

JUL 02 2014

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO
DIVISION OF PROBATE

RECEIVED FOR FILING

ARTHUR P. DUECK, <i>et al.</i>	)	CASE NO. 2012 ADV 179424
)	
Plaintiffs,)	
	)	JUDGE ANTHONY J. RUSSO
v.)	
	)	<u>PLAINTIFFS ARTHUR P. DUECK'S,</u>
THE CLIFTON CLUB COMPANY, <i>et al.</i>	)	<u>TODD GILMORE'S, NANCY</u>
	)	<u>BINDER'S, AND WILLIAM R.</u>
Defendants.	)	<u>KELLER'S, PUTATIVE PLAINTIFFS</u>
	)	<u>RHONDA LOJE'S AND JEFFREY</u>
	)	<u>MANSELL'S, AND DEFENDANT</u>
	)	<u>DENNIS F. BUTLER'S REPLY IN</u>
	)	<u>SUPPORT OF THEIR JOINT MOTION</u>
	)	<u>TO COMPEL</u>

INTRODUCTION

The Movants¹ filed their Motion to Compel requesting that the Trustees produce all communications between the Trustees and their counsel relating to the Ulmer Memo and its subject matter as Ohio law is clear that disclosure of attorney-client communications in a non-privileged context constitutes a waiver of the attorney-client privilege. R.C. 2317.02(A); *Hollingsworth v. Time Warner Cable*, 157 Ohio App.3d 539, 2004-Ohio-3130, at ¶ 65-66 (1st Dist.). In response, the Trustees admit that they published the Ulmer Memo, which was addressed to the Trustees from their attorneys in an engagement unrelated to this litigation, on the Internet. Accordingly, the waiver is clear and the Court only has to decide the scope of that waiver, which Ohio courts instruct is the same subject matter as the disclosed communication.

In response to their admitted waiver, the Trustees oppose the Motion to Compel based on an outdated statute, an incorrect claim that express consent of the client is required for waiver, and claims that the Movants' request is overbroad based on a misreading of the Motion to

¹ All capitalized terms herein have the same meaning as used in Movants' Motion to Compel unless specifically stated otherwise herein.

Compel as seeking the Trustees' counsel's litigation file – which is not true. But the waiver is clear. And the Movants' request is in accordance under Ohio law. If there is any confusion as to the scope of the waiver, it is due to the Trustees' failure to produce a requested privilege log identifying those pre-litigation documents that the Trustees claim are privileged. Accordingly, the Movants file this reply to correct the Trustees' misstatements of the law and clarify that it only requests that the Court order the production of documents and communications related to the Ulmer Memo and its subject matter created prior to the commencement of this litigation.

Because the Trustees have waived the attorney-client privilege by disclosing the Ulmer Memo and Ohio courts define the scope of that waiver to include communications and documents related to the same subject matter, the Movants respectfully request that the Court order the production of all documents and communications related to the Ulmer Memo and its subject matter created prior to this litigation, which include: (1) communications and documents between the Trustees and their counsel soliciting the legal advice that resulted in drafting the Ulmer Memo, (2) communications and documents between the Trustees and their counsel regarding the facts forming the basis for the Ulmer Memo, (3) communications and documents between the Trustees and their counsel relating to the Ulmer Memo, (4) the other versions and drafts of the Ulmer Memo shared with the Trustees, and (5) documents evidencing communications between the Trustees and their counsel regarding the transmittal of facts for the Ulmer Memo.

FACTS

As the Trustees informed the public on their website in March 2012, the Trustees retained Ulmer and “initially requested that they review foundational documents and the 100 year relationship of the Trust and the Club to determine compliance with the terms of the Trust”

months before the Complaint against the Club was filed. (Mot. Ex. 2, at 2, ¶ 9.) The Trustees admit that the result of that engagement was the Ulmer Memo, which was only addressed to the Trustees, and that the engagement was unrelated to this litigation. (Opp. Br. at 2; Mot. Ex. 3.) Subsequently, the Trustees voluntarily chose to publish that communication and legal analysis from its attorneys on its website, which is accessible by members of the public with access to the Internet at <http://cliftonparktrustees.org/trustee-communications/>. The Trustees apparently wanted to keep the Clifton Park residents informed, but chose not to keep their counsel's communications confidential from the world. (Opp. Br. at 2.)

Months after publishing their attorneys' legal analysis and months after the Complaint was filed, the Trustees then requested to be made parties to this lawsuit. (10/16/2012 Trustee Mot. for Leave to File Amicus Br.) That request was granted. And, as permitted under the Ohio Rules of Civil Procedure, the Movants issued several discovery requests to the Trustees. The Trustees did not produce any documents related to the Ulmer Memo and did not produce a privilege log regarding the communications related to the published Ulmer Memo that occurred prior to the commencement of this litigation. Instead, Movants were forced to issue a deficiency letter requesting those communications, to which the Trustees' counsel improperly responded that there was no waiver. (Mot. Exs. 5, 6.)

The Movants then filed the Motion to Compel seeking all documents and communications related to the Ulmer Memo and the subject matter of that memorandum, not Ulmer's entire litigation file and every communication between the Trustees and their counsel as portrayed in the Trustees' opposition brief. Because the Trustees have no real justification for withholding the communications and documents related to the Ulmer Memo, the Trustees responded to the Motion to Compel by painting the motion as an overbroad fishing expedition.

If the Ulmer Memo and the communications related to that memorandum were ever privileged, that privilege was waived when the Trustees voluntarily and publicly disclosed the Ulmer Memo and the substance of the advice received from counsel on their website.² Accordingly, under Ohio law, the Trustees have waived the privilege as to all communications relating to the Ulmer Memo and its subject matter and made those communications discoverable.

LAW AND ARGUMENT

The attorney-client privilege does not bar discovery when a party waives its protection. R.C. 2317.02(A)(1); *Hollingsworth v. Time Warner Cable*, 157 Ohio App.3d 539, 2004-Ohio-3130, at ¶ 65-66 (1st Dist.). The voluntary, partial disclosure of attorney-client communications removes the privilege's protection as to all documents and communications relating to the same subject matter as the disclosed communications. *Id.*

The Trustees voluntarily published the Ulmer Memo on the Trustees' website. Under longstanding Ohio law, any claim of privilege over the Ulmer Memo and its subject matter was waived by that disclosure. As there is no dispute regarding the relevance, the only question left for the Court is the scope of that disclosure. As shown in the Motion to Compel and herein, the scope of that waiver includes all documents created prior to this litigation related to the Ulmer Memo and the subject matter of the Ulmer Memo.

I. The Trustees Are Wrong. Express Consent Is Not an Exclusive Avenue for Waiver; a Voluntary Disclosure of Communications in a Non-Privileged Context Is a Waiver.

The Trustees only support for their claim that there was no waiver is that the Trustees did not expressly consent, which they claim is required under R.C. 2317.02(A). (Opp. Br at 3. The Trustees are wrong and rely on an old version of R.C. 2317.02(A) for support. The Trustees cite

² The Trustees have not been shy about disclosing the advice received from counsel. The Trustees have also disclosed on their website in response to Frequently Asked Question No. 11 the advice of their counsel regarding the Trustees' decision to file their amicus brief on October 12, 2012. (*See Ex. 2, at 3, ¶ 11.*)

a pre-2012 version of R.C. 2317.02(A). Specifically, the Ohio General Assembly amended the statute to make clear that revealing the substance of the attorney-client communication in a non-privileged context amounts to a waiver: “The 2012 amendment by HB 461, in the first paragraph of (A)(1), inserted . . . substituted ‘reveals the substance of attorney-client communications in a nonprivileged context’ for ‘testifies’ in the second sentence.” Ohio Rev. Code Ann. § 2317.02 (2014), Editor’s Notes, Effect of Amendments.

Ohio law is clear that a client waives the privilege when he voluntarily discloses the substance of attorney-client communications in a non-privileged context:

An attorney, concerning a communication made to the attorney by a client in that relation or concerning the attorney's advice to a client, except that the attorney may testify by express consent of the client or, if the client is deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of the deceased client. ***However, if the client voluntarily reveals the substance of attorney-client communications in a nonprivileged context*** or is deemed by section 2151.421 of the Revised Code to have waived any testimonial privilege under this division, ***the attorney may be compelled to testify on the same subject.***

R.C. 2317.02(A)(1) (emphasis added); *Mid-American Nat’l Bank & Trust Co. v. Cincinnati Ins. Co.*, 74 Ohio App.3d 481, 489 (6th Dist. 1991) (“a partial, voluntary disclosure of privileged communications” is a waiver as to all communications related to the same subject matter.)

No context is more non-privileged than the World Wide Web. Thus, the Trustees waived the privilege as to the Ulmer Memo and its subject matter.³ Because there is a clear waiver, the

³ The Trustees cannot preserve the privilege with their claim that they told the Clifton Park residents that “communications with counsel will remain privileged.” (Opp. Br. at 4.) As explained in *Mid-American*, where a client “passe[s] along, to a third party, whole portions of analysis provided by [its] attorney,” Ohio courts have found that such conduct “demonstrated no intention of keeping the thought processes of its attorney confidential and [the party] has waived the attorney-client privilege.” *Mid-American*, 74 Ohio App.3d at 489-490; *Hollingsworth*, 2004-Ohio-3130, at ¶ 65-66 (client voluntarily disclosing “communications with his or her attorney to a third party” is simply “inconsistent with an assertion of attorney-client privilege”); *Cline v. Reliance Trust Co.*, No. 1:04-CV-02079, 2005 U.S. Dist. LEXIS 26066, at * 10-11 (Oct. 31, 2005). The Trustees cannot make a selective disclosure.

only question is the scope of the waiver, and that scope includes all communications relating to the Ulmer Memo and its subject matter created prior to this litigation.⁴

II. Contrary to the Trustees' Hyperbole, the Motion Only Seeks Documents and Communications Relating to the Ulmer Memo and Its Subject Matter.

The Trustees claim that the Movant's motion seeks all of Ulmer's files and communications regarding this lawsuit. This misconstrues Movant's motion and cannot prevent Movant's rights to review documents and communications which the Trustees have demonstrated an intent to not keep confidential.

As the Trustees admit, their attorneys' initial engagement occurred before this lawsuit and entailed a non-litigation review of documents and the 100-year relationship of the Trust and Club "to outline what rights the [Club] and its members have to access the beach under that certain **Trust Deed**," and drafting a legal memorandum to the Trustees regarding the rights of the Club members' to access the Beach. (Mot Ex. 2; Mot. Ex. 3 (emphasis in original); Opp. Br. at 2.) The Motion to Compel does not seek documents and communications created after that time or unrelated to the Ulmer Memo. Rather, the Motion to Compel seeks communications and documents related to the Ulmer Memo and its subject matter only. To avoid any further misapprehension of the scope of Movants' request, the Movants have attached a revised proposed order as Exhibit 1 to this reply brief.⁵

Contrary to the Trustees' claims, such a requested order is not unprecedented. Rather, the court's decision in *Cline* is instructive and dealt with substantially similar circumstances. In

⁴ The Trustees also boldly claim that they "have not disclosed any information pertaining to the analysis undertaken by the attorneys who prepared the Ulmer Memo." (Opp. Br. at 4.) Apparently the Trustees do not believe disclosing the Ulmer Memo is a disclosure of the information pertaining to analysis undertaken by their attorneys.

⁵ The Movants note that the Trustees still have failed to produce a privilege log regarding the communications related to the Ulmer Memo. Thus, it is impossible to know when the Ulmer Memo assignment ceased and the engagement of Ulmer as trial counsel began.

Cline, the client disclosed a memorandum to third parties that provided legal advice and analysis regarding the appropriateness of and potential liability for the client's actions. *Cline*, 2005 U.S. Dist. LEXIS 26066, at * 12-14 (Oct. 31, 2005). This disclosure waived the privilege as to documents soliciting the legal advice that resulted in drafting the memorandum, other versions of the memorandum, communications between the attorney and client addressing the legal concerns raised in the memorandum, and responses to the memorandum:

The submitted documents fall into three categories: (1) soliciting the legal advice that resulted in drafting the Memorandum; (2) other versions of the Memorandum; and (3) communications between [the attorney and the client] addressing legal concerns raised in the Memorandum and prompted by responses received from third parties" to the memorandum. . . . All three of these categories fall within the scope of the same subject matter.

Id. The court ordered the production of those documents. Here, the Movants make a similar request, and the Court should order the production of the requested documents. Even though some of the Trustees' communication with their attorneys regarding the Ulmer Memo and occurring before this litigation address some of the issues later raised in this litigation, those communications are still discoverable. *See Mid-American*, 74 Ohio App.3d at 490 (affirming order compelling production of "attorney-client communications" related to "subject matter of [the] case"). Accordingly, where a party discloses a legal memorandum from its counsel to third parties, the waiver includes all communications relating to the memorandum and the subject matter of that memorandum. And the Trustees can present no authority to the contrary.

Because the Trustees have waived the attorney-client privilege as to the Ulmer Memo by knowingly and voluntarily disclosing it to the world, the Trustees have waived the privilege with regard to communications relating to the Ulmer Memo and its subject matter. Accordingly, the Court should order production of all documents and communications created before the commencement of this litigation that are (1) communications and documents between the

Trustees and their counsel soliciting the legal advice that resulted in drafting the Ulmer Memo, (2) communications and documents between the Trustees and their counsel regarding the facts forming the basis for the Ulmer Memo, (3) communications and documents between the Trustees and their counsel relating to the Ulmer Memo, (4) the other versions and drafts of the Ulmer Memo shared with the Trustees, and (5) documents evidencing communications between the Trustees and their counsel regarding the transmittal of facts for the Ulmer Memo.⁶

III. The Non-Litigation Communications and Documents Relating to the Ulmer Memo Are Not Protected by the Work Product Doctrine

The Trustees further urge the Court to reject the Motion to Compel because it invades the work-product privilege and the Movants fail to address the work-product privilege. Movants do not address work product because they do not seek the mental impressions, notes, legal theories, or trial strategies Trustees' counsel regarding this case or the Ulmer Memo. Rather, the Motion to Compel is limited to all documents relating to the Trustees communications with their attorneys prior to this litigation regarding the creation of the Ulmer Memo, including any other versions or drafts of the Ulmer Memo shared with the Trustees. Communications to and from the Trustees and their counsel regarding the Ulmer Memo and its subject matter created prior to the Ulmer Memo and this litigation are not work product. The Trustees without support or explanation claim that "communications between the Trustees and their attorney . . . fall under the 'mental processes' category." This assertion is baseless and lacks any support under any fair reading of the attorney-work product doctrine. Civ.R. 26(B)(3) (defining work product as

⁶ The Trustee erroneously cite *State ex rel. Benesch, Friedlander Coplan & Arnoff, L.L.P. v. Rossford*, 140 Ohio App.3d 149, 155 (6th Dist., 2000) for the proposition that "preliminary drafts of client communications and legal advice that are intended to be made public are protected by the attorney-client privilege." This case is inapposite as it deals with whether drafts of a public agency's bond documents prepared by the agency's attorneys are public records or whether the drafts are privileged communications under R.C. 149.43(A)(1)(p). Here, the Court is not presented with such a document as a legal memorandum from an attorney to her client is not comparable to the final version of bond documents that is publicly released pursuant to a public duty.

“documents, electronically stored information and tangible things prepared in *anticipation of litigation.*” (emphasis added)).

Further any documents memorializing the transmittal of facts from the Trustees to their attorneys to aid the preparation of the memorandum are not work product. A document memorializing or noting facts transmitted from the client to an attorney constitutes work product if it was prepared in anticipation of litigation. *Id.*; see also *Gruenbaum v. Werner Enters.*, 270 F.R.D. 298, 304 (S.D. Ohio 2010) (“In order to determine whether a document constitutes work product, i.e., was prepared in anticipation of, or ‘because of,’ litigation, a court must ask two questions: ‘(1) whether that document was created because of a party’s subjective anticipation of litigation, as contrasted with an ordinary business purpose; and (2) whether that subjective anticipation was objectively reasonable.” quoting *In re Professionals Direct Ins. Co.*, 578 F.3d 432, 439 (6th Cir. 2009)). “A party asserting the work product privilege bears the burden of establishing that the documents he or she seeks to protect were prepared in ‘anticipation of litigation.’” *United States v. Roxworthy*, 457 F.3d 590, 593, 595 (6th Cir. 2006) (must show that anticipated litigation was the “driving force behind the preparation of each requested document.”); see, e.g. *360 Constr. Co. v. Atsalis Bros. Painting Co.*, 280 F.R.D. 347, 353 (E.D. Mich. 2012) (Admission that legal memorandum and its drafts, prepared by non-litigation counsel relating to whether a party should be disqualified as bidder on public works project, “were not prepared in anticipation of litigation” shows that the memorandum and its drafts are not work product.)

The Trustees admit that the Ulmer Memo was not prepared in anticipation of litigation and was the result of a non-litigation related assignment. Opp. Br. at 5-6 (“The disclosure of the Ulmer Memo to the Trustees’ beneficiaries was extrajudicial and in a context unrelated to the

later filed lawsuit.”) The Trustees unequivocally differentiate the assignment resulting in the Ulmer Memo and the assignment as trial counsel. Movants agree with that admission, and the Trustees cannot later equivocate in Section III of their brief and claim that the work done for the Ulmer Memo was in anticipation of litigation, particularly because it was not and the Trustees present no evidence that it was. Further, the Trustees only became parties to this litigation because they asked to be parties over four months after the lawsuit was filed. And there was no threat of litigation against the Trustees at the time of preparing the Ulmer Memo. Finally, the Trustees have demonstrated an intent that those documents would not remain confidential and such documents should not be afforded protection under the attorney work product doctrine. Accordingly, any documents memorializing the verbal conversations between the Trustees and their attorneys relating to the Ulmer Memo and its subject matter before the Ulmer Memo was created and before this litigation are not work product.

To the extent that the Trustees’ counsel claims that specific documents are protected by the attorney-work product privilege, the Trustees should at least be compelled to submit a privilege log identifying those documents so that the Court can make a determination if that assertion is proper under an *in camera* inspection. And to the extent that any documents in Ulmer’s file that are not direct communications between the Trustees and their counsel contain mental impressions, notes, or legal theories, the Trustees can redact such portions.

CONCLUSION


The Trustees engaged counsel to advise them regarding the rights of the Club’s members to access the Beach. In response, the Trustees received the Ulmer Memo and then proceeded to publicly and voluntarily disclose the Ulmer Memo in non-privileged context, *i.e.* via the Internet. Under Ohio law, the Trustees have waived the privilege as to the Ulmer Memo and communications and documents related to the Ulmer Memo and its subject matter. Thus, the

Court should compel the production of those documents. For the forgoing reasons, the Movants respectfully request that the Court enter an order substantially similar to the proposed order attached hereto as Exhibit 1.

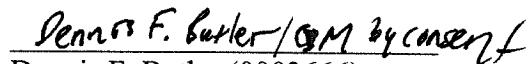
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Plaintiffs Arthur P. Dueck's, Todd Gilmore's, Nancy Binder's, and William R. Keller's, Putative Plaintiffs Rhonda Loje's and Jeffrey Mansell's, and Defendant Dennis R. Butler's Reply in Support of Their Joint Motion to Compel and Brief in Support* has been served by electronic mail on July 2, 2014 upon the following:

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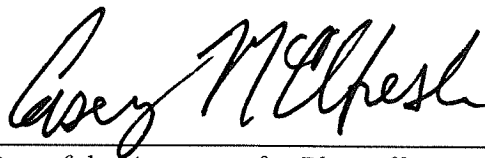
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One of the Attorneys for Plaintiffs

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO
DIVISION OF PROBATE

ARTHUR P. DUECK, *et al.*)
)
) Plaintiffs,)
)
) v.)
)
) THE CLIFTON CLUB COMPANY, *et al.*)
)
) Defendants.)

CASE NO. 2012 ADV 179424
JUDGE ANTHONY J. RUSSO
(PROPOSED) ORDER

This matter comes before this Court on Plaintiffs Arthur P. Dueck's, Todd Gilmore's, Nancy Binder's, and William R. Keller's, Putative Plaintiffs Rhonda Loje's and Jeffrey Mansell's, and Defendant Dennis R. Butler's Joint Motion to Compel and Brief in Support (the "Motion"). The Court finds the Motion to be well taken and it is **GRANTED**. It HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Defendants Charles Drumm, John S. Pyke, Jr., Peter A. Kuhn, Philip W. Hall, and Warren Coleman, Trustees, Clifton Park Trust waived the attorney-client privilege as to May 9, 2012 Memorandum (the "Ulmer Memo") attached to the Motion as Exhibit 3 and all documents and communications relating to the same subject matter of the Ulmer Memo by knowingly and publicly disclosing to third parties the Ulmer Memo and its substance on the Trustee's Website.
2. Because the Trustees have waived any privilege to the Ulmer Memo and any communications and documents related to the same subject matter, the Trustees shall produce all documents and communications created before the commencement of this litigation that are (1) communications and documents between the Trustees and their counsel soliciting the legal advice that resulted in drafting the Ulmer Memo, (2)

communications and documents between the Trustees and their counsel regarding the facts forming the basis for the Ulmer Memo, (3) communications and documents between the Trustees and their counsel relating to the Ulmer Memo, (4) the other versions and drafts of the Ulmer Memo shared with the Trustees, and (5) documents evidencing communications between the Trustees and their counsel regarding the transmittal of facts for the Ulmer Memo, within 14 days of this Order.

IT IS SO ORDERED.

Date: _____

Judge Anthony J. Russo