of Rule 26(b)(3).

This conclusion makes it unnecessary, at least in this Order, to address the Defendants' alternate argument that Rule 26(b)(3) does not protect the materials at issue because they were generated in anticipation of, or during, different litigation. *See, e.g. Hunnewell, Inc. v. Piper Aircraft Corp.*, 50 F.R.D. 117, 119 (M.D. Pa. 1970); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 207 F. Supp. 407, 410 (M.D. Pa. 1962). The Plaintiffs have a reasonable argument that the connection between the State's claims and charges in the prior civil and criminal cases on the one hand and their claims in this case on the other hand is sufficient to extend the protection of Rule 26(b)(3) to their counsels' work product as to which that protection has not been waived, even though the prior litigation is concluded. *See Federal Trade Commission v. Grolier, Inc.*, 462 U.S. 19, 28 (1983) (in Freedom of Information Act appeal, "attorney work product is exempt from mandatory disclosure without regard to the status of the litigation for which

it was prepared"). See also *Philadelphia Elec. Co. v. Anaconda American Brass Co.*, 275 F. Supp. 146, 148 (E.D. Pa. 1967), citing *Republic Gear Company v. Borg-Warner Co.*, 381 F.2d 551 (2d Cir. 1967). However, the court need not and does not decide the broader question of how Rule 26(b)(3) applies to Plaintiffs' counsels' work product materials beyond those that have been communicated to opposing counsel in the prior cases.

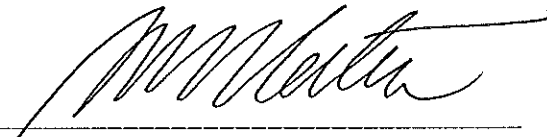
The 6-page privilege log filed as Exhibit A on its face indicates that all of the documents at issue—assigned Bates numbers with a KWC prefix—were communications between Plaintiffs' counsel and one or more representatives of the Office of the Attorney General and, in some cases, others. On their face therefore, all of the disputed materials are outside the protection of Rule 26(b)(3) based on waiver by means of voluntary disclosure to opposing counsel. It is thus unnecessary for the court to conduct any *in camera* review of the enumerated materials.

IT IS ORDERED AS FOLLOWS:

(1) Defendants' Joint Motion to Compel is hereby granted. Plaintiffs' Motion for Protection is hereby denied. All documents listed with a KWC Bates number prefix in the privilege log attached to Plaintiffs' motion as Exhibit A shall be disclosed by Plaintiffs' counsel forthwith to the Defendants' counsel within 10 days of this Order.

Pursuant to M.R. Civ. P. 79(b), the clerk is hereby directed to incorporate this Order by reference in the docket.

Dated 4 January 2012



A. M. Horton
Justice, Business and Consumer Court

Entered on the Docket: 1.4.2012
Copies sent via Mail Electronically