



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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February 12, 2008

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Re: Rush v. Sunrise Senior Living, Inc., CL-07-11322

Dear Counsel,

This case came before me on Plaintiff's Motion to Compel Responses to Requests for Production of Documents from Defendant Sunrise Senior Living, Inc. Following a hearing, I took the matter under advisement. For the reasons that follow, I grant Plaintiff's motion in part and deny it in part; order certain documents to be produced to the Plaintiff immediately; order certain documents listed on Defendant's privilege log to be produced for an *in camera* review which will be conducted by a court-appointed Special Commissioner; and sustain and overrule certain other objections that will result in the required production of additional documents.

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Background

This is a breach of contract and defamation action arising out of Defendant, Sunrise Senior Living's ("Sunrise"), termination of the employment of its CFO, Plaintiff Bradley B. Rush. Sunrise is a publicly traded Delaware corporation that is engaged in the business of development, construction, sale and operation of senior citizen assisted living communities throughout North America and Europe. Mr. Rush served as Sunrise's CFO from August 2005 until May 2007. Mr. Rush alleges that he was terminated without cause and in retaliation for, *inter alia*, his disclosure of Sunrise's improper, and in some instances fraudulent, accounting practices to the Securities and Exchange Commission (SEC). Sunrise contends Mr. Rush was fired because he violated company policies, including its policy on document retention.

Mr. Rush served his First Set of Requests for Production of Documents ("Document Requests") on Sunrise in September of 2007. Sunrise timely objected to Document Requests which seek, generally: (1) documents relating to Mr. Rush's interview with the SEC; (3) minutes of Sunrise's Board of Directors and its Special Independent Committee; (8) documents relating to Sunrise's submissions to the SEC, including the eleven page "roadmap" letter; (10) all documents created, received or maintained by Mr. Rush during his employment; (11) documents related to the Fox Hill joint venture; (12) documents relating to Sunrise's potential private buyers; (17) documents reflecting Tiffany Tomasso's travel and related expenses; (18) any computer issued by Sunrise to Mr. Rush during his employment; and (19) "objects in the shape of an acorn." Sunrise objected on the basis that the requests were irrelevant, overly broad, and sought information protected from discovery under the attorney-client privilege ("the privilege") and/or the attorney work-product doctrine. Sunrise provided Rush and the Court with a thirty-page privilege log.

Mr. Rush filed the instant Motion to Compel, disputing that his requests were irrelevant and overly broad. In addition, Mr. Rush argues that the documents listed in Sunrise's privilege log should be produced because (1) Sunrise cannot assert the privilege over documents that Rush, its former officer, previously reviewed, had access to, or even authored himself during his tenure; (2) Sunrise cannot assert the privilege over documents that provide mere business, as opposed to legal, advice; (3) Sunrise cannot cloak, and therefore shield from discovery, underlying case facts in privileged communications; and (4) Sunrise has waived the privilege by sharing so-called privileged communications with an unrelated third-party, namely its public relations firm, Robinson Lerer & Montgomery ("RLM").

In response, Sunrise argues that the documents listed in its privilege log should not be produced because (1) Rush, who is no longer an officer or director of Sunrise, is not entitled to privileged documents, even those he reviewed or created during his tenure; (2) that the documents listed in Sunrise's privilege log contain strictly legal, not merely business, advice; (3) that documents containing a mix of law and fact, such as those in Sunrise's privilege log, are still considered privileged; and (4) Sunrise did not waive its privilege by sharing privileged information with RLM. Sunrise also contends that the document requests are overly broad and not relevant to the claims and defenses in this case.

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The Attorney-Client Privilege

The attorney-client privilege is one of the oldest common law privileges sanctioned by the courts. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). When it applies, the privilege is absolute and, unlike the work product doctrine, cannot be overcome, “even for the purpose of administering justice.” Commonwealth v. Edwards, 235 Va. 499, 508-09, 370 S.E.2d 296, 301 (1988). Its elements have been set forth in various ways,¹ but the leading privilege test in Virginia is found in Edwards, which provides that “confidential communications between attorney and client made because of that relationship and concerning the subject matter of the attorney’s employment are privileged from disclosure.” Id.

The attorney-client privilege is available to corporations. Owens-Corning Fiberglas Corp. v. Watson, 243 Va. 128, 141, 413 S.E.2d 630, 638 (1992) citing Upjohn, 449 U.S. at 389-90. The policy for extending the privilege to corporate clients is conceptually the same as for individual clients: “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” Upjohn, 449 U.S. at 389. Although the underlying policy considerations are identical, courts and commentators alike have frequently expressed concern that the privilege may be used by corporations to create a large “zone of secrecy” for communications whose probative value could be important to a fair resolution of disputes. See, e.g., Am. Cyanamid Co. v. Hercules Powder Co., 211 F. Supp. 85, 88 (D. Del. 1962); see generally, David Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 Yale L.J. 953, 956 (1956). This is particularly true with regard to in-house counsel, through which corporations routinely route all business correspondence. Accordingly, “... the privilege is strictly construed to apply only where necessary to protect its underlying policy aims.” Edwards, 235 Va. at 509, 370 S.E.2d at 301. Further “[t]he proponent [of the privilege] has the burden to establish that the attorney-client relationship existed, that the communications under consideration are privileged, and that the privilege was not waived.” Id.

The Supreme Court of Virginia has not yet decided whether the attorney-client privilege applies against a former officer or director as to documents created during the course of his employment. However, some jurisdictions considering the issue have held that the privilege cannot be invoked against a corporation’s former directors because directors are treated as the “joint client” when they receive legal advice for the corporation. See, e.g., Gottlieb v. Wiles,

¹ See, e.g., U.S. v. United Shoe Machinery Corp., 89 F. Supp. 357, 338-39 (1950) (stating that the privilege applies where “(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is the member of the bar of court, or his subordinate, and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the propose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.”).

143 F.R.D. 241, 247 (D. Colo. 1992) rev'd on other grounds, Gottlieb v. Barry, 43 F.3d 474 (1994) (stating that the present board of directors could not assert privilege against a former director because the situation is analogous to one where parties with a common interest retain the same attorney, but when they later become adverse, neither is allowed to claim privilege); Kirby v. Kirby, Civ. A. No. 8604, 1987 Del. Ch. LEXIS 463, at 18 (Del. Ch. July 29, 1987). Such cases find persuasive the fact that the former employee was already aware of the contents of the employee's own communications with counsel for the organization. At least one Virginia court of record has adopted this approach, and held, in a suit by a minority shareholder and former director and officer, that "the privilege must yield if it would violate a weightier public policy than the protection of client confidence in the attorney-client relationship." Ostermann v. Monoflo International, 1992 WL 884430 (Va. Cir.Ct. 1992).

In contrast, other courts uphold the privilege without limitation and refuse access by the former officer. See, e.g., Lane v. Sharp Packaging Systems, Inc., 640 N.W.2d 788, 803 (Wis. 2002) ("we conclude that even though Lane is a former officer and director, and the documents at issue were prepared during his tenure, Sharp can effectively assert the lawyer-client privilege against him."); American Steamship Owners Mutual Protection and Indemnity Association, Inc. v. Alcoa Steamship Co., Inc., 232 F.R.D. 191, 198 (S.D.N.Y. 2005) (stating that a corporate officer "can neither disseminate confidential information he has received as a Board member nor pierce the privilege to obtain additional information"). Still other courts permit access only to the former officer's own communications with counsel. See, e.g., In re Braniff, Inc., 153 B.R. 941 (Bankr. M.D. Fla. 1993) (former officers and directors entitled to discovery of privileged documents prepared by, addressed to, or copied to them).

Sunrise primarily relies on the United States Supreme Court case of Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 349 n. 5; 105 S. Ct. 1986, 1991 n. 5 (1985), contending it stands for the proposition that an individual who is now neither an officer nor a director retains no control over the corporation's privilege. But Weintraub is of limited applicability here. In Weintraub, a Chapter 7 corporate liquidation case, the Court stressed that its review was limited to "the control of the attorney-client privilege of a corporation *in bankruptcy*." *Id.* at 349; 1991 (emphasis added). The Court held that the corporate debtor's attorney-client privilege passed to the trustee due to the specialized role that a trustee plays in corporate bankruptcy cases. *Id.* at 356-57; 1995. Accordingly, the Court's suggestion in a footnote that former directors retain no control of the corporation's privilege is *dicta*, and the limited context of the Court's holding makes it less helpful here.

Professor Wigmore describes four conditions that must exist for any privilege to defeat the disclosure of communication to which adverse parties and the public otherwise have a right:

- (1) The communications must originate in a *confidence* that they will not be disclosed.
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
- (3) The *relation* must be one which in the opinion of the community out to be sedulously *fostered*.

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(4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

Garner v. Wolfenbarger, 430 F.2d 1093, 1102-1103 (5th Cir. 1970), cert. denied, 401 U.S. 974 (1971), citing 8 Wigmore, Evidence, § 2285 at 527.

Sunrise has the burden to establish that the communications under consideration are privileged. Edwards, 235 Va. at 509, 370 S.E.2d at 301. Under the circumstances of this case, I find that the public policy of furthering Sunrise's "full and frank communication" with its in-house and outside counsel is outweighed by Mr. Rush's right of access to documents which he received or reviewed, authored or reasonably had access to as CFO during his tenure. Because a narrow application of the attorney-client privilege is required by law, I find that it does not apply to such documents in this case. The issue is not whether Mr. Rush may waive the privilege that Sunrise currently holds. Rather, under the circumstances presented, I find the privilege does not apply to those documents. Applying Wigmore, these were not documents that were kept confidential in relation to Mr. Rush. At the same time, the privilege may still apply to documents not reasonably accessible by Mr. Rush as CFO during his tenure, documents created outside of his tenure, and documents clearly not intended to be for his eyes even during his tenure.

I order that Sunrise immediately produce to Mr. Rush all documents Mr. Rush received, reasonably had access to as CFO, or authored himself during his tenure at Sunrise, subject to the work product doctrine ruling below. All other documents responsive to the discovery requests that Sunrise continues to maintain are privileged must be reviewed in camera. Because of the volume of documents involved, I am appointing Joel M. Birken as Special Commissioner to conduct such a review.

In deciding whether a document is privileged, Mr. Birken shall also determine whether the communication involves business versus legal advice, as the privilege "does not shield from discovery communications generated or received by an attorney acting in some other capacity, or communications in which an attorney is giving business advice rather than legal advice." 1 Paul R. Rice, et al., *Attorney Client Privilege in the United States*, 7.1, at 7, 11 (2d ed. 1999).

Finally, as to documents that Mr. Birken determines are privileged, that privilege may have been waived by Sunrise. I do not have sufficient evidence before me to make such a determination, nor do I impose that burden on Mr. Birken. Therefore, I will conduct a separate hearing to determine whether Sunrise, expressly or impliedly through its conduct, has waived the privilege as to those documents Mr. Birken finds are privileged.

Work Product Doctrine

The work product doctrine, first recognized in Hickman v. Taylor, 329 U.S. 495 (1947), is codified in Rule 4:1(b)(3) of the Rules of the Supreme Court of Virginia, which provides as follows:

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“Subject to the provisions of subdivision (b)(4) of this Rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this Rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.”

The policy rationale of the work product doctrine is not protection of the attorney-client relationship, but rather enhancement of the integrity of the litigation process. See Hickman, 329 U.S. at 510-11. Accordingly, the doctrine protects documents which are prepared by an attorney “in anticipation of litigation” from discovery. See Va. Sup. Ct. R. Rule 4:1(b)(3) (2007). Unlike the attorney-client privilege, the doctrine is qualified: it may be overcome by a showing that an opposing party has a substantial need for the materials and that the party would not be able to obtain the “substantial equivalent” without “undue hardship”. See Id. Even where such a showing is made, however, an attorney’s mental impressions, conclusions, opinions, and legal theories are still afforded special protection that is treated essentially as an absolute prohibition. See Id.

While mindful of this legal framework, granting or denying a request for attorney work product remains “a matter within the trial court’s discretion.” Rakes v. Fulcher, 210 Va. 542, 546 (1970) (interpreting Rule 34 of the Federal Rules of Civil Procedure, which the Court found analogous to Virginia’s Rule 4:9). I decline to apply the work product doctrine in this case to documents Mr. Rush received, authored or reasonably had access to during his tenure as CFO, and order that Sunrise immediately produce to Mr. Rush all such documents, subject to the attorney-client privilege ruling above. All other documents responsive to the discovery requests that Sunrise continues to maintain are work product must be reviewed in camera by Mr. Birken. He shall determine whether the documents in Sunrise’s privilege log were or were not “created in anticipation of litigation” (as opposed to, for example, created in the regular course of business in responding to SEC investigations and/or to its concerned shareholders).

As to documents Mr. Birken finds were created in anticipation of litigation², he must also determine whether Mr. Rush has a substantial need for the documents and whether Mr. Rush is unable without undue hardship to obtain their substantial equivalent by other means. I generally find, and direct Mr. Birken to consider, that as between these parties Sunrise has exclusive possession of these documents, and Mr. Rush has a seemingly substantial need for and little

² Mr. Birken shall order that documents created exclusively in anticipation of litigation between Sunrise and Mr. Rush shall not be produced.

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other means of obtaining them. However, Rule 4:1(b)(3) further provides that even when a substantial need is established, the mental impressions, conclusions and opinions or legal theories of an attorney are not discoverable. In the event he finds that substantial need and undue hardship are established, Mr. Birken must nonetheless exclude from production those impressions, conclusions, and legal opinions of Sunrise's counsel.

Relevancy

Mr. Rush contends, and Sunrise disputes, that the contested document requests are relevant to the claims and defenses in this case and are not overly broad. In that regard, this discovery dispute is like many faced by trial courts, where each side seeks to expand or limit discovery depending on its view of the case. Mr. Rush contends that he was fired because of information he provided to the SEC concerning Sunrise's finances. Sunrise contends that Mr. Rush was fired because he failed to comply with various company policies (e.g., document retention). Sunrise seeks to preclude the production of financial information because, it says, such information is irrelevant to Mr. Rush's firing; Mr. Rush contends it is part and parcel of the reason for his termination.

I have analyzed the relevance and breadth of Mr. Rush's document requests as required by Rule 4:1(b)(1). In so doing, I have considered whether the documents sought are relevant to any claim or defense, or are reasonably calculated to lead to the discovery of admissible evidence; whether production would be unduly burdensome or expensive, given the amount at issue, the parties' resources and the importance of the issues at stake; and whether the documents may be more conveniently or inexpensively obtained from some other source.

As to the objections of relevancy and over breadth, I find as follows.

As to Request No. 1, I overrule the objection except as to the first portion of section (4), to which the objection is sustained.

As to Request No. 3, I overrule the objection.

As to Request No. 8, I overrule the objection.

As to Request No. 10, I sustain the objection to the general portion of the Request. However, as to the specific requests in Request No. 10, I overrule the objection to sections (1), (2), (3) and (4) and sustain the objection to section (5).

As to Request No. 11, I overrule the objection.

As to Request No. 12, I sustain the objection.

As to Request No. 17, I sustain the objection.

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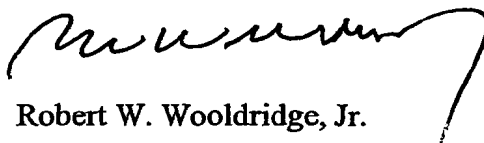
As to Request No. 18, I overrule the objection.

As to Request No. 19, I sustain the objection.

Conclusion

For those reasons, Mr. Rush's motion is granted in part and denied in part. Plaintiff's counsel shall prepare an order reflecting this ruling and incorporating this opinion letter, and forward it to defense counsel for review and endorsement. I am placing the matter on my docket for February 15, 2008 at 9:00 a.m. for entry of the order.

Very truly yours,

A handwritten signature in black ink, appearing to read "Robert W. Wooldridge, Jr.", with a long, sweeping flourish extending to the right.

Robert W. Wooldridge, Jr.

Cc: Joel M. Birken, Esq.