UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, On Behalf of Itself and All Others Similarly Situated, Plaintiff, vs. HOUSEHOLD INTERNATIONAL, INC., et al., Defendants.	Lead Case No. 02-C-5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

APPENDIX OF ELECTRONIC CASES

CASES **TABS**

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Tab 1

LEXSEE 2006 US DIST LEXIS 28877

CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS, Plaintiff, v. CERTAIN UNDERWRITERS AT LLOYD'S LONDON, CERTAIN SUBSCRIBING LONDON MARKET INSURANCE COMPANIES and JOHN DOE INSURANCE COMPANIES 1-100, Defendants.

Civil Action No.: 05-3158 (SRC)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

2006 U.S. Dist. LEXIS 28877

May 11, 2006, Decided

SUBSEQUENT HISTORY: Counsel Amended July 14, 2006.

COUNSEL: [*1] For CELLOCO PARTNERSHIP D/B/A VERIZON WIRELESS, Plaintiff: PHILIP R. SELLINGER, GREENBERG TRAURIG, LLP, FLORHAM PARK, NJ.

For CERTAIN UNDERWRITERS AT LLOYD'S LONDON, CERTAIN SUBSCRIBING LONDON MARKET INSURANCE COMPANIES, Defendants: THOMAS F. QUINN, BRIAN J. WHITEMAN, WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP, NEWARK, NJ; STEFAN R. DANDELLES, WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP, CHICAGO, IL.

For JOHN DOE INSURANCE COMPANIES 1-100, Defendant: THOMAS F. QUINN, WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP, NEWARK, NJ.

JUDGES: HUGHES, U.S.M.J.

OPINION BY: HUGHES

OPINION:

MEMORANDUM OPINION

HUGHES, U.S.M.J.

This matter comes before the Court upon Motion by Plaintiff Celico Partnership d/b/a Verizon Wireless ("Plaintiff") to compel production of documents, [Docket Entry #11], returnable April 17, 2006, and upon Motion by Defendants Certain Underwriters at Lloyd's London and Certain Subscribing London Market Insurance Companies ("Defendants"), [Docket Entry #12], also returnable April 17, 2006. The Court reviewed the written submissions of the parties, conducted oral argument on April 11, 2006 and reviewed the subject documents *in camera*. For the reasons set forth below, Plaintiffs Motion to Compel production of documents is [*2] denied and Defendants' Motion to Compel production of documents is granted in part and denied in part.

I. BACKGROUND AND PROCEDURAL HISTORY

In July 2003, Defendants issued an insurance policy to Plaintiff with an inception date of July 1, 2003, expiring July 1, 2004. Aon became Plaintiff's insurance broker soon thereafter. On April 13, 2004, Aon provided notice to Defendants that Plaintiff was making a claim based on one of its former employee's misappropriation of and theft of its PIN numbers and calling cards, with a calculated loss by Plaintiff of $ 21,266,185. In July 2004, Defendants informed Plaintiff that it was declining coverage under Plaintiff's Commercial Crime Policy. In September 2004, Defendants reiterated their denial of Plaintiff's claim.

In response, Plaintiff filed a declaratory action and breach of contract action in New Jersey State Court, arguing that its claims were wrongfully denied. The action was removed to this Court on diversity grounds. Subsequently, on or about September 28,2005, Defendants served discovery requests upon Plaintiff. Plaintiff provided responses to the document requests and also provided a privilege log. Pursuant to *FED. R. CIV. P. 26(b)(5)* [*3] , Plaintiff withheld a number of documents prepared by, transmitted to, or that summarize communications with brokers at Aon, claiming the documents are protected by attorney-client and/or work-product privilege. After a number of conferences between the parties, fifteen (15) documents remain in dispute.

Plaintiff also served its discovery requests upon Defendants. In so doing, Plaintiff sought all documents related to the investigation and handling of [Plaintiff's] claim. In response, Defendants withheld a number of documents claiming attorney-client and work-product

privileges. Plaintiff claims these documents were improperly withheld; arguing that Defendants obtained outside counsel, Wilson, Elser, Moskowitz, Edelman & Dicker LLP ("Wilson Elser") to investigate and handle Plaintiff's claim. Thus, anything related to this investigation, Plaintiff argues, was done as routine and ordinary business practices, and thus falls outside the purview of protected communications under the attorney-client or work-product privilege.

II. DISCUSSION

A. Attorney-Client Privilege

Communications between an attorney and client are protected by the attorney-client privilege. [*4] The purpose of this privilege is to promote frank discussions between a client and his/her attorney to allow the attorney to best represent the client. *Fisher v. United States, 425 U.S. 391, 403, 96 S.Ct. 1569, 48 L. Ed. 2d 39 (1976).*

The privilege provides that:

> communications between lawyer and his client in the course of that relationship and in professional confidence, are privileged, and a client has privilege to (a) to refuse to disclose any such communication, and (b) prevent his lawyer from disclosing it, and (c) to prevent any other witness from disclosing such communication if it came to the knowledge of such witness (i) in the course of its transmittal between the client and the lawyer, or (ii) in a manner not reasonably to be anticipated, or (iii) as a result of a breach of the lawyer-client relationship, or (iv) in the course of a recognized confidential or privileged communications between the client and such witness. . . .

N.J.R.E. 504.

However, this privilege is not unconditional. It can be waived if the privileged information is communicated to outside parties. *United States v. Rockwell Int'l, 897 F.2d 1255, 1265 (3d Cir. 1990).* [*5] However, the presence of any third party does not automatically constitute a waiver of the privilege. For example, "communications between corporate counsel and company personnel are privileged so long as the information is relayed for the purpose of obtaining legal counsel." *Andritz Sprout-Bauer, Inc., v. Beazer East, Inc., 174 F.R.D. 609, 633 (M.D. Pa. 1997)* (citing *Upjohn Co. v. United States, 449 U.S. 383, 394-95, 101 S.Ct. 677, 685, 66 L.Ed.2d 584 (1981)).* Similarly, "disclosure to agents retained by counsel to assist him or her in advising the client and handling legal matters does not operate as a waiver. The privilege attaches to agents and representatives of counsel whose services are necessary for effective representation of the client's interests." *Id. at 632* (quoting *X Corp. v. Doe, 805 F. Supp. 1298 (E.D. Va. 1992)).*

As noted, the presence of an agent or interpreter does not automatically waive the attorney-client privilege. To protect the privilege, the party claiming a third party as an agent,

> bears the burden of showing that the person in question worked at the direction of the lawyer, and performed tasks [*6] relevant to the client's obtaining legal advice, while responsibility remained with the lawyer. Morever, when the third party is a professional, such as an accountant, capable of rendering advice independent of the lawyer's advice to the client, the claimant must show that the third party served some specialized purpose in facilitating the attorney-client communications and was essentially indispensable in that regard.

2 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence P 503(a)(3)[01] at 503-31 to 38 (1993). In considering the parameters of the agency exception to the wavier of attorney-client privilege, the Second Circuit Court of Appeals determined that conversations between counsel and a tax specialist, retained to help counsel understand the consequences of a pending client action, did not serve a specialized purpose in facilitating the attorney-client relationship. *United States v. Ackert, 169 F.3d 136, 139 (2d Cir. 1999).* While noting that *United States v. Kovel, 296 F.2d 918 (2d Cir. 1961)* found the presence of an "interpreter" in an attorney-client meeting did not constitute waiver of the privilege, *id. at 922,* [*7] the Second Circuit distinguished the role of the tax specialist whom an attorney consulted for clarification on the tax consequences of its clients' actions. *Ackert, 169 F.3d at 139.* The Court found that while the attorney interviewed the specialist to gain information to better advise his client, "the privilege protects communications between a client and an attorney, not communications that prove important to an attorney's legal advice to a client....[A] communication between an attorney and a third party does not become shielded by the attorney-client privilege solely because the communication proves important to the attorney's ability to represent the client." *Id. at 139.*

Therefore, just because a communication between an attorney and a specialist prove helpful to the attorney's representation of his/her client does not mean that the communications are necessarily privileged. However, the "inclusion of a third party in attorney-client communications does not destroy the privilege if the purpose of the third party's participation is to improve the comprehension of the communications between the attorney and the client." *Id.* The Third Circuit [*8] Court of Appeals, in analyzing the clergy/communicant privilege found that "as is the case with the attorney-client privilege, the presence of third parties, if essential to and in furtherance of the communication, should not void the privilege." *In re Grand Jury Investigations, 918 F.2d 374, 384 (3rd Cir. 1990).* Further, the Court found that

> the constructional rule that evidentiary privileges should be narrowly construed, that recognition of the clergy-communicant privilege in this circumstance depends upon whether the third party's presence is essential to and in furtherance of a communication to a member of the clergy. As is the case with consultants between attorneys and clients, the presence of multiple parties, unrelated by blood or marriage, during discussions with a member of the clergy may, but will not necessarily, defeat the condition that communications be made with a reasonable expectation of confidentiality in order for the privilege to attach.

Id. at 386.

1. Plaintiff's Communications with Aon

a. Attorney-Client Relationship

Plaintiff claims that Aon provided legal counsel to Plaintiff despite its designation [*9] as an insurance broker. Plaintiff relies, in part, on the fact that John Morrissey, an employee of Aon who worked on Plaintiff's claim, is a licensed attorney and acted in that role while assisting Plaintiff with its claims. However, given the factual circumstances surrounding the relationship between Aon and Plaintiff, the Court cannot find that either an explicit nor implicit attorney-client relationship existed between Plaintiff and Aon.

First, no retainer agreement existed. While the lack of a retainer agreement is not dispositive, it is a factor to consider in determining whether an attorney-client relationship existed. Second, the parties acknowledge that Aon was originally hired as an insurance broker. While Plaintiff claims their role changed throughout the course of their relationship, Plaintiff has not demonstrated how or when that relationship changed. Finally, while Mr. Morrissey is a licensed attorney, that does not automatically transform any professional relationship he has into an attorney-client relationship. More specifically, in his correspondence with Plaintiff, Mr. Morrissey clearly states that the information he is providing is not intended to be legal advice. [*10] This also demonstrates that neither Aon nor Plaintiff could have reasonably believed that an attorney-client relationship existed or that they had an expectation of confidentiality surrounding their communications. Given the above, the Court cannot find that either an explicit or implicit attorney-client relationship existed, thus the attorney-client privilege does not apply.

b. Aon's role as an Agent

In the alternative, Plaintiff claims that Aon acted as an agent/interpreter for Plaintiff and Plaintiff's Counsel and therefore, their communications with Plaintiff and Plaintiff's counsel remain confidential. However, Aon's role in providing information and advice to Plaintiff is more closely related that of the tax specialist in *Ackert. Ackert, 169 F3d at 139.* As mentioned the Court found that the specialist assisted the attorney in determining the best advice to provide his clients on tax-related issues. The Court also found that this did not rise to the level of agent/interpreter as it did not serve a specialized purpose in facilitating the attorney-client relationship, despite it having aided in the attorney's representation of his client. The same is true [*11] here. Aon did not act as an agent of the attorney or Plaintiff for purposes of providing or interpreting legal advice. While the information and advice provided may have proved helpful, it was not needed to interpret complex issues in order to provide competent legal advice or to facilitate the attorney-client relationship. Therefore, Aon's communication between it and Plaintiff or Plaintiff's counsel is not protected by the attorney-client privilege under this theory.

2. Defendants Communications with Wilson Elser

Like Plaintiff, Defendants have withheld documents based on attorney-client privilege. Plaintiff's oppose such claim, arguing that Wilson Elser did not serve as counsel to Defendants, but, rather served as an independent investigator of Plaintiff's coverage claim. Plaintiff further claims that because such work is done in the ordinary course of the insurance business, it is not protected by the attorney-client privilege even though Wilson Elser provides legal counsel in other contexts. Plaintiff also claims that the lack of any documents which indicate an independent investigation of their claim by Defendants supports their argument that Wilson Elser must have [*12] performed this function.

However, after reviewing the documents submitted for *in camera* review, it is apparent to the Court that Wilson Elser was retained as legal counsel and provided such counsel to the Defendants. The documents do not suggest that Wilson Elser performed any independent investigation of Plaintiff's claim, but rather provided legal advice regarding its claim, including strategy for addressing any potential challenges to Defendants' declination of such claim. Thus, the communications between Defendants and Wilson Elser fall within the purview of attorney-client privilege and need not be produced to Plaintiff.

B. Work-Product Privilege

Both Plaintiff and Defendants claim that their documents are also protected by the work-product privilege. This doctrine "shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *In re Cendant Corp. Sec. Litig., 343 F.3d 658, 661-63 (3d Cir. 2003)* (*discussing, Fed. R. Civ. P. 26(b)(3)*)(citations omitted). As with the attorney-client privilege, the work-product privilege can be waived. [*13] *Maertin v. Armstrong World Indus., 172 F.R.D. 143, 148 (D.N.J. 1997)*(citing *United States v. Nobles, 422 U.S. 225, 238, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975)*). Waiver will not apply if the documents were "prepared in anticipation of litigation." *See, United States v. Rockwell Int'l, 897 F.2d 1255, 1266 (3d Cir. 1990).*

To determine if documents meet this standard, the Court should look to "whether in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *Martin v. Bally's Park Place Hotel & Casino, 983 F.2d 1252, 1258 (3d Cir. 1993)* (citing *Rockwell, 897 F. 2d at 1266*)(citation omitted). The mere possibility of future litigation is insufficient to meet this test. *Leonen v Johns-Manville, 135 F.R.D. 94, 96 (D.N.J. 1990).* In addition, documents prepared in the ordinary course of business will not be shielded by the work-product privilege. *Rockwell, 897 F.2d at 1266.*

1. Plaintiff and Aon-Work Product

In the present case, the Court finds that litigation [*14] was reasonably anticipated by the parties once Defendants denied Plaintiff's claim for coverage on July 8, 2004. While Plaintiff claims that they could have anticipated litigation prior to this date, based on Defendants prior history of denying similar claims, such conclusion is not reasonable given the factual circumstances of the case. Thus, any documents prepared prior to this date, cannot reasonably be understood to be "prepared in anticipation of litigation" and will not be protected by the work-product privilege.

Given that litigation could reasonably be anticipated after the declination of Plaintiff's claim on July 8, 2004, there are several documents which the Court finds need not be produced to Defendants. These documents discuss legal advice by plaintiff's in-house counsel, were prepared in anticipation of litigation and should be protected from disclosure, despite not being protected under the attorney-client privilege. After conducting an *in camera* review, the Court finds that Plaintiff must only produce the following documents, as they were either not prepared by or sent to legal counsel, were prepared prior to the date where litigation could reasonably be anticipated, [*15] or they do not involve legal advice or strategy in the pending suit: 1) VZW-INS 042087; 2) VZW-INS 042064; 3) VZW-INS 042145-042150 and 4) VZW-INS 042054-042055.

2. *Defendants and Wilson Elser - Work Product*

As mentioned above, Defendants' communications with Wilson Elser are protected by the attorney-client privilege. In addition, a number of documents are also protected under the work-product privilege. For example, the communications between Wilson Elser and Defendants after the June 8, 2004 declination of coverage, when Defendants could have reasonably anticipated litigation, are protected by the work-product privilege. The documents do not concern the routine investigation of the claim, but rather the strategy for dealing with Plaintiff's anticipated challenge to the declination of coverage.

III. CONCLUSION

For the reasons stated herein, Plaintiff's Motion to Compel discovery is denied. The Court finds that Wilson Elser was retained to provide legal counsel to Defendants regarding Plaintiff's allegations that its claim for coverage was improperly denied. The Court further finds that Plaintiff cannot establish that Aon served as legal counsel [*16] to Plaintiff, despite the fact that one of Aon's employees is a licensed attorney. Rather, the Court finds that Aon served as Plaintiff's Insurance Broker, but that such role did not elevate it to agent/interpreter for Plaintiff's attorney or Plaintiff, which would have protected communications between Aon and Plaintiff or Plaintiff's counsel from disclosure. However, the Court also finds that certain of Plaintiff's documents were prepared by Plaintiff's counsel in anticipation of litigation, contain legal advice, and as such are shielded from discovery by the work-product privilege. An appropriate Order accompanies this Memorandum Opinion.

Dated: May 11, 2006

Tab 2

LEXSEE 1998 US DIST LEXIS 1747

FRANK J. DIPALMA v. MEDICAL MAVIN, LTD., et al.

CIVIL ACTION No. 95-8094

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

1998 U.S. Dist. LEXIS 1747

February 9, 1998, Decided
February 10, 1998, Filed

DISPOSITION: [*1] Defendants Kevin J. Ryan and Crawford, Wilson, Ryan & Agulnick, P.C.'s for a Protective order Relating to Plaintiff's Deposition of Defendant Kevin J. Ryan, Esq. (Doc. # 48), and plaintiff's Motion to Compel Answers at Deposition (Doc. # 50, Part 1), GRANTED IN PART and DENIED IN PART.

CASE SUMMARY:

PROCEDURAL POSTURE: The United States District Court for the Eastern District of Pennsylvania ruled on defendant attorney's motion to terminate the attorney's deposition after two days of questioning and on plaintiff claimant's motion to compel the attorney to answer certain questions during his deposition.

OVERVIEW: The underlying action was filed by the claimant after he sold his business to individuals represented by the attorney. Others were named as defendants along with the attorney and the attorney field a motion to terminate his deposition because the claimant's counsel's alleged tactic of needlessly extending the deposition to a third day or alternatively for a protective order barring claimant's counsel from asking certain questions which they claim elicit information protected by the attorney-client privilege. Also before the court was the claimant's motion to compel the attorney to answer the questions he has refused to answer. The claimant alleged that the challenged questions sought discoverable non-privileged information and that any privilege had been waived in any event. The court found that allowing the attorney's deposition to continue a third day was appropriate where the nine hour deposition was not taken in bad faith or with any intent to harass. As to the privilege arguments, the court ordered the attorney to answer questions regarding conversations between himself and his client's wife and to otherwise respond to questions not inquiring into privileged matters.

OUTCOME: The court denied the motion to terminate the attorney's deposition and ordered the attorney to provide responses to all questions which did not seek to elicit privileged information.

LexisNexis(R) Headnotes

Civil Procedure > Discovery > Methods > Oral Depositions

[HN1] A court may terminate an ongoing deposition upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party. *Fed. R. Civ. P. 30(d)(3)*. A "strong showing" is generally required before a party will be denied the right to complete a deposition. The length of the deposition alone, however, is not indicative of bad faith.

Civil Procedure > Federal & State Interrelationships > Erie Doctrine
Civil Procedure > Discovery > Privileged Matters > General Overview

[HN2] In diversity cases such, federal courts apply the state law of privilege. *Fed. R. Evid. 501*.

Civil Procedure > Counsel > General Overview
Evidence > Privileges > Attorney-Client Privilege > Waiver
Legal Ethics > Client Relations > Confidentiality of Information

[HN3] The Pennsylvania attorney-client privilege provides that in a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client. *42 Pa.*

Cons. Stat. Ann. § 5928 (1982). The statute is essentially a codification of the common law attorney-client privilege.

Civil Procedure > Discovery > Privileged Matters > General Overview
Evidence > Privileges > Attorney-Client Privilege > Elements
Evidence > Privileges > Attorney-Client Privilege > Waiver
[HN4] The traditional elements of the attorney-client privilege that identify communications protected from disclosure are: (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his or her subordinate, and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding, and (d) not for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Evidence > Privileges > Attorney-Client Privilege > General Overview
Legal Ethics > Client Relations > Confidentiality of Information
[HN5] The purpose of the attorney-client privilege is to foster a confidence between the attorney and the client that will lead to a trusting and open dialogue. When deciding whether the attorney-client privilege applies, courts look not only to the privilege itself, but to the well-established rationale behind the privilege. The attorney-client privilege only protects confidential communications between the client and the attorney in cases where the attorney is acting in an advisory capacity. The general nature of the privileged matter, the occasion and circumstances of any communications and the factual circumstances of the attorney-client relationship remain discoverable even when the communication itself is protected.

Civil Procedure > Discovery > Privileged Matters > General Overview
[HN6] Under Pennsylvania law, the party seeking disclosure of attorney-client communications bears the burden of showing that such communications are not protected.

Evidence > Privileges > Attorney-Client Privilege > General Overview
Legal Ethics > Client Relations > Confidentiality of Information
[HN7] The attorney-client privilege may extend beyond the parties in the attorney-client relationship to an agent to whom disclosure of otherwise privileged communications is necessary for the client to obtain legal advice. It is not sufficient, however, that information was communicated through a third-party as a matter of convenience.

Legal Ethics > Client Relations > Confidentiality of Information
[HN8] The commonality of interest concept is designed to preserve and not extend the privilege. Every communication between a lawyer and someone who has a commonality of interest with his client does not become privileged.

Evidence > Privileges > Attorney-Client Privilege > Waiver
Legal Ethics > Client Relations > Confidentiality of Information
[HN9] The attorney-client privilege belongs to the client and can be waived only by the client. *42 Pa. Cons. Stat. Ann. § 5928* (1982).

Evidence > Privileges > Attorney-Client Privilege > Waiver
Legal Ethics > Client Relations > Confidentiality of Information
[HN10] While a client may waive the attorney-client privilege by disclosing the substance of the communication with his attorney in a pleading or in a letter to a third-party, only the actual statements divulged in those documents lose their privileged status. The attorney-client privilege is not waived merely by the filing of a lawsuit or the assertion of a defense by a party who is not invoking the privilege.

COUNSEL: For FRANK J. DIPALMA, PLAINTIFF: PETER J. LEYH, KAUFMAN, COREN & RESS, PHILA, PA USA.

For MEDICAL MAVIN, LTD., ROBERT DEBIASSE, DEFENDANTS: ROBERT W. LENTZ, LENTZ, CANTOR AND MASSEY, LTD., MALVERN, PA USA. SCOTT E. YAW, LENTZ, CANTOR, KILGORE AND MASSEY, FRAZER, PA USA.

For KEVIN J. RYAN, CRAWFORD, WILSON, RYAN & AGULNIC, P.C., DEFENDANTS: MICKEY M.

MARDIROSSIAN, COZEN & O'CONNOR, PHILA, PA USA. H. ROBERT FIEBACH, COZEN AND O'CONNOR, PHILADELPHIA, PA USA.

JUDGES: JAY C. WALDMAN, J.

OPINION BY: JAY C. WALDMAN

OPINION: MEMORANDUM ORDER

This case arises out of the sale of plaintiff's podiatric practice to defendant Michael LaLiberte. Plaintiff has asserted various breach of contract and tort claims against Dr. LaLiberte and his wife, Patricia LaLiberte. n1 Plaintiff also has asserted tort and breach of contract claims against defendants Medical Mavin and DeBiasse, the brokerage house and broker who agreed to use their best efforts to find a suitable purchaser for plaintiff's practice. Defendant Ryan was the lawyer for Dr. LaLiberte in the sale transaction and allegedly was also the lawyer and CEO of Medical Mavin. Plaintiff has asserted [*2] claims of negligence, breach of fiduciary duty against Ryan and his law firm of Crawford, Wilson, Ryan, & Agulnick, P.C. Plaintiff has asserted claims of fraud and civil conspiracy against all six defendants.

n1 The LaLibertes defaulted in this action and a default judgment against Dr. LaLiberte has been entered.

Presently before the court is the motion of defendants Ryan and Crawford, Ryan, Wilson & Agulnick, P.C. for an order terminating Mr. Ryan's deposition because of plaintiff's counsel's alleged tactic of needlessly extending the deposition to a third day or alternatively for a protective order barring plaintiff's counsel from asking certain questions which they claim elicit information protected by the attorney-client privilege. Also before the court is plaintiff's motion to compel Mr. Ryan to answer the questions he has refused to answer. Plaintiff contends that the challenged questions seek discoverable non-privileged information and that any privilege has been waived in any event.

[HN1] A court may terminate [*3] an ongoing deposition upon a showing that "the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party." *Fed. R. Civ. P. 30(d)(3)*. A "strong showing" is generally required before a party will be denied the right to complete a deposition. *Caplan v. Fellheimer Eichen Braverman & Kaskey, 161 F.R.D. 29, 30 (E.D. Pa. 1995).*

Defendants' contention that the Ryan deposition has been unreasonably protracted is not without merit. Plaintiff has deposed Mr. Ryan for more than nine hours over two days. From a review of the record, it appears that his testimony could have been completed in that time. The length of the deposition alone, however, is not indicative of bad faith, see *Smith v. Logansport Comm. School Corp., 139 F.R.D. 637, 644 (N.D. Ind. 1991),* and it is not clear that plaintiff's counsel bears sole responsibility for the unnecessary delay. The moving defendants have not made a "strong showing" for the termination of Mr. Ryan's deposition.

Plaintiff's counsel asked Mr. Ryan to relate any conversation he had with Mrs. LaLiberte concerning the sale transaction and her execution of promissory notes which [*4] formed part of the transaction underlying this lawsuit. Plaintiff's counsel also asked Mr. Ryan whether he ever inspected billing records which show that plaintiff engaged in billing fraud. n2 Mr. Ryan declined to answer these questions on the ground that they would elicit information protected by Dr. LaLiberte's attorney-client privilege.

n2 Among their defenses, defendants assert that plaintiff's own actions caused or contributed to the losses for which he now sues. Defendants allege that plaintiff engaged in fraudulent billing practices which inflated the true value of his podiatric practice.

[HN2] In diversity cases such as this, federal courts apply the state law of privilege. *Fed. R. Evid. 501*; *United Coal Cos. v. Powell Constr. Co., 839 F.2d 958, 965 (3d Cir. 1988); Cedrone v. Unity Sav. Ass'n, 103 F.R.D. 423, 426 (E.D. Pa. 1984); Super Tire Eng'g Co. v. Bandag Inc., 562 F. Supp. 439, 440 (E.D. Pa. 1983).*

[HN3] The Pennsylvania attorney-client privilege provides that "in a civil matter counsel shall not [*5] be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client." *42 Pa. Cons. Stat. Ann. § 5928* (West 1982). The statute is essentially a codification of the common law attorney-client privilege. See *Garvey v. National Grange Mut. Ins. Co., 167 F.R.D. 391, 395 (E.D. Pa. 1995); Eastern Techs., Inc. v. Chem Solv., Inc., 128 F.R.D. 74, 77 (E.D. Pa. 1989).* n3

n3 [HN4] The traditional elements of the attorney-client privilege that identify communications protected from disclosure are:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his or her subordinate, and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding, and (d) not for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.
>
> See *Rhone-Poulenc Rorer Inc. v. Home Indem. Co., 32 F.3d 851, 862 (3d Cir. 1994); United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950);* 8 Wigmore, Evidence, § 2292, at 554 (McNaughton rev. 1961).

[*6] [HN5]

The purpose of the attorney-client privilege is to foster a confidence between the attorney and the client that will lead to a trusting and open dialogue. See *Estate of Kofsky, 487 Pa. 473, 409 A.2d 1358, 1362 (Pa. 1979).* See also *United States Fidelity & Guar. Co. v. Barron Indus., Inc., 809 F. Supp. 355, 363-64 (M.D. Pa. 1992).* When deciding whether the attorney-client privilege applies, courts look "not only to the privilege itself, but to the well-established rationale behind the privilege." *United States Fidelity & Guar. Co., 809 F. Supp. at 364.*

The attorney-client privilege only protects confidential communications between the client and the attorney in cases where the attorney is acting in an advisory capacity. Id. The general nature of the privileged matter, the occasion and circumstances of any communications and the factual circumstances of the attorney-client relationship remain discoverable even when the communication itself is protected. See *Stabilus v. Haynsworth, Baldwin, Johnson & Greaves, 144 F.R.D. 258, 268 (E.D. Pa. 1992).* See also, *Rhone-Poulenc Rorer Inc., 32 F.3d at 862.*

[HN6] Under Pennsylvania law, the party seeking disclosure of attorney-client [*7] communications bears the burden of showing that such communications are not protected. See *Cedrone v. Unity Sav. Ass'n, 103 F.R.D. 423, 427 (E.D. Pa. 1984); Estate of Kofsky, 409 A.2d at 1362-63 (Pa. 1979).* See also *Commonwealth v. Maguigan, 511 Pa. 112, 511 A.2d 1327, 1334 (Pa. 1985).* But see *Garvey, 167 F.R.D. at 395* (placing the burden in a diversity case on the party resisting discovery).

It is acknowledged that no attorney-client relationship ever existed between Mrs. LaLiberte and Mr. Ryan. Defendants maintain, however, that Mrs. LaLiberte at all times during the pertinent transaction acted as Dr. LaLiberte's agent and any conversation she had with Mr. Ryan was necessary for his provision of legal services to Dr. LaLiberte.

[HN7] The attorney-client privilege may extend beyond the parties in the attorney-client relationship to an agent to whom disclosure of otherwise privileged communications is necessary for the client to obtain legal advice. It is not sufficient, however, that information was communicated through a third-party as a matter of convenience. See *Advanced Tech. Assocs. Inc. v. Herley Indus., Inc., 1996 U.S. Dist. LEXIS 17931, 1996 WL 711018,* *8 (E.D. Pa. Dec. 5, 1996). See [*8] also, *Giovan v. St. Thomas Diving Club, Inc., 37 V.I. 176, 1997 U.S. Dist. LEXIS 8816, 1997 WL 360867,* *3 (D.V.I. 1997).

Based on the record presented, it is far from clear that Mrs. LaLiberte was an essential or necessary "conduit" for the transmission of communications between Dr. LaLiberte and his attorney. Plaintiff is entitled to probe the circumstances surrounding any conversation between Mr. Ryan and Mrs. LaLiberte regarding the sale transaction to determine whether they were necessarily relayed between Dr. LaLiberte and Mr. Ryan through her. In this regard, it is particularly difficult to discern how a statement by Mrs. LaLiberte about her willingness to sign promissory notes could constitute a transmittal of a communication between Mr. Ryan and Dr. LaLiberte, let alone one that was necessarily undertaken through her. n4

> n4 Mrs. LaLiberte was deposed for two days. It is virtually inconceivable that she was not questioned about any prior statements regarding her execution of the promissory notes. There is no suggestion that she invoked the privilege in response to such questions on the ground such statements were merely authorized transmissions between lawyer and client.

[*9]

Defendants also contend with apparent force that there was a commonality of interest between the LaLibertes. Thus, had Mrs. LaLiberte merely been present at and privy to conversations between Dr. LaLiberte and Mr. Ryan, her presence would not vitiate the privilege. See *In re Grand Jury Investigation, 918 F.2d 374, 386 (3d Cir. 1990); Schreiber v. Kellogg, 1992 U.S. Dist. LEXIS 16180, 1992 WL 309632* (E.D. Pa. Oct. 19, 1992). [HN8] The commonality of interest concept is designed to preserve and not extend the privilege. Every communication between a lawyer and someone who has a commonality of interest with his client does not become privileged.

Plaintiff's questioning about whether Dr. LaLiberte ever showed Mr. Ryan billing records from Dr. DiPalma's practice which either thought were false or inaccurate would tend to reveal the content of discussions between Mr. Ryan and his client, and are privileged.

Plaintiff's questions regarding whether Mr. Ryan had seen false or inaccurate billing records that may have been supplied by sources other than Dr. LaLiberte are not improper. Only communications between the client and his attorney are protected from disclosure by the attorney-client privilege. Plaintiff also [*10] argues that Dr. LaLiberte's attorney-client privilege has been waived as to any conversations between Dr. LaLiberte and Mr. Ryan regarding Dr. DiPalma's billing records. Plaintiff argues that the privilege was waived when Mr. Ryan discussed the general allegations of fraudulent billings at his deposition; when defendants raised Dr. DiPalma's alleged fraudulent billings as an affirmative defense; when Dr. LaLiberte filed a civil action in a state court against Dr. DiPalma based on alleged fraudulent billing practices; and when Dr. LaLiberte authorized Ryan to disclose the possibility of fraudulent billing in a letter to a third-party.

[HN9] The attorney-client privilege belongs to the client and can be waived only by the client. See *42 Pa. Cons. Stat. Ann. § 5928* (West 1982); *Emejota Eng'g Corp. v. Kent Polymers Inc., 1985 U.S. Dist. LEXIS 13415, 1985 WL 4019,* *2 (E.D. Pa. 1985). n5 [HN10] While Dr. LaLiberte may waive the attorney-client privilege by disclosing the substance of the communication with his attorney in a pleading or in a letter to a third-party, only the actual statements divulged in those documents lose their privileged status. See *Frieman v. USAir Group, Inc., 1994 U.S. Dist. LEXIS 16994, 1994 WL 675221,* *7 (E.D. Pa. Nov. [*11] 23, 1994). The attorney-client privilege is not waived merely by the filing of a lawsuit or the assertion of a defense by a party who is not invoking the privilege. See *Barr Marine Prods. Co., Inc. v. Borg-Warner Corp., 84 F.R.D. 631, 635 (E.D. Pa. 1979).*

n5 Mr. Ryan may properly assert the privilege on behalf of Dr. LaLiberte. See *Fisher v. United States, 425 U.S. 391, 402 n.8, 48 L. Ed. 2d 39, 96 S. Ct. 1569 (1976)*(noting it is universally held that attorney-client privilege may be raised by the attorney).

ACCORDINGLY, this 9th day of February, 1998, upon consideration of the Motions of defendants Kevin J. Ryan and Crawford, Wilson, Ryan & Agulnick, P.C.'s for a Protective order Relating to Plaintiff's Deposition of Defendant Kevin J. Ryan, Esq. (Doc. # 48), and plaintiff's Motion to Compel Answers at Deposition (Doc. # 50, Part 1), **IT IS HEREBY ORDERED** that said Motions are **GRANTED IN PART** and **DENIED IN PART**in that the parties shall complete defendant Ryan's deposition at a mutually [*12] agreeable time but in no event later than February 20, 1998 at which time the plaintiff may inquire into the circumstances surrounding communications as to which the privilege is reasserted and at which Mr. Ryan shall answer the questions regarding statements made by Mrs. LaLiberte which are not within the limits of the attorney-client privilege as discussed by the court herein. Any assertion by a witness of a privilege which is unfounded may result in the imposition of appropriate sanctions.

BY THE COURT:

JAY C. WALDMAN, J.