

COURT OF APPEALS
DIVISION II

No. 42290-5-II

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**COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON
BY *kb*
DEPUTY

TROY DANA and PAMELA DANA,

Petitioners,

vs.

RICK PIPER, et ux., et al.

Respondents

PETITIONER'S OPENING BRIEF

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ORIGINAL

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I. INTRODUCTION

Central to this appeal is the question whether a plaintiff in a legal malpractice action waives the attorney-client privilege as to representation in litigation that took place two years after the underlying transactional matter from which the malpractice claim arose. The defendant attorneys in this case represented Mr. Dana in a transaction with CMN, Inc. Two years later, Mr. Dana engaged litigation counsel and sued CMN for breach of contract and rescission. Mr. Dana settled the CMN litigation. Later, using the same litigation counsel, Mr. Dana sued defendants for malpractice in the underlying CMN transaction.

The trial court held that Mr. Dana waived the attorney-client privilege with his counsel in the CMN litigation by bringing a legal malpractice claim against defendants. It refused to protect against depositions of his attorneys regarding the CMN litigation. Ultimately, the trial court disqualified the entire litigation firm from representing Mr. Dana. This court has accepted discretionary review. Mr. Dana asks this court to reverse the trial court's decisions.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting defendants' motion to compel production of the files of Mr. Dana's attorneys in the subsequent CMN

litigation by order dated February 25, 2011.

2. The trial court erred in denying Mr. Dana's motion for reconsideration by order dated March 11, 2011.

3. The trial court erred in denying Mr. Dana's request for a protective order prohibiting deposition of his attorneys by order dated March 11, 2011.

4. The trial court erred in denying Mr. Dana's second request for a protective order prohibiting deposition of his attorneys by order dated May 27, 2011.

5. The trial court erred in disqualifying Mr. Dana's attorneys and their entire firm by order dated May 27, 2011.

6. The trial court erred in entering finding of fact #10 in its May 27, 2011, disqualification order.

7. The trial court erred in entering finding of fact #11 in its May 27, 2011, disqualification order.

8. The trial court erred in entering finding of fact #12 in its May 27, 2011, disqualification order.

Issues Pertaining to Assignments of Error

Whether implied waiver of the attorney-client privilege in a legal malpractice case is limited to communications with only those attorneys

involved in the underlying matter from which the defendants' alleged malpractice arose. (assignments of error #1, 2, 3, and 4)

Whether an attorney in a firm may act as advocate in a trial where another attorney in the firm is a witness. (assignment of error #5)

Whether an attorney cannot be disqualified under RPC 3.7 when the attorney is not a necessary witness. (assignments of error #5, 6, 7, and 8)

Whether findings of fact #10, 11, and 12 were unsupported by the record before the trial court. (assignments of error # 6, 7, and 8)

III. STATEMENT OF THE CASE

A. The Underlying Transactional Matter

Troy Dana and Larry Gilliam were the sole shareholders of Hodges, Gilliam & Dana Investment Real Estate, Inc. ("Hodges"), a real estate broker in Olympia. (CP at 10.) Messrs. Dana and Gilliam engaged attorneys John McCormick and Dallas Thomsen of the Sussman Shank firm (collectively, "Sussman Shank"), to represent them in the sale of their Hodges stock to CMN, Inc. ("CMN"). (CP at 10-11.)

Sussman Shank negotiated and reviewed agreements affecting Mr. Dana's rights in the stock sale transaction and his future employment with CMN. *Id.* They advised Mr. Dana on his employment contract and the

stock sale. *Id.* This representation lasted from June 2007 until November 2007, when the sale closed. (CP at 174¹.) Sussman Shank's representation of Mr. Dana in the CMN transaction is the underlying matter from which Mr. Dana's legal malpractice claims arose. (*See* CP at 10-13.)

B. The Subsequent Litigation

Within two years of closing of the CMN transaction, the relationship between Mr. Dana and CMN had deteriorated. (CP at 11.) Mr. Dana engaged Cushman Law Offices to represent him against CMN. (CP at 174.) Mr. Dana filed a complaint against CMN on June 5, 2009, for breach and rescission of the transaction. (CP at 64, 174.) Eventually, Seattle attorney Scott Johnson took over the litigation and negotiated a settlement. (CP at 175.)

C. The Malpractice Lawsuit

Four months later, Mr. Dana, again represented by the Cushman firm, filed this lawsuit against Sussman Shank. (CP at 5.) Mr. Dana's complaint made no reference to the CMN litigation. (CP at 10-13.) Rather, Mr. Dana alleged that Sussman Shank breached duties to him and failed to protect his interests when Sussman Shank represented him in the

¹ Mr. Dana adopted and swore to the statement of facts found in CP at 173-76. (CP at 190.)

transaction with CMN. *Id.*

The Cushman firm was not involved in the transactional work done by Sussman Shank in 2007. (CP at 175, 365.) The underlying transaction and the legal malpractice alleged in this case were complete nearly two years before Cushman Law Offices represented Mr. Dana in the CMN litigation.

D. The Trial Court Waives the Attorney-Client Privilege

In discovery, Sussman Shank sought Cushman Law Offices' complete files from the CMN litigation. (CP at 56.) Mr. Dana produced all unprivileged documents from the file. *Id.* Sussman Shank brought a motion to compel disclosure of the privileged documents, arguing attorney-client privilege and work product protections were waived as to the CMN litigation under *Pappas v. Holloway*, 114 Wn.2d 198, 787 P.2d 30 (1990). (CP at 106-17.) Mr. Dana argued *Pappas* did not support waiver as to attorneys who were involved only *after* the underlying matter was complete.(CP at 172-88.)

The trial court reviewed the privileged documents *in camera* and ordered disclosure on the grounds that Mr. Dana's malpractice claim made the documents from the CMN litigation relevant to the issue of damages. (RP, February 25, 2011, at 3-4; CP at 255-57.)

Mr. Dana brought a motion for reconsideration (CP at 258-66), citing two cases that presented facts parallel to the present case: *Fischel & Kahn, Ltd. v. van Straaten Gallery, Inc.*, 189 Ill.2d 579, 727 N.E.2d 240 (2000), and *1st Sec. Bank of Wash. v. Eriksen*, 2007 WL 188881 (W.D. Wash. 2007). Dana argued that in these cases, the courts held there was no implied waiver privilege as to representation by litigation counsel after the underlying transactional matter was complete. *Id.* The court maintained that relevance as to damages was enough to create an implied waiver of the privilege and denied the motion for reconsideration. (RP, March 11, 2011, at 14-15; CP at 294-95.)

E. The Trial Court Refuses Protection Against Depositions

Mr. Dana brought a motion for protective order, seeking to prohibit Sussman Shank from deposing the Cushman attorneys who had represented him in the CMN. litigation. (CP at 267-71.) Mr. Dana argued a deposition of his attorneys in the present case would work a severe hardship and prejudice against him, *Id.*, and warned that Sussman Shank simply wanted to make his attorneys witnesses in order to disqualify them (CP at 290). Sussman Shank argued it was too early to rule on depositions when it had not yet reviewed the privileged documents from the CMN litigation file. (CP at 280.) The court refused Mr. Dana's requests without

comment, but did order that the attorney-client privilege and work product protections were not waived as to the present malpractice lawsuit. (RP, March 11, 2011, at 14-15; CP at 292-93.)

Mr. Dana produced the privileged documents from the CMN litigation file. (*See* CP at 310.) After reviewing the documents, Sussman Shank noted the depositions of Mr. Dana's attorneys in the CMN litigation: Jon Cushman, Ben Cushman, Clydia Cuykendall, and Scott Johnson. (CP at 310, 321-32.)

Mr. Dana brought a second motion for protective order, seeking once more to prohibit the depositions. (CP at 333-37.) Mr. Dana argued that the information Sussman Shank sought in the depositions was all available from other sources and that the request was merely a tactic to make the attorneys necessary witnesses and disqualify them. (CP at 333-37; 387-94.) Sussman Shank argued the depositions were legitimate discovery. (CP at 341-55.) The court denied Mr. Dana's motion. (CP at 433-34.)

F. The Trial Court Disqualifies Mr. Dana's Attorneys

Sussman Shank next brought a motion to disqualify the Cushman firm, arguing an attorney cannot be both advocate and witness in the same case. (CP at 296-98.) Mr. Dana argued that where the attorney is called as

a witness by the opposing party, or where disqualification would work a hardship on the client, the court has discretion to allow the attorney to continue as both advocate and witness. (CP. at 372-80.) Mr. Dana also argued that even if Jon Cushman and Ben Cushman were disqualified under RPC 3.7, other Cushman attorneys could act as advocates at trial. *Id.*

The court held the Cushman firm had a “clear conflict of interest” that disqualified it from representing Mr. Dana, and entered an order disqualifying the entire firm, indicating RPC 3.7 as the basis for disqualification. (RP, April 15, 2011, at 14-15; CP at 435-40.)

IV. SUMMARY OF ARGUMENT

The trial court abused its discretion by basing its decisions on incorrect legal conclusions. These erroneous decisions ultimately stripped Mr. Dana of his counsel of choice on the grounds they would be necessary witnesses, even though communications with Mr. Dana’s attorneys in the CMN litigation should have been protected by the attorney-client privilege.

Implied waiver of the attorney-client privilege in a legal malpractice case does not extend to communications between the plaintiff and other attorneys in litigation that took place after the alleged malpractice was already complete. As shown in section V.A. below, the

trial court abused its discretion by basing its decisions on the erroneous legal conclusion that the privilege was waived as to Mr. Dana's attorneys in the subsequent CMN litigation.

The trial court also abused its discretion in disqualifying the entire Cushman firm, contrary to the provisions of RPC 3.7, as shown in section V.B. below. The rule disqualifies only individual attorneys who are necessary witnesses. The trial court did not find that the Cushman attorneys were necessary witnesses, nor is such a finding supported by the record, as shown in sections V.B.3. and V.C. This court should reverse the erroneous decisions of the trial court and remand with instructions to enter orders that will protect Mr. Dana's attorney-client privilege.

V. ARGUMENT

A. **The Trial Court's Decision Waiving the Attorney-Client Privilege Should Be Reversed Because the Implied Waiver Under *Pappas* Does Not Extend Beyond Attorneys Involved in the Underlying Matter.**

Discovery rulings are generally reviewed for abuse of discretion. However, the extent of an implied waiver of the attorney-client privilege appears to be a matter of law that should be reviewed de novo. *See, e.g., Pappas v. Holloway*, 114 Wn.2d 198, 787 P.2d 30 (1990) (substituting the court's own judgment on the extent of implied waiver). In any event,

discretion is abused when it is based on an error of law. *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007). The trial court abused its discretion in granting Sussman Shank's motion to compel production of privileged documents based on the trial court's erroneous legal conclusion that Mr. Dana had waived his attorney-client privilege under *Pappas*.

1. Implied waiver of the attorney-client privilege under *Pappas* extends only to attorneys involved in the underlying matter.

“The purpose of the attorney-client privilege is to encourage free and open attorney-client communications by assuring the client that his communications will be neither directly nor indirectly disclosed to others.” *Pappas*, 114 Wn.2d at 203 (citations omitted). One long-standing exception to the privilege is that it is waived as to an attorney who is sued for malpractice by the client, enabling the attorney to defend himself. See *Stern v. Daniel*, 47 Wash. 96, 98, 91 P. 552 (1907). In *Pappas*, the Washington Supreme Court extended this waiver to other attorneys involved in the same underlying matter, but no further—not wanting to render the privilege illusory in all legal malpractice actions. *Pappas*, 114 Wn.2d at 206.

In *Pappas*, the claimed malpractice arose from litigation over the sale of cattle infected with brucellosis. In that underlying litigation, Mr.

Pappas had represented the malpractice plaintiffs during much of the trial preparation, but withdrew one month prior to trial. The malpractice plaintiffs had also been represented by various other attorneys in the same litigation either prior to or concurrent with Mr. Pappas. Mr. Pappas, defending himself against the malpractice claim, sought documents from the other attorneys in the underlying brucellosis litigation.

The Washington Supreme Court found that the malpractice issue “will involve examining decisions made at various stages of the underlying litigation. This will necessarily involve information communicated between these attorneys and the [malpractice plaintiffs].” *Pappas*, 114 Wn.2d at 209. The court held that the privilege was waived as to all attorneys involved in the underlying matter (the brucellosis litigation). *Id.* at 208.

The *Pappas* court was careful to distinguish its holding from cases in which information was sought from attorneys who were *not* involved in the underlying matter. *Id.* at 204-06 (e.g., referring to *Jakobleff v. Cerrato, Sweeney & Cohn*, 97 A.D.2d 834, 468 N.Y.S.2d 895 (1983): “The distinction between the two cases rests largely on the fact the plaintiff’s present attorney in *Jakobleff* did not participate in the underlying litigation which gave rise to the malpractice claim against the defendants.”). The

court clearly agreed that in such cases the privilege was not waived. *Id.* at 206 (“any communications between this attorney and plaintiff, which would have taken place after the underlying divorce became final, would have no effect upon the malpractice issue raised in plaintiff’s complaint.”).

By its own terms, *Pappas* does not waive the privilege in the present case. Mr. Dana’s complaint alleged malpractice committed by Sussman Shank in its representation of Mr. Dana in the *transaction* with CMN. The CMN litigation arose two years after Sussman Shank’s work in the transaction—and any alleged malpractice—was already complete. Neither Cushman Law Offices nor Scott Johnson was involved in the underlying transaction. Any communications between Mr. Dana and his attorneys in the CMN litigation would have no effect on the issue of Sussman Shank’s malpractice in the transaction. Since *Pappas* only waives the privilege as to attorneys involved in the underlying matter (the transaction), not in matters occurring after the alleged malpractice (the CMN litigation), the trial court erred in holding that Mr. Dana had waived the privilege as to the files of his attorneys in the CMN litigation. The trial court abused its discretion in ordering Mr. Dana to produce the privileged documents based on this error of law.

2. Mr. Dana did not waive his attorney-client privilege under the *Hearn* test.

In *Pappas*, the Washington Supreme Court adopted the *Hearn* test.

Under the *Hearn* test, a court will find an implied waiver of the attorney-client privilege when

- (1) the assertion of privilege was the result of some affirmative act, such as filing suit by the asserting party;
- (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to its defense.

Pappas, 114 Wn.2d at 207 (citing *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975)).

The second and third prongs of the *Hearn* test are not satisfied in the present case. Mr. Dana did not place the CMN litigation at issue. His complaint focused on the negligence of Sussman Shank in the underlying *transaction* and the damages caused by that negligence—the difference between the position in which Mr. Dana found himself, unprotected as a stockholder and employee, and his rightful position had Sussman Shank lived up to the proper standard of care as his attorneys in the transaction. Mr. Dana did not raise the issue of the CMN litigation, nor did he claim any damages arising therefrom.

Even if Mr. Dana placed the CMN litigation in issue, that litigation

is not relevant to the issue of Sussman Shank's negligence, since all acts of other attorneys in the CMN litigation occurred long after Sussman Shank's negligence was complete. *See Pappas*, 114 Wn.2d at 205-06. The actions of the attorneys at Cushman Law Offices in the CMN litigation have no bearing on whether Sussman Shank committed malpractice during the underlying transaction two years before.

Even if the CMN litigation were relevant to the issue of damages, the third prong of the *Hearn* test has not been satisfied, because the files are not vital to the preparation of Sussman Shank's case. Information is vital under the *Hearn* test only where it is unavailable from any other, unprivileged source. *Frontier Refining, Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 701 (10th Cir., 1998) (*citing Hearn*, 68 F.R.D. at 581). Mere relevance is insufficient. *Id.* Evidence to challenge Mr. Dana's claimed damages is readily available from other sources, so it is unnecessary to invade the attorney-client privilege and work product protections.

Because the second and third prongs of the *Hearn* test are not satisfied as to the files in the CMN litigation, the attorney-client privilege is not waived as to those files. The trial court abused its discretion by ordering Mr. Dana to produce the privileged files based on its error of law.

3. Other courts have refused to waive the attorney-client privilege under similar facts.

The Washington Supreme Court's reasoning in *Pappas*, which demands reversal of the trial court on this issue, is also supported by the decisions of other courts faced with facts strikingly similar to the present case. In both *Fischel & Kahn, Ltd. v. van Straaten Gallery, Inc.*, 189 Ill.2d 579, 727 N.E.2d 240 (2000), and *1st Sec. Bank of Wash. v. Eriksen*, 2007 WL 188881 (W.D. Wash. 2007), the courts held that the attorney-client privilege was not waived as to attorneys who represented the malpractice plaintiffs in litigation that took place after the underlying transactions from which the malpractice arose.

In *Fischel & Kahn*, an opinion from the Supreme Court of Illinois which discussed *Pappas* at length, the defendant law firm, Fischel & Kahn, had drafted documents for van Straaten to use when taking art on consignment to sell in its gallery. Subsequently, some consignment artists sued van Straaten, which retained other counsel for its defense. That litigation settled. When Fischel & Kahn sued for payment of its legal fees, van Straaten counterclaimed for malpractice in drafting the documents, explicitly seeking damages for the defense and settlement of the subsequent litigation. Fischel & Kahn sought files from van Straaten's

litigation counsel.

The Supreme Court of Illinois held that the files of the litigation attorneys were not relevant to the issue of Fischel & Kahn's negligence in the transactional work. *Fischel & Kahn*, 189 Ill.2d at 588-89 ("Here, no question exists regarding who allegedly committed the malpractice complained of."). The court refused to find a waiver of the privilege even though van Straaten had explicitly placed damages arising from the subsequent litigation at issue. *Id.* at 587 ("If raising the issue of damages in a legal malpractice action automatically resulted in the waiver of the attorney-client privilege with respect to subsequently retained counsel, then the privilege would be unjustifiably curtailed."). The court held the files were not vital to Fischel & Kahn's defense because evidence to challenge damages was readily available to either party from non-privileged sources. *Id.* at 589. The greater convenience of obtaining the information from the attorney files could not justify invasion of the privilege. *Id.* at 590.

Similarly, in *1st Security*, a case from the Western District of Washington, the federal court, applying Washington law, granted a protective order to the malpractice plaintiff, prohibiting the discovery of files of plaintiff's litigation attorneys. The plaintiff had retained the

defendant attorneys to draft employment documents for its CEO. Subsequently, the CEO was fired and sued the plaintiff, who obtained other counsel for the litigation. That litigation settled, and the plaintiff sued defendant attorneys for malpractice in drafting the employment documents, seeking to recover as damages its attorney fees and settlement costs from the subsequent litigation. Defendant attorneys sought the files of plaintiff's counsel in the litigation, arguing the privilege was waived.

The court held that *Pappas* did not support a waiver because the communications being sought occurred *after* the underlying matter that gave rise to the malpractice claim. *1st Security*, 2007 WL 188881, at *3.

Pappas is clear in distinguishing cases such as this where the attorney-client communications being sought occurred only after “the underlying litigation which gave rise to the malpractice claim.” The “underlying matter” that give rise to the malpractice claim here is the drafting of the SERP, not the later filed lawsuit.

Id. (citations omitted). The court then applied the *Hearn* test and held that the files of litigation counsel were not relevant to defendant attorneys' malpractice liability. *Id.* Even if information about the settlement was relevant to damages, it was not vital to the defense because such information was available from other non-privileged sources. *Id.* (“On the question of the reasonableness of the settlement, defendants have access to

witnesses other than plaintiff's attorneys who can shed light on the reasons for settlement, and to experts who could opine on the reasonableness of the settlement.").

Just as in *Ist Security*, the underlying matter here is the *transaction* with CMN, not the CMN litigation, which took place two years later. Just as in *Fischel & Kahn*, no question exists as to who could have committed the malpractice alleged in Mr. Dana's complaint. Cushman Law Offices was not involved until two years after the underlying transaction was complete. Mr. Dana has not claimed damages arising from the CMN litigation, but even if he had, as in *Fischel & Kahn* and , files of his attorneys in the CMN litigation would not be vital to Sussman Shank's defense because information relevant to damages can be obtained from other, non-privileged sources.

It was an error of law for the trial court to conclude that Mr. Dana's attorney-client privilege was waived as to his attorneys in the CMN litigation. The trial court abused its discretion by ordering Mr. Dana to produce the privileged documents, based on its erroneous conclusion of law. This court should reverse the trial court's decision and remand for further proceedings, including appropriate orders to protect Mr. Dana's attorney-client privilege.

Reversal on the issue of attorney-client privilege would, of course, also require reversal of the trial court's decision to disqualify Cushman Law Offices, because there would be no material information to which any of the Cushman attorneys could testify. Thus none of the Cushman attorneys could be necessary witnesses, and there would be no grounds for disqualification. But even if Mr. Dana's attorney-client privilege was waived as to the subsequent CMN litigation, disqualification of Cushman Law Offices was still an abuse of discretion, and this court should reverse.

B. The Trial Court's Decision Disqualifying Cushman Law Offices Should Be Reversed Because It Was Contrary to Law and Based on Untenable Reasons.

The standard of review of disqualification orders is abuse of discretion. *Am. States Ins. Co. ex rel. Kommavongsa v. Nammathao*, 153 Wn. App. 461, 466, 220 P.3d 1283 (2009). A trial court abuses its discretion when it bases its decision on untenable grounds or untenable reasons. *State v. Schmitt*, 124 Wn. App. 662, 666, 102 P.3d 856 (2004) (citing *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)). Discretion is also abused when it is exercised contrary to law. *Am. States*, 153 Wn. App. at 466 (citing *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007)).

A court should not disqualify an attorney under RPC 3.7 without

compelling circumstances. *Pub. Util. Dist. No. 1 of Klickitat County v. Int'l Ins. Co.*, 124 Wn.2d 789, 812, 881 P.2d 1020 (1994) (“*PUD No. 1*”).

1. The lawyer-witness rule is embodied in RPC 3.7.

“[A] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness” unless one of four exceptions applies. RPC 3.7(a). This rule protects the fact finder from confusion caused by a lawyer playing dual roles in the same trial. RPC 3.7, Comments [1]-[5]. The lawyer may continue as advocate where “(3) disqualification of the lawyer would work substantial hardship on the client; or (4) the lawyer has been called by the opposing party.” RPC 3.7(a).

Where the lawyer is called by the opposing party, disqualification may still be proper if the lawyer (1) will provide material evidence (2) that is unobtainable elsewhere and (3) the testimony is prejudicial to the testifying lawyer’s client. *PUD No. 1*, 124 Wn. 2d at 812. But even then the court has discretion to allow the lawyer to continue to act as advocate. *Am. States*, 153 Wn. App. at 468; RPC 3.7, Comment [8].

Where disqualification would work a hardship on the client, the court must balance the interests of the client against the interests of the tribunal and the opposing party. RPC 3.7, Comment [4].

2. Disqualification of the entire firm was contrary to law.

The plain language of RPC 3.7 only requires disqualification of a lawyer who is a necessary witness. Disqualification is not imputed to other members of the firm. “A lawyer *may act as advocate* in a trial in which another lawyer in the lawyer’s firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.” RPC 3.7(b) (emphasis added). There is no danger of confusing the fact finder when the advocate is a different person than the lawyer-witness, even when both belong to the same firm. RPC 3.7, Comment [5].

To disqualify the entire firm, Sussman Shank had to show that each and every attorney at Cushman Law Offices was a necessary witness. *See Microsoft Corp. v. Immersion Corp.*, 2008 WL 682246, *3, 87 U.S.P.Q.2d 1701 (W.D. Wash. 2008) (denying Microsoft’s motion to disqualify an entire law firm). Sussman Shank made no such showing. It showed only that the attorneys whose depositions it noted (including Jon Cushman and Ben Cushman) might provide relevant evidence. There is no evidence in the record that other Cushman attorneys have personal knowledge of any material facts. The other Cushman attorneys are not necessary witnesses and should not have been disqualified.

Alternatively, Sussman Shank had to show that a non-consentable conflict could be imputed to the entire firm. *See* RPC 3.7, Comment [7]. Sussman Shank presented no evidence of a non-consentable conflict under Rule 1.7 or Rule 1.9. The trial court made no finding of any such conflict. Jon Cushman and Ben Cushman testified they would have no such conflicts, and their testimony would not likely conflict with that of their client, Mr. Dana. Sussman Shank presented no evidence to refute this. There are no conflicts that can be imputed to the rest of the firm.

Other Cushman attorneys are not necessary witnesses and have no imputed conflicts. Rule 3.7 allows them to represent Mr. Dana in this malpractice lawsuit, even if Jon Cushman and Ben Cushman were properly disqualified (which, as shown below, they were not). The Rule does not grant discretion here. The trial court erred by disqualifying the entire firm. This court should reverse the trial court's abuse of discretion.

3. Disqualification was untenable because the record shows that the Cushman attorneys were not necessary witnesses.

[A] motion for disqualification *must be supported by a showing* that the attorney will give evidence material to the determination of the issues being litigated, that the evidence is unobtainable elsewhere, and that the testimony is or may be prejudicial to the testifying attorney's client.

PUD No. 1, 124 Wn.2d at 812 (emphasis added). The court is required to

apply this standard and make findings on each of the three issues—material, unobtainable elsewhere, and prejudicial—before making the decision to disqualify. *Am. States*, 153 Wn. App. at 467.

Sussman Shank’s two-page motion for disqualification failed to address any of these elements. It was not supported by any declarations. It mentioned RPC 3.7, but did not argue why the rule would require disqualification under these facts. “Such bald assertions are insufficient in the context of a motion to disqualify.” *Microsoft*, 2008 WL 682246 at *3 (Microsoft failed to present evidence that the attorneys were necessary witnesses, merely asserting that they should be disqualified because they participated in the underlying suit).

At best, the motion showed, by reference to other briefing, that the information was material and the attorneys were a *convenient* source. But mere convenience does not make the attorneys necessary witnesses. *See Fischel & Kahn*, 189 Ill.2d at 590. An attorney is only a necessary witness if the evidence is unobtainable elsewhere. *PUD No. 1*, 124 Wn.2d at 812. Sussman Shank did not even suggest that the evidence was unobtainable elsewhere, so it failed to show that Jon Cushman and Ben Cushman were necessary witnesses. It also failed to show that their testimony would be prejudicial to Mr. Dana.

In addition to Sussman Shank's complete failure of proof, the trial court did not make a finding that any of the Cushman attorneys were necessary witnesses or that the evidence was unobtainable elsewhere. In fact, the record does not support any such findings.

The court found as facts that the attorney depositions had been noted (CP at 436-38, ¶ 3); that the depositions may lead to discoverable evidence, *Id.* at ¶ 7; that the Cushman attorneys' testimony would be central to the case, *Id.* at ¶¶ 10-11; that the deposition testimony may be disadvantageous to Mr. Dana, *Id.* at ¶ 13; and that Mr. Dana would incur only minor prejudice by disqualification of the Cushman firm, *Id.* at ¶¶ 15-17. At best, these findings establish that the Cushman attorneys would give material evidence that may be prejudicial to Mr. Dana. The court made no finding that the evidence is unobtainable elsewhere. (*See* CP at 436-38.) Without such a finding, the Cushman attorneys are not necessary witnesses and there are no tenable grounds for disqualification.

The record in this case does not support a finding that the evidence is unobtainable elsewhere. Sussman Shank set forth in related briefing the information it sought through attorney depositions. (CP at 343-53.) It explained how the information was relevant but did not show that the attorneys were the only source. *Id.* Mr. Dana then demonstrated that all of

the information could be obtained from Scott Johnson, Clydia Cuykendall, expert witnesses, or Mr. Dana, without the need to make Jon Cushman or Ben Cushman witnesses. (CP at 388-93.)

Without the required showing in Sussman Shank's motion to disqualify, the trial court's decision lacked a factual basis. The record does not support a finding that any of the Cushman attorneys were necessary witnesses. The trial court abused its discretion by disqualifying the Cushman attorneys on untenable grounds. This court should reverse the disqualification of each of the Cushman attorneys.

4. Even if disqualification was proper, the disqualified attorneys are only precluded from acting as advocates at trial.

Rule 3.7(a) provides that "a lawyer shall not act as advocate *at a trial* in which the lawyer is likely to be a necessary witness" (emphasis added). This plain language "is unequivocally clear in only prohibiting attorneys from acting as an advocate *at trial*." *Microsoft*, 2008 WL 682246 at *3 (emphasis in original). Thus, attorneys disqualified under RPC 3.7 may still represent their clients. They may negotiate settlements, conduct discovery, draft motions and briefs, and otherwise prepare for trial. What they may *not* do, under the rule, is act as advocate *at the trial*. This is because the main concern of RPC 3.7 is to protect the tribunal from the

possible confusion of an attorney acting in a dual role at trial. Since that danger only arises *at trial*, there is no reason to disqualify the attorney from other aspects of the representation, and the rule does not do so.

Even if this court finds that disqualification was proper, the court should order that Cushman Law Offices may continue to represent Mr. Dana in this case, so long as the disqualified attorneys do not act as advocates at trial.

C. **The Trial Court's Findings of Fact Are Not Supported By the Record.**

In its May 27, 2011, disqualification order, the trial court erroneously found as facts that the Cushman attorneys' communications with Mr. Dana would be central to the case (CP at 437, ¶ 10); that the Cushman attorneys' testimony would be central to the legal malpractice claims (CP at 437, ¶ 11); and that the Cushman attorneys would be witnesses and advocates defending their own handling of the CMN litigation (CP at 437, ¶ 12). These findings are based on a fundamental misunderstanding of the issues in this case.

The testimony of Cushman attorneys and their communications with Mr. Dana are not central to this case. What is central to this case is the alleged malpractice of Sussman Shank in the 2007 transaction with

CMN. The Cushman attorneys have no personal knowledge of the alleged malpractice or the transaction, which was complete two years before they represented Mr. Dana in the CMN litigation in 2009-10. The Cushman attorneys' handling of the CMN litigation has nothing to do with the central issue of whether Sussman Shank breached duties it owed to Mr. Dana in 2007. In addition, Mr. Dana has not claimed any damages arising from the CMN litigation or the settlement. The CMN litigation is simply not at issue in this case. The trial court's finding that the Cushman attorneys could provide testimony central to the case has no basis in the record and should be reversed.

VI. CONCLUSION

For the reasons stated above, Mr. Dana asks this court to reverse the decisions of the trial court and remand with instructions to enter orders that will protect Mr. Dana's attorney-client privilege and allow the attorneys at Cushman Law Offices to continue to represent him.

Respectfully Submitted this 13 day of February, 2012.

CUSHMAN LAW OFFICES, P.S.



Kevin Hochhalter, WSBA #43124
Attorney for Troy Dana

CERTIFICATE OF SERVICE

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STATE OF WASHINGTON

BY [Signature] DEPUTY

I certify, under penalty of perjury under the laws of the State of Washington, that on February 13, 2012, I caused to be served a true copy of the foregoing Brief, by the method indicated below, and addressed to each of the following:

original:	Court of Appeals Division II 950 Broadway, #300 Tacoma, WA 998402 253-593-2806	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input checked="" type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Electronic Mail
copy:	Patrick Rothwell Davis Rothwell Earle & Xochihua, PC 701 Fifth Ave, Suite 5500 Seattle, WA 98104-7047	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input checked="" type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Electronic Mail
copy:	Frank Lagesen Cosgrave Vergeer Kester LLP 805 SW Broadway, 8 th Floor Portland, OR 97205	<input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Electronic Mail

DATED this 13th day of February, 2012 in Olympia, Washington.

[Signature]
M. Katy Kuchno
Paralegal to Kevin Hochhalter

APPENDIX

189 Ill.2d 579
Supreme Court of Illinois.

FISCHEL & KAHN, LTD., Appellee,
v.
van STRAATEN GALLERY, INC. et al., Appellants.

No. 86831. | Jan. 21, 2000. |
Rehearing Denied April 3, 2000.

Law firm which had advised operator of art studios, and framing businesses, regarding Consignment of Art Act, sued operator and businesses for attorney fees owed, and operator counterclaimed for legal malpractice. The Circuit Court, Cook County, Loretta C. Douglas, J., entered order finding operator and businesses in contempt for refusing to disclose documents relating to their representation by subsequent attorneys in actions arising from fire which destroyed artwork. Appeal was taken, and on motion for rehearing, the Appellate Court, 304 Ill.App.3d 336, 234 Ill.Dec. 773, 703 N.E.2d 634, affirmed as modified. Operator's petition for leave to appeal was granted. The Supreme Court, Miller, J., held that operator's filing of legal malpractice counterclaim did not waive attorney-client privilege or work-product protection for operator's communications with the law firm that represented it in underlying lawsuit brought by consignment artists.

Affirmed in part, reversed in part, and remanded.

Attorneys and Law Firms

****241 *580 ***942** Daniel S. Hefter, Martin B. Carroll and Todd Harold Fox, Hefter & Carroll, Chicago, for Appellants.

Hinshaw & Culbertson, Chicago (Stephen R. Swofford, Thomas P. McGarry and David M. Schultz, of counsel), for Appellee.

Opinion

Justice MILLER delivered the opinion of the court:

Plaintiff, Fischel & Kahn, Ltd. (Fischel & Kahn), filed a complaint in the circuit court of Cook County against defendants, van Straaten Gallery, Inc., and the New van Straaten Gallery, Inc. (van Straaten), for attorney fees. Van Straaten filed a counterclaim alleging that Fischel & Kahn was professionally negligent in representing van Straaten. During discovery, Fischel & Kahn filed a request for the

production of documents. Van Straaten refused to produce 38 documents resulting from representation by subsequent counsel, claiming that documents were protected by attorney-client and work product privileges. Of the 38 documents van Straaten refused to produce, the trial court ordered the production of 22 documents. Van Straaten refused to produce any of the documents. As a result of van Straaten's failure to produce the documents, the trial court cited van Straaten for contempt and fined van Straaten. Van Straaten appealed. Fischel & Kahn cross-appealed. The appellate court found that van Straaten had waived any privileges ***581** as to some, but not all, of the contested documents and ordered van Straaten to turn over the documents for which it found van Straaten had waived any privilege. The appellate court vacated the trial court's order of contempt. 301 Ill.App.3d 336, 234 Ill.Dec. 773, 703 N.E.2d 634. We allowed van Straaten's petition for leave to appeal (177 Ill.2d R. 315(a)), and we now reverse that portion of the appellate court's opinion requiring disclosure.

BACKGROUND

In 1986, van Straaten retained the law firm of Fischel & Kahn to provide legal advice regarding the impact that the then recently enacted Illinois Consignment of Art Act (Consignment Act) (815 ILCS 320/0.01 *et seq.* (West 1996)) would have on van Straaten's art gallery business. Fischel & Kahn advised van Straaten that it could limit its liability to consignment artists in case of damage or destruction of the artists' work to the cost of the materials used to create the work. Fischel & Kahn drafted contractual language consistent with this advice for van Straaten to use in contracts with consignment artists.

On April 15, 1989, a fire destroyed van Straaten's gallery, including van Straaten's inventory of consigned art. Van Straaten filed suit against the owner of the building where the gallery was located and against the company that was renovating the building at the time of the fire. Several consignment artists intervened in this litigation, bringing claims against van Straaten for damages stemming from the destruction of their artwork. (The parties here refer to this action as the Mesirow litigation, for the name of one of the entities in the underlying litigation.) In July 1990, van Straaten retained the law firm of Pope & John to represent van Straaten in the Mesirow litigation. We note that Fischel ****242 ***943** & Kahn continued to represent van Straaten until no later than March 31, 1992.

*582 Fischel & Kahn commenced the present action on October 14, 1992, when it filed a complaint in the circuit court of Cook County against van Straaten seeking payment of legal fees. In the complaint, Fischel & Kahn alleged that from on or about August 1, 1990, through March 31, 1992, Fischel & Kahn furnished professional legal services to van Straaten totaling \$41,903.26.

Van Straaten answered the complaint by denying the allegations that payment was due to Fischel & Kahn. Additionally, van Straaten asserted several affirmative defenses alleging that no amount was due to Fischel & Kahn because Fischel & Kahn breached fiduciary duties owed to van Straaten; the contract for legal services was voidable at the discretion of van Straaten; and Fischel & Kahn breached its agreement to perform legal services for van Straaten. Van Straaten also filed a counterclaim against Fischel & Kahn. In the counterclaim, van Straaten alleged, among other things, that Fischel & Kahn committed malpractice in 1986 by negligently providing van Straaten with erroneous advice regarding the liability limiting contract provision Fischel & Kahn drafted for van Straaten to use with consignment artists.

In answering van Straaten's counterclaim, Fischel & Kahn denied that it was professionally negligent. Further, Fischel & Kahn filed several affirmative defenses of its own, alleging that van Straaten was contributorily negligent in failing to exercise ordinary care, that van Straaten assumed the risk of damages in failing to secure adequate insurance, and that the settlement of the disputes with the responsible parties constituted an accord and satisfaction of any claims for damages van Straaten might have resulting from the Mesriow litigation.

Fischel & Kahn filed a request for production of documents on July 30, 1993. In this request, Fischel & Kahn sought all of the contents of Pope & John's files relating *583 to the Mesriow litigation and the consignment artists' claims. Van Straaten objected to the production of 38 of the documents based either on the attorney-client privilege or the work product doctrine.

After an *in camera* inspection, the trial court found that van Straaten had waived its attorney-client and attorney work product privileges with respect to 22 of the documents. The trial court believed these documents were relevant to claims made by van Straaten in its counterclaim and that van Straaten waived any privilege when it placed these claims into controversy by filing the counterclaim against Fischel & Kahn. The trial court ordered these 22 documents

disclosed. The trial court, however, believed that 16 of the 38 contested documents remained privileged. Van Straaten refused to produce any of the 22 documents ordered disclosed and was held in contempt.

Van Straaten appealed, asking the appellate court to find that the privilege had not been waived and to reverse the trial court's order holding van Straaten in contempt for failure to produce the documents that it alleged were protected by the attorney-client and work product privilege. In a cross-appeal, Fischel & Kahn asked the appellate court to modify the order of the trial court finding 16 documents protected by the attorney-client and work product privilege by finding that van Straaten, in addition to waiving the privilege with respect to the 22 documents, also waived any privilege with respect to the 16 remaining documents.

The appellate court affirmed, concluding that van Straaten's counterclaim for malpractice and Fischel & Kahn's affirmative defenses to that action put the contents of the documents at issue, waiving both the attorney-client and work product privileges. 301 Ill.App.3d at 341-42, 234 Ill.Dec. 773, 703 N.E.2d 634. Accordingly, the appellate court held that documents 1 **243 ***944 through 10, 17, and 19 through 23 were *584 discoverable. The appellate court held, however, that documents 11, 12, 14, 15, 16, and 18 remained privileged because these documents were correspondence between Pope & John and a law firm later retained by van Straaten to pursue the malpractice claim against Fischel & Kahn. The appellate court remanded the cause for the trial judge to consider the status of the 16 documents the trial court had found protected. Finally, the appellate court vacated the trial court's order of contempt and directed van Straaten to turn over all documents for which it found any privilege had been waived. 301 Ill.App.3d at 348, 234 Ill.Dec. 773, 703 N.E.2d 634. We allowed van Straaten's petition for leave to appeal. 177 Ill.2d R. 315(a).

DISCUSSION

The issue before us is whether van Straaten, by filing a counterclaim against Fischel & Kahn for malpractice, waived the attorney-client and work product privileges with Pope & John, thereby subjecting the disputed documents to disclosure.

Because van Straaten contends that the discovery of the documents is protected by both the attorney-client privilege and the work product doctrine, we address each separately.

I. Attorney-Client Privilege

In defining the attorney-client privilege, this court has stated that where legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relating to that purpose, made in confidence by the client, are protected from disclosure by himself or the legal adviser, except the protection be waived. *In re Himmel*, 125 Ill.2d 531, 541, 127 Ill.Dec. 708, 533 N.E.2d 790 (1988), quoting *People v. Adam*, 51 Ill.2d 46, 48, 280 N.E.2d 205 (1972), quoting 8 J. Wigmore, *Evidence* § 2292 (McNaughton rev. ed.1961).

“The purpose of the attorney-client privilege is to encourage and promote full and frank consultation between *585 a client and legal advisor by removing the fear of compelled disclosure of information.” *Waste Management, Inc. v. International Surplus Lines Insurance Co.*, 144 Ill.2d 178, 190, 161 Ill.Dec. 774, 579 N.E.2d 322 (1991), quoting *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill.2d 103, 117-18, 59 Ill.Dec. 666, 432 N.E.2d 250 (1982); see also *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). Moreover, “[t]he [attorney-client] privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client.” *Upjohn*, 449 U.S. at 389, 101 S.Ct. at 682, 66 L.Ed.2d at 591.

1 In the present case, Fischel & Kahn asserts that van Straaten waived its attorney-client privilege with Pope & John when van Straaten sued Fischel & Kahn for malpractice. Fischel & Kahn argues that because van Straaten seeks damages for the defense and settlement of the Mesirow litigation, any facts surrounding that litigation are central to the question of whether Fischel & Kahn can be held liable for malpractice. Fischel & Kahn claims that without receiving all the documents surrounding the Mesirow litigation and its settlement, including documents that reveal otherwise privileged attorney-client communications, it would be impossible to determine whether and to what extent van Straaten's alleged loss resulted from Fischel & Kahn's alleged malpractice. We disagree.

In the present case, it is undisputed that van Straaten, by counterclaiming against Fischel & Kahn for legal malpractice, has placed Fischel & Kahn's advice at issue and has waived the attorney-client privilege with respect to communications between it and Fischel & Kahn. However, we do not believe that it follows that van Straaten, by that

same action, has waived the attorney-client privilege with respect to communications between it and its subsequent counsel, Pope & John.

****244 *586 ***945** We find support for our conclusion in cases from other jurisdictions addressing similar circumstances. In *Jakobleff v. Cerrato, Sweeney & Cohn*, 97 A.D.2d 834, 468 N.Y.S.2d 895 (1983), the court held that when a plaintiff sued her former attorney for malpractice, she did not waive the attorney-client privilege as to her present attorney when the defendant attorney impleaded the present attorney on the issue of damages. The court stated that by bringing an action against her former attorney for legal malpractice, “plaintiff has placed her damages in issue, and defendants may both raise the defense of plaintiff's failure to mitigate damages and assert a third-party claim for contribution against the present attorney for those damages for which the former attorneys may be liable to plaintiff.” *Jakobleff*, 97 A.D.2d at 835, 468 N.Y.S.2d at 897. The court further stated:

“[I]t simply cannot be said that plaintiff has placed her privileged communications with her present attorney in issue, or that discovery of such communications is required to enable defendants to assert a defense or to prosecute their third-party claim. To conclude otherwise would render the privilege illusory in all legal malpractice actions: the former attorney could, merely by virtue of asserting a third-party claim for contribution against the present attorney, effectively invade the privilege in every case.” *Jakobleff*, 97 A.D.2d at 835-36, 468 N.Y.S.2d at 897.

In the present case, we believe the affirmative defenses filed by Fischel & Kahn are analogous to the third-party claim for contribution against the attorney in *Jakobleff*. To allow Fischel & Kahn to invade the attorney-client privilege with respect to subsequently retained counsel in this case simply by filing the affirmative defenses it did would render the privilege illusory with respect to the communications between van Straaten and Pope & John. Thus, we believe that the allegations raised in Fischel & Kahn's affirmative defenses were insufficient to put the cause of van Straaten's damages at issue, *587 resulting in waiver of the attorney-client privilege in this case.

Similar to *Jakobleff*, in *Miller v. Superior Court*, 111 Cal.App.3d 390, 168 Cal.Rptr. 589 (1980), plaintiff Miller sued one of her former attorneys for malpractice, alleging that he negligently represented her in her divorce. The attorney raised the statute of limitations as a defense and

requested discovery of otherwise privileged communications between plaintiff and other attorneys after defendant's alleged malpractice. The court held that the communications with plaintiff's attorneys after the alleged malpractice were protected by the attorney-client privilege. *Miller*, 111 Cal.App.3d at 395, 168 Cal.Rptr. at 591. The court explained:

"Miller's state of knowledge is clearly in issue and may be proved by any competent evidence available to real parties [*i.e.*, Miller's former attorney]. However, the mere fact that her state of mind is in issue does not cause a waiver of her privilege concerning confidential communications between her and attorneys she consulted after the alleged malpractice. There is no statutory waiver in such circumstances, and no basis for creating a nonstatutory waiver. To do so would create an intolerable burden upon the attorney-client privilege, making it very difficult for the parties to the relationship to openly discuss matters which might eventually lead to litigation." *Miller*, 111 Cal.App.3d at 394-95, 168 Cal.Rptr. at 591.

We believe that a similar principle applies in this case. That van Straaten's damages are subject to dispute by the parties does not mean that van Straaten has waived its attorney-client privilege regarding communications between it and Pope & John that might touch on that question. If raising the issue of damages in a legal malpractice action automatically resulted in the waiver of the attorney-client privilege with respect to subsequently **245 ***946 retained counsel, then the privilege would be unjustifiably curtailed. See *Schlumberger Ltd. v. Superior *588 Court*, 115 Cal.App.3d 386, 393, 171 Cal.Rptr. 413, 417 (1981).

In support of its position, Fischel & Kahn relies on the decision by the Supreme Court of Washington in *Pappas v. Holloway*, 114 Wash.2d 198, 787 P.2d 30 (1990). In that case, the court held that when clients sued a former attorney for malpractice, the clients waived the attorney-client privilege with respect to all attorneys involved in the underlying litigation. *Pappas*, 114 Wash.2d at 208, 787 P.2d at 36.

We believe that *Pappas* is distinguishable from the present case. In *Pappas*, attorney Pappas sued his former clients, the Holloways, for attorney fees. The Holloways counterclaimed, alleging that Pappas committed malpractice in his handling of the underlying litigation. Pappas then brought third-party actions against other attorneys who jointly represented the Holloways in the underlying matter. Pappas alleged the same cause of action against the third-party defendants as the

Holloways had alleged against him. Pappas later sought discovery of the third-party attorneys' files pertaining to the underlying suit. The lawyers objected to the production of the requested materials on the basis of the attorney-client privilege.

The Washington Supreme Court affirmed the trial court's ruling that the Holloways waived the attorney-client privilege with respect to all the lawyers involved in the underlying litigation. The court concluded that the Holloways could not bring an action against Pappas for malpractice and at the same time protect from disclosure communications made with other lawyers who also participated in the underlying litigation that gave rise to the Holloways' malpractice claim. Distinguishing *Miller* and *Jakobleff*, the *Pappas* court noted that the communications sought by Pappas took place during the time of the alleged malpractice and involved lawyers who were *589 also representing the clients in the same matter when the malpractice allegedly occurred. *Pappas*, 114 Wash.2d at 205-06, 787 P.2d at 34-35.

For these reasons, we believe that *Pappas* is distinguishable from the present case. Here, no question exists regarding who allegedly committed the malpractice complained of. There are no allegations in van Straaten's counterclaim referring to Fischel & Kahn's conduct during the Mesirow litigation. Here, Fischel & Kahn's alleged negligence, occurring in 1986, was already complete at the time Pope & John was retained. Thus, we do not perceive the same problem here as the *Pappas* court did in determining who, among a number of different lawyers handling the same matter simultaneously, might have committed the alleged malpractice.

Moreover, *Pappas* ruled in favor of disclosure of the communications with the other lawyers only after determining, under *Hearn v. Rhay*, 68 F.R.D. 574 (E.D.Wash.1975), that application of the privilege would deny Pappas access to information vital to his defense of the Holloways' malpractice action. The *Pappas* court believed that decisions made at various stages in the proceedings would be at issue in the malpractice case, and the court noted that Pappas did not actually try the case or take part in its eventual settlement. We do not believe that the material sought by Fischel & Kahn in this case is similarly vital to its defense of van Straaten's malpractice action. Nondisclosure of van Straaten's communications with Pope & John about the course and conduct of the Mesirow litigation will not prevent Fischel & Kahn from challenging van Straaten's evidence on the issue of damages. Evidence regarding the client's damages resulting from the law firm's alleged negligence would, in the

present context, be readily available to either party. Thus, we cannot conclude here, as the court did in *Pappas*, that the requested information is vital to the lawyer's defense of the malpractice action.

****246 *590 ***947** As additional authority, Fischel & Kahn directs this court's attention to *Rutgard v. Haynes*, 185 F.R.D. 596 (S.D.Cal.1999). In *Rutgard*, the court held that a plaintiff, by claiming damages to recover the amount of a settlement of an underlying case, waived the attorney-client privilege between himself and a subsequently retained attorney by putting "in issue" the reasonableness of that settlement and the attorney's actions in defending plaintiff and recommending that settlement. *Rutgard*, 185 F.R.D. at 599-600.

Although *Rutgard* offers support for Fischel & Kahn's position, we believe that the better approach is set forth in *Jakobleff* and *Miller*. Thus, we disagree with Fischel & Kahn's assertion that, without reviewing all the documents surrounding the Mesirow litigation and its settlement, it is impossible to determine whether and to what extent van Straaten's alleged loss resulted from Fischel & Kahn's alleged malpractice, if any, or some other source. Here, the privileged documents present one alternative means, though perhaps the most convenient, in which this information may be obtained. Mere convenience, however, should not justify waiver of the attorney-client privilege. To allow Fischel & Kahn access to the privileged documents in this case would, we believe, unnecessarily undermine the purpose of the attorney-client privilege to encourage full and frank communication between attorneys and their clients. See *Waste Management*, 144 Ill.2d at 190, 161 Ill.Dec. 774, 579 N.E.2d 322; see also *Upjohn Co.*, 449 U.S. at 389, 101 S.Ct. at 682, 66 L.Ed.2d at 591. Therefore, we hold that van Straaten has not waived the attorney-client privilege in this case with respect to Pope & John by filing a malpractice action seeking attorney fees and settlement costs of the Mesirow litigation.

II. Work Product Doctrine

Rule 201(b)(2) sets the parameters for the scope of discovery of work product materials. It provides, in pertinent part:

***591** "(2) *** *Work Product*. *** Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney." 166 Ill.2d R. 201(b)(2).

2 The work product doctrine provides a broader protection than the attorney-client privilege and is designed to protect the right of an attorney to thoroughly prepare his case and to preclude a less diligent adversary attorney from taking undue advantage of the former's efforts. See *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947).

Similar to the argument Fischel & Kahn made with respect to the attorney-client privilege, Fischel & Kahn contends that van Straaten waived the work product privilege by suing Fischel & Kahn for malpractice. Again, Fischel & Kahn asserts that without reviewing all the documents surrounding the Mesirow litigation and its settlement, including Pope & John's documents that reveal otherwise privileged work product, it would be impossible to determine whether and to what extent van Straaten's alleged loss resulted from Fischel & Kahn's alleged malpractice.

Initially, we observe that the work product documents sought by Fischel & Kahn in this case pertain to the underlying Mesirow litigation, which has concluded. It has been held, however, that the work product doctrine protects materials prepared for any litigation or trial so long as they were prepared by or for a party to the subsequent litigation. *Federal Trade Comm'n v. Grolier Inc.*, 462 U.S. 19, 25-26, 103 S.Ct. 2209, 2213-14, 76 L.Ed.2d 387, 393 (1983). The rationale for continuing protection, even in unrelated cases, was explained in *In re Murphy*, 560 F.2d 326 (8th Cir.1977):

"If work product is protected in related, but not unrelated future cases, an attorney would be hesitant to assemble extensive work product materials because of the concern ***592** that the materials will not ****247 ***948** be protected in later, unrelated litigation. The unrelatedness of the subsequent litigation provides an insufficient basis for disregarding the privilege ***." *Murphy*, 560 F.2d at 335.

3 We agree with the rationale expressed in *Murphy* and conclude that the work product privilege extends to all subsequent litigation. See, e.g., *Midland Investment Co. v. Van Alstyne, Noel & Co.*, 59 F.R.D. 134 (S.D.N.Y.1973); *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 275 F.Supp. 146 (E.D.Pa.1967). The issue then becomes whether van Straaten has waived the work product doctrine by suing Fischel & Kahn for malpractice.

4 As stated, van Straaten is suing Fischel & Kahn for malpractice. Van Straaten is attempting to recover damages in the amount it settled the Mesirow litigation as well as attorney fees. Although Pope & John's work product may be relevant

to the issues raised, we do not believe that its potential relevance justifies waiver of the work product doctrine in this case. If a lawyer's work product were subject to disclosure to opposing counsel merely on a showing of relevancy, much of what is now put down in writing would remain unwritten. "An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." *Hickman*, 329 U.S. at 511, 67 S.Ct. at 393-94, 91 L.Ed. at 462. For the reasons stated above, and for the reasons expressed in the earlier discussion of the attorney-client privilege, we conclude that van Straaten did not waive the work product

doctrine in this case by filing a malpractice action against Fischel & Kahn.

CONCLUSION

For the reasons stated, we reverse that part of the *593 appellate court judgment requiring disclosure of the privileged documents and remand to the circuit court for further proceedings consistent with this opinion.

Appellate court judgment affirmed in part and reversed in part; cause remanded.

Parallel Citations

189 Ill.2d 579, 727 N.E.2d 240

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United States District Court, W.D. Washington,
at Seattle.

1st SECURITY BANK OF WASHINGTON, Plaintiff,

v.

Thomas B. ERIKSEN and Jordan
Schrader, P.C., Defendants.

No. CV06-1004RSL. | Jan. 22, 2007.

Attorneys and Law Firms

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Opinion

ORDER GRANTING MOTION FOR PROTECTIVE ORDER

ROBERT S. LASNIK, United States District Judge.

I. INTRODUCTION

*1 This matter comes before the Court on plaintiff's "Motion for Protective Order" (Dkt.# 12). Plaintiff seeks a protective order under Federal Rule of Civil Procedure 26(c) to prohibit the discovery of materials relating to its defense in an earlier related lawsuit, *Blakenship v. 1st Security Bank of Washington*, CV05-1697(W.D.Wash.2006). Plaintiff argues that these materials are protected by attorney-client privilege and attorney work product doctrine. Defendants contend that this privilege has been waived. For the reasons laid out below, the Court grants plaintiff's motion for a protective order.

II. FACTUAL BACKGROUND

Plaintiff in this action is 1st Security Bank of Washington and defendants are Thomas Eriksen, an attorney, and Jordan Schrader, P.C., a law firm based in Portland, Oregon. In early 2004, plaintiff retained defendant law firm to draft a Supplemental Employee Retirement Plan ("SERP") for its Chief Executive Officer Ronald Blankenship. Soon after the SERP was signed, Blankenship was terminated. He

then filed a lawsuit in the Western District of Washington for payment under the plan. Cross motions for summary judgment were filed, but before any decision was issued, the parties settled for \$500,000. Plaintiff was represented throughout that litigation by the law firm of Preston Gates & Ellis ("Preston").¹

¹ Preston Gates & Ellis is now K & L Gates.

Plaintiff has now filed a malpractice lawsuit against defendants alleging that were it not for the professional negligence of defendant law firm, it would not have been forced to enter into a settlement requiring payment to Blankenship. Plaintiff seeks reimbursement for both the \$500,000 settlement and the more than \$100,000 in attorney's fees it incurred defending itself in the earlier action.

At issue here is defendants' request that plaintiff produce a "complete copy" of Preston's file relating to its representation of plaintiff in the earlier lawsuit. Defendants argue that plaintiff has waived its privilege from the earlier case and assert that they require this information for three primary reasons. First, they maintain that plaintiff, in the earlier lawsuit, argued that the SERP was "clear and unambiguous," whereas in this suit it argues the opposite. They contend that this entitles them to "review the file of Preston Gates to see what material they obtained, both from their client and from other sources, in coming to the conclusions that they asserted in their pleadings." Response at p. 4. Second, defendants argue that they require this material to challenge plaintiff's assertion that its settlement with Blankenship was "reasonable." Finally, defendants assert that they require the complete file to investigate plaintiff's claim for attorney's fees incurred in the earlier action. Plaintiff seeks a protective order prohibiting the disclosure of such information on attorney-client privilege and attorney work product grounds.

III. DISCUSSION

Federal Rule of Evidence 501 provides that state law supply the rule of decision on attorney-client privilege questions in diversity cases. *Home Indem. Co. v. Lane Powell Moss and Miller*, 43 F.3d 1322, 1326 (9th Cir.1995). Washington law therefore controls this issue. RCW 5.60.060(2)(a) provides the applicable statutory rule:

*2 An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.

This same privilege, afforded to the attorney in the statute, is extended to the client under the common law rule. *Pappas v. Holloway*, 114 Wn.2d 198, 202-03 (1990).

Like many other jurisdictions, Washington courts have adopted the test set out in *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D.Wash.1975) when determining whether an implied waiver of the attorney-client privilege has occurred. See *Pappas*, 114 Wn.2d at 207-08; see also *Home Indem. Co. v.*, 43 F.3d at 1326 (also adopting *Hearn* test). Under *Hearn*, an implied waiver of the attorney-client privilege occurs when (1) the party asserts the privilege as a result of some affirmative act, such as filing suit; (2) through this affirmative act, the asserting party puts the privileged information at issue; and (3) allowing the privilege would deny the opposing party access to information vital to its defense. *Hearn*, 68 F.R.D. at 581. Under the *Hearn* test, "an overarching consideration is whether allowing the privilege to protect against disclosure of the information would be 'manifestly unfair' to the opposing party." *Home Indem. Co.*, 43 F.3d at 1326 (quoting *Hearn*, 68 F.R.D. at 581).

Though both parties reference *Hearn*, neither party attempts to analyze the privilege claims at issue here under the framework laid out in the case. Both parties, however, do attempt to draw support from *Pappas*, which rests on an analysis of the *Hearn* factors. As such, the Court will begin there. In *Pappas*, defendant Holloway hired plaintiff Pappas, together with a number of other attorneys, to represent him in various lawsuits filed against him in relation to the sale of diseased cattle. *Id.* at 199-200. Prior to going to trial, Pappas withdrew as counsel. *Id.* at 200. Holloway ultimately lost at trial, which resulted in a \$2.9 million verdict against him. *Id.* After the conclusion of the trial Pappas sued Holloway to recover unpaid attorney's fees and Holloway counter-claimed alleging malpractice. *Id.* at 200-01. Pappas then brought third-party complaints against all the other attorneys who also represented Holloway in the underlying litigation and eventually filed a motion to compel these third-party defendants to produce documents relating to the underlying litigation. *Id.* at 201. The third-party defendants objected to production of the materials on the basis of attorney-client privilege and attorney work product doctrine. *Id.* at 202.

The court ultimately rejected the third-party defendants' attorney-client privilege claims after conducting a *Hearn* analysis and affirmed the lower court's grant of Pappas' motion to compel. *Id.* at 207-08. Analyzing the facts under the first two prongs of the *Hearn* test, the court concluded

that it was defendant's affirmative act of filing a counterclaim against Pappas that caused malpractice to become an issue in the litigation. *Id.* at 208. Once malpractice became an issue in the case, the decisions, actions and duties of the other attorneys involved in the underlying litigation became central to determining the legal and factual issues of the case. The court also concluded that the third *Hearn* prong had been met because Pappas' defense would require an examination of decisions made at various stages of the underlying litigation by not just himself, but also the other attorneys involved in the case, including those who eventually took the case to trial. *Id.* at 208-09. To deny access to the materials surrounding those decisions would be to deny Pappas information vital to his defense. *Id.*

*3 Defendants argue that *Pappas* is applicable here and that it stands for the broad proposition that attorney-client privilege is waived in a malpractice action with respect to communications made between the client and his attorneys in a related "underlying matter." In doing so, defendants overstate the reach of *Pappas* as it applies to the facts of this case. *Pappas* is clear in distinguishing cases such as this where the attorney-client communications being sought occurred only after "the underlying litigation which gave rise to the malpractice claim." *Id.* at 205-06. The "underlying matter" that gave rise to the malpractice claim here is the drafting of the SERP, not the later filed lawsuit by Blankenship. Preston played no role in the drafting of the SERP, and its representation of plaintiff only began after the SERP was signed. This case, therefore, presents a fundamentally different situation than the one that was present in *Pappas*, where the decisions and actions of the third-party defendants were significantly intertwined with the allegations of malpractice made against Pappas in the counter-claim. *Pappas*, therefore, cannot support defendants' waiver argument.

Having determined that *Pappas* provides no support for defendants' arguments, the Court moves to analyzing the waiver issue under the *Hearn* test. For the purposes of this analysis, the Court will assume that plaintiff's malpractice claim constitutes an affirmative act that satisfies the first element of the test. The next question becomes whether the malpractice claim itself puts the privileged information at issue. The Court finds that it does not. Under Washington law, a legal malpractice claim requires a showing of (1) the existence of an attorney-client privilege giving rise to a duty of care to the client, (2) an act or omission in breach of the duty, (3) damages to the client, and (4) proximate causation between the breach and damages. *Sherry v. Diercks*,

29 Wn.App. 433, 437 (1981). As discussed above, plaintiff's privileged communications with Preston are not relevant to the determination of defendant's malpractice liability in drafting the SERP. Though the reasonableness of the settlement may become an issue in determining the amount of damages, as long as plaintiff seeks to justify the settlement amount on objective terms apart from the advice of counsel, the attorney-client privilege should remain protected. See *Home Indem. Co.*, 43 F.3d at 1327 (determining that plaintiff does not waive attorney-client privilege simply by defending the reasonableness of a previous settlement provided that it does not attempt to justify the settlement on the basis of its counsel's recommendations).

Because the information defendants seek is largely available from other sources, analyzing defendants' argument under the final *Hearn* prong also weighs in favor of granting plaintiff's motion. Under *Hearn*, the information sought must be "vital" to defendants' case, meaning that the information is available from no other source. *United States v. Amlani*, 169 F.3d 1189, 1195 (9th Cir.1995); *Frontier Refining Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 701-02 (10th Cir.1998). Mere relevance to defendant's case is not sufficient. *Frontier Refining Inc.*, 136 F.3d at 701. Nearly all the information defendants seek to obtain from privileged material can be determined from non-privileged sources. For instance, defendants are free to reference plaintiff's summary judgment briefing in the *Blankenship* case to develop an understanding of the basis of its arguments in that matter. On the question of the reasonableness of the settlement, defendants have access to witnesses other than plaintiff's attorneys who can shed light on the reasons for settlement, and to experts who could opine on the reasonableness of the settlement. See *Frontier Refining Inc.*, 136 F.3d at 701-702 (holding that privileged information was not vital to defense case because defendant "had access to information regarding the reasonableness of the settlement and Frontier's motivations for settling through witnesses other than Frontier's attorneys"); see also *Tribune Co. v. Purcigliotti*, No. 93 CIV. 7222 LAP THK, 1997 WL 10924, at *7 (S.D.N.Y. Jan. 10, 1997) (defendants are free to challenge the reasonableness of a previous settlement, but they can do so without breaching

plaintiff's privileges based on defenses they choose to assert). Because defendants can obtain this information from non-privileged sources, the Court concludes that plaintiff has made no implied waiver of attorney-client privilege on communications relating to arguments made in the underlying action or to the reasonableness of the settlement.²

² Plaintiff also seeks the protective order based on attorney work product doctrine. Having found that the attorney-client privilege protects all of the documents that reflect the advice of counsel, the Court need not consider the applicability of the work product doctrine.

*4 Though the Court concludes that a protective order is justified for the majority of information sought by defendants, defendants are correct that they are likely entitled to some information relating to the fees paid by plaintiff to Preston in the underlying action. See *Clarke v. American Commerce Nat'l Bank*, 974 F.2d 127, 129 (9th Cir.1992) ("Our decisions have recognized that the identity of the client, the amount of the fee, the identification of payment by case file name, and the general purpose of the work performed are usually not protected from disclosure by the attorney-client privilege."). Plaintiff itself acknowledges this in its motion. Motion at p. 3 n. 1. That being said, defendants are entitled to significantly less than the entire Preston file on the underlying matter. See *Amlani*, 169 F.3d at 1194-95 (applying *Hearn* factors to request for billing records as well as additional correspondence). Rather than rule on this limited aspect of defendants' request here, the Court requests that the parties seek to resolve this issue using this Order as guidance. If agreement cannot be reached, the Court will address this question at that time.

IV. CONCLUSION

For all the foregoing reasons, plaintiff's motion for a protective order (Dkt. # 12) prohibiting the disclosure of attorney-client information and work product pertaining to the defense of plaintiff in the case of *Blankenship v. 1st Security Bank of Washington*, is GRANTED. The Court reserves the issue of the scope of discoverable materials relating to the fees paid to Preston by plaintiff.

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136 F.3d 695
United States Court of Appeals,
Tenth Circuit.

FRONTIER REFINING INC., a Wyoming corporation; Commercial Union Assurance Company, PLC; Ocean Marine Insurance Company, Northern Assurance Company, Ltd., Indemnity Marine Assurance Company, Ltd., Sirius (UK) Insurance PLC, Uni Storebrand Skadeforsikring, Codan Insurance, Houston Casualty Insurance Company, Gjensidege Forsikring, Hull and Company and Alexander Howden Energy, Inc., Plaintiffs-Appellants,

v.

GORMAN-RUPP COMPANY, INC., an Ohio corporation, Defendant-Appellee,
Joe M. Teig and Holland & Hart, Movants.

No. 96-8014. | Feb. 13, 1998.

Refinery operator brought action against manufacturer of centrifugal pumps used in refinery's "slop system" for equitable implied indemnity to recover money paid to settle personal injury claims made against operator after explosion and fire at refinery. The United States District Court for the District of Wyoming, Brimmer, J., entered judgment upon jury verdict in favor of manufacturer and denied operator's motion for new trial. Operator appealed. The Court of Appeals, Murphy, Circuit Judge, held that: (1) operator did not waive attorney-client privilege as to settlement materials in files of operator's attorney; (2) materials prepared in anticipation of underlying claims were protected under work-product doctrine; (3) erroneous admission of protected evidence was not harmless; and (4) operator's failure to object to magistrate's order granting manufacturer's motion to join operator's insurers as real parties in interest precluded appeal of that issue.

Reversed and remanded.

Attorneys and Law Firms

*697 John M. Palmeri, Thomas B. Quinn and Christopher P. Kenney, White and Steele, P.C., Denver, CO, for Plaintiffs-Appellants.

J.E. Vlastos, Vlastos & Duncan, Casper, WY; John M. Majoras, Jones, Day, Reavis & Pogue, Cleveland, OH; and

John I. Henley and John C. Brooks, Brooks, Henley & Drell, P.C., Casper, WY, for Defendant-Appellee.

Before BRORBY, HENRY, and MURPHY, Circuit Judges.

Opinion

MURPHY, Circuit Judge.

I. INTRODUCTION

Plaintiff Frontier Refining, Inc. ("Frontier") brought an action for equitable implied indemnity against Gorman-Rupp Co., Inc. ("Gorman-Rupp") in the United States District Court for the District of Wyoming. Frontier sought to recover approximately \$19.25 million paid to settle personal injury claims made against Frontier and its affiliated companies after an explosion and fire at the Frontier Refinery in Cheyenne, Wyoming. Frontier appeals the district court's rulings allowing discovery, and receipt as trial evidence, of materials protected by the attorney-client privilege and work product doctrine. It also appeals the district court's ruling which allowed joinder of Frontier's liability insurers as real parties in interest. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we REVERSE and REMAND.

II. FACTS

Frontier operates a refinery in Cheyenne, Wyoming. In 1992, the refinery had a "slop system" to recover oil for recycling into crude tanks for future use. The slop system included two storage tanks, designated as Tank S5 and Tank S6. The slop system also included two centrifugal pumps, designated as Pumps 160-A and 160-B, manufactured by Gorman-Rupp. A fire originated in the refinery's slop system on June 8, 1992, causing extensive damage to the cast iron casing of pump 160-B.

The fire severely burned four contractors who were working in the area of the slop system. Three of the victims, Robin Torres, Merv Vowles, and Kee Elsie, filed lawsuits against Frontier. Frontier and its liability insurers settled the Torres claim for \$8.25 million, the Vowles claim for \$6.75 million, and the Elsie claim for \$3.50 million. Frontier and its liability insurers also settled the claim of the fourth contractor, Sheldon Eike, for the sum of \$750,000. Holland & Hart, and particularly attorney Joe Teig, represented Frontier in the defense of these claims.

Following settlement of the claims, Frontier filed this lawsuit seeking indemnification from Gorman-Rupp. Frontier obtained different counsel to prosecute the indemnity action. During the course of discovery, Gorman-Rupp filed a Motion to Compel Disclosure of the files of Frontier's counsel for the underlying claims. The district court granted the motion, ordering the production of Holland & Hart's files and the deposition of attorney Teig. The district court ruled that Frontier had waived the attorney-client privilege by filing a suit for equitable implied indemnity and that the work product doctrine did not apply.

Holland & Hart and Mr. Teig subsequently filed a motion for a protective order on their own behalf, arguing that the attorney-client privilege and work product doctrine shielded their files from discovery. The magistrate judge denied the motion and ordered that the files be produced.¹ Holland & Hart attempted to appeal the magistrate's Order on the first day of trial, but the district court refused to hear its appeal.

¹ The magistrate judge based his decision on the following: "[S]aid documents directly or indirectly relate to the issue of the plaintiff's decision to engage in and settle the underlying disputes, and are reasonably calculated to lead to the discovery of admissible evidence under Federal Rule of Civil Procedure 26." The only documents the magistrate withheld from production were those which "did not directly or indirectly relate to the settlement in any way, or did not contain any useful information."

The case proceeded to trial before a jury. As some of the allegedly protected and privileged materials began to come into evidence, the court became concerned that it had erred in its previous rulings.² Accordingly, the district court scheduled a hearing before another district judge to hear Holland & Hart's appeal of the magistrate's Order.³ The district court affirmed in part and reversed in part the magistrate's Order, limiting waiver to documents existing on and testimony relating to dates prior to the settlement of the underlying claims.⁴ The trial proceeded and *699 Gorman-Rupp continued to use Holland & Hart file materials in its case. It also called attorney Joe Teig as an adverse witness.

² The court stated:

Gentlemen, the reason I called you to chambers right now is that since the hearing after lunch on Monday, I've been convinced that I was wrong in denying Holland & Hart their opportunity to

appeal the Magistrate's ruling with regard to their files.

Since then disclosures have been made in the course of the evidence in this trial, particularly the exhibit board that was admitted into evidence this morning with the Holland & Hart logo on it, convinces me that I was absolutely wrong because I think that there's a good basis for the Holland & Hart appeal.

And I don't know what our Magistrate was doing, but I never would have allowed discovery of something like that. I don't think it should have been. I think the Magistrate may have gone entirely too far.

....
It strikes me that the hearing of an appeal of this nature at this point after the disclosure has already been made and the Holland & Hart file has been photocopied could be a process in unringing a bell, but nonetheless, there also could be some documents that they would not want public....

....
And I think that that is making Holland & Hart's work product work against them and I think that's just plain wrong.

So I think that it's necessary for Holland & Hart to have this hearing now.

³ The district judge presiding over this case has a relative who was then an attorney with Holland & Hart. Evidently, he did not hear the Holland & Hart appeal due to this relationship.

⁴ Gorman-Rupp was allowed to introduce the following exhibits at trial:

1. BBB1 (Letter dated October 9, 1992 from attorney Joe Teig of Holland & Hart to Douglas Beck, Corporate Director of Frontier Refining Inc.'s parent corporation, Wainoco Oil Corporation, regarding investigation, liability analysis, damage analysis, opposing counsel, judge assignment, and litigation strategies);
2. BBB2 (Letter dated December 11, 1992 from attorney W.T. Womble, co-counsel for Frontier, to attorney Cliff Hall, counsel for Frontier's insurers, regarding settlement);
3. BBB9 (Memorandum dated September 29, 1992 of M.E. King of Holland & Hart regarding case investigation);
4. BBB13 (Summary of findings of a public opinion poll concerning the fire and explosion, prepared on behalf of Holland & Hart);
5. BBB16 (Letter dated August 13, 1992 from attorney Brad Cave of Holland & Hart to Lorna

- Bullene, Frontier Refining Inc., Risk Management Coordinator, regarding investigation);
6. CCC Series of Exhibits (two-feet by four-foot enlargements of summaries prepared by Holland & Hart detailing strengths and weaknesses in the underlying litigation).

The case was submitted to the jury on claims of product liability, misrepresentation, and negligence. The jury returned a verdict for the defense on all claims. The court entered judgment in favor of Gorman-Rupp on the verdict. Frontier filed a Motion for New Trial, which the court denied. This appeal followed.

III. ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE

1. Standard of Review

1 Frontier contends the district court erred in concluding that Frontier waived the protections of the attorney-client privilege and work product doctrine when it brought an indemnity action against Gorman-Rupp. This court has previously held that we will not reverse a trial court's order denying discovery absent an abuse of discretion. See *Motley v. Marathon Oil Co.*, 71 F.3d 1547, 1550 (10th Cir.1995), cert. denied, 517 U.S. 1190, 116 S.Ct. 1678, 134 L.Ed.2d 781 (1996). Although this case involves an order compelling discovery rather than denying it, we see no meaningful distinction between the two in articulating a standard of review.⁵ Thus, we review the district court's determinations regarding waiver of attorney-client privilege and work product protection for abuse of discretion. In this context, however, we review the court's underlying factual determinations for clear error and review *de novo* purely legal questions. See *United States v. Anderson (In re Grand Jury Subpoenas)*, 906 F.2d 1485, 1488 (10th Cir.1990).

⁵ But see *Tennenbaum v. Deloitte & Touche*, 77 F.3d 337, 340 (9th Cir.1996) (noting that whether party has waived attorney-client privilege is mixed question of law and fact which is reviewed *de novo*).

2. Attorney-Client Privilege

Rule 501 of the Federal Rules of Evidence provides that state law supplies the rule of decision on privilege in diversity cases. Wyoming law thus controls this issue.⁶ See *Wylie v. Marley Co.*, 891 F.2d 1463, 1471 (10th Cir.1989).

- 6 Wyoming has codified its attorney-client privilege. Wyo. Stat. Ann. § 1-12-101(a)(i) provides:

The following persons shall not testify in certain respects:

An attorney or a physician concerning a communication made to him by his client or patient in that relation, or his advice to his client or patient. The attorney or physician may testify by express consent of the client or patient, and if the client or patient voluntarily testifies the attorney or physician may be compelled to testify on the same subject.

Courts generally employ some version of one of the three following general approaches to determine whether a litigant has waived the attorney-client privilege. The first of these general approaches is the "automatic waiver" rule, which provides that a litigant automatically waives the privilege upon assertion of a claim, counterclaim, or affirmative defense that raises as an issue a matter to which otherwise privileged material is relevant. See *Independent Prods. Corp. v. Loew's Inc.*, 22 F.R.D. 266, 276-77 (S.D.N.Y.1958) (originating "automatic waiver" rule); see also *FDIC v. Wise*, 139 F.R.D. 168, 170-71 (D.Colo.1991) (discussing *Independent Productions* and "automatic waiver" rule). The second set of generalized approaches provides that the privilege is waived only when the material to be discovered is both relevant to the issues raised in the case and either vital or necessary to the opposing party's defense of the case. See *Black Panther Party v. Smith*, 661 F.2d 1243, 1266-68 (D.C.Cir.1981) (balancing need for discovery with importance of privilege), vacated without opinion, 458 U.S. 1118, 102 S.Ct. 3505, 73 L.Ed.2d 1381 (1982); *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D.Wash.1975) (setting forth three-factor test, which includes relevance and vitality prongs). Finally, several *700 courts have recently concluded that a litigant waives the attorney-client privilege if, and only if, the litigant directly puts the attorney's advice at issue in the litigation. See, e.g., *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 863-64 (3d Cir.1994) (adopting restrictive test and criticizing more liberal views of waiver).

2 The district court here adopted the intermediate test set out in *Hearn* to analyze whether Frontier had waived its attorney-client privilege in bringing this indemnity action against Gorman-Rupp. This court reviews *de novo* the district court's determination of state law. See *Salve Regina College v. Russell*, 499 U.S. 225, 231, 111 S.Ct. 1217, 1220-21, 113 L.Ed.2d 190 (1991).

Frontier contends that the Wyoming Supreme Court has adopted the most restrictive view of waiver: the bringing of an indemnity suit does not impliedly waive the attorney-client privilege unless the plaintiff asserts reliance on the advice of counsel to prove the reasonableness of the underlying settlement. Frontier cites *Oil, Chemical & Atomic Workers International Union (OCAW) v. Sinclair Oil Corp.*, 748 P.2d 283 (Wyo.1987), in support of its argument.

Sinclair involved a union decertification election in which a letter critical of the union and its officers was circulated among Sinclair employees. The union lost the election and thereafter brought an action for libel and civil conspiracy against officers and representatives of Sinclair. *See id.* at 287. During the course of discovery, Sinclair asserted attorney-client privilege in response to nearly all questions eliciting communications made in the presence of Sinclair's attorney. *See id.* at 289. The union argued that Sinclair had waived the attorney-client privilege by pleading the absence of malice as an affirmative defense and by asserting that the decision to circulate the letter had been made with the advice of counsel. *See id.* at 290. The Wyoming Supreme Court concluded that malice was an element of the *plaintiff's* case and thus "became an issue when [plaintiff's] filed their complaint." *Id.*⁷ Directing its attention to reliance on the advice of counsel, the court noted:

⁷ Although Sinclair pleaded lack of malice as one of its affirmative defenses, the plaintiff had already raised the issue in its complaint; therefore, malice did not become an issue as a result of Sinclair's "affirmative acts." *Oil, Chem. & Atomic Workers Int'l Union (OCAW) v. Sinclair*, 748 P.2d 283, 290 (Wyo.1987).

We recognize that reliance upon a defense of advice of counsel has, in some circumstances, been held to constitute a waiver of the attorney-client privilege. In this case, however, appellees did not rely on advice of counsel as a defense. They merely stated, in response to questions posed by appellants' counsel, that [their counsel] participated in the decision to publish the ... letter and helped prepare a cover letter for it.

Id. (citations omitted). The court concluded that under those facts, no waiver had occurred. *See id.*

3 Frontier argues *Sinclair* stands for the proposition that a party must allege reliance on the advice of counsel before a court may find an implied waiver of the attorney-client privilege. The *Sinclair* court, however, did not so hold. Instead, it merely noted that an allegation of such reliance was

one way in which waiver could occur. Because the Wyoming Supreme Court has not directly announced a definitive test for waiver of attorney-client privilege, we must predict how that court would resolve this issue. In doing so, we may look to "other state-court decisions, well-reasoned decisions from other jurisdictions, and any other available authority to determine the applicable state law." *Burns v. International Ins. Co.*, 929 F.2d 1422, 1424 (9th Cir.1991).

4 In ruling on Gorman-Rupp's Motion to Compel Disclosure, the district court declined to adopt the "automatic waiver" rule because, according to the court, it has been roundly criticized in the circuits, does not adequately account for the importance of the attorney-client privilege to the adversary system, and is more applicable to constitutional, rather than attorney-client, privileges. We find the district court's analysis convincing and agree that Wyoming would not adopt the "automatic waiver" rule. *Cf. Greater *701 Newburyport Clamshell Alliance v. Public Serv. Co.*, 838 F.2d 13, 20 (1st Cir.1988) (criticizing "automatic waiver" rule); *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1205 (Fed.Cir.1987) (same); *see also Arnold v. Mountain W. Farm Bureau Mut. Ins. Co.*, 707 P.2d 161, 165 (Wyo.1985) ("[T]he preservation of the attorney-client privilege is essential to the operation of our judicial process.").

5 Having concluded that Wyoming would not adopt the "automatic waiver" rule, this court need not choose between the remaining two general approaches because Gorman-Rupp failed to demonstrate its entitlement to the privileged materials under the more liberal of the two approaches to waiver. In its analysis of this issue, the district court adopted the intermediate approach and applied the widely cited case *Hearn v. Rhay*, 68 F.R.D. 574 (E.D.Wash.1975). Under the *Hearn* test, each of the following three conditions must exist to find waiver:

- (1) assertion of the privilege was the result of some affirmative act, such as filing suit, by the asserting party;
- (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to [its] defense.

Id. at 581 (emphasis added). An analysis of the nature of the claims in this case in light of the availability of other sources for evidence establishes that the third condition for waiver of the privilege was not and could not be established.

6 In an action for equitable implied indemnity under Wyoming law, the party seeking indemnity must prove that the settlement was reasonable and “made in good faith to discharge a potential or actual liability.” *Schneider Nat'l, Inc. v. Holland Hitch Co.*, 843 P.2d 561, 579 (Wyo.1992); see also *Pan Am. Petroleum Corp. v. Maddux Well Serv.*, 586 P.2d 1220, 1225 (Wyo.1978). If the indemnitor was not adjudged liable in the underlying action, the party seeking indemnity must prove that the wrongful conduct of the indemnitor created the claim against the indemnitee. See *Schneider*, 843 P.2d at 580. To recover on its indemnity claim, Frontier therefore had to prove that Gorman-Rupp's pump caused the fire and explosion which created claims against Frontier and that the settlements were reasonable and made in good faith to discharge its actual or potential liability to the burn victims.

Gorman-Rupp contends that it is entitled to “information and communications relating to the settlement agreements and relating to the rationale” for the decision by Frontier and its insurers to settle the underlying claims.⁸ Appellee's Brief at 20. The district court agreed, ruling that “information and communications relating to the settlement agreements are relevant to this case. Advice given by Frontier Refining's counsel in the underlying suits is relevant to determine whether the settlement agreements were reasonable.” Order Granting Motion to Compel Discovery at 6. Without conducting any analysis of whether the information was accessible elsewhere, the court opined that “applying the privilege here would deny Gorman-Rupp access to information that is necessary to its defense. Gorman-Rupp is entitled to production of information relating to the settlement agreements so that it may challenge their reasonableness.” *Id.*

⁸ Specifically, Gorman-Rupp requested the “claims files, underwriting files, and all other files pertaining to the underlying cases.” Appellant App. at 49. Gorman-Rupp also requested that Frontier's former attorney, Joe Teig, be compelled to answer deposition questions relating to the settlement of the underlying cases. *Id.* Gorman-Rupp argued that the Holland & Hart files “may be at issue in this case.” *Id.* at 57.

7 The court hinged its conclusion that the information was “necessary” to its conclusion that the information was “relevant.” Mere relevance, however, is not the standard articulated in *Hearn*. Instead, the information must also be “vital,” which necessarily implies the information is available from no other source. *Hearn*, 68 F.R.D. at 581; see *Greater Newburyport Clamshell Alliance*, 838 F.2d at 20.

In this case, Gorman-Rupp had access to information regarding the reasonableness of the settlement and Frontier's motivations for *702 settling through witnesses other than Frontier's attorneys. For example, Richard Barrett, an attorney for two of the burn victims, testified that his clients' claims were based solely on Frontier's negligence and human error and that neither the victims nor Mr. Teig had made any allegations against Gorman-Rupp in the underlying suits. Mr. Barrett further disclosed Mr. Teig's admission that Frontier had no defense to the negligence claims. Other expert witnesses testified about the likely reasons for settlement and risks of exposure. In addition, Gorman-Rupp was free to inquire of other Frontier employees or representatives to discern Frontier's reasons for settling. Such information was not within the exclusive possession of Frontier's attorneys and was not necessarily protected by the privilege. See *Remington Arms Co. v. Liberty Mut. Ins. Co.*, 142 F.R.D. 408, 415-16 (D.Del.1992) (noting company officials' knowledge of facts and their decision to seek coverage are subject to discovery but also noting a court cannot justify compelling production of privileged documents solely as means of checking indemnitee's statements). As a consequence, the privileged and protected information at issue was not truly “vital” to Gorman-Rupp's defense. The trial court's ruling to the contrary, being based on an error of law regarding the meaning of “vital,” was therefore an abuse of discretion.⁹

⁹ We further note that Gorman-Rupp has candidly admitted on appeal that

[t]here is nothing contained in [the privileged] material which could allow the jury to engage in any meaningful analysis of whether or not the Gorman-Rupp pump was negligently manufactured, designed or distributed, or whether the pump was defective. Furthermore, the jury could not in any way determine whether there was any misrepresentation made by Gorman-Rupp regarding the pumps in that evidence.

Appellee Br. at 33. This court has reviewed the materials in question and agrees that, without regard to whether the admission of the evidence was prejudicial, no jury could **legitimately** rely on the privileged evidence to conclude that GormanRupp's pump was or was not the cause of the explosion. Cf. *infra* Part IV of this opinion (concluding that the admission into evidence of the improperly discovered materials adversely affected Frontier's substantial rights). In light of Gorman-Rupp's admission and our review, we conclude that the district court need

not reconsider the privilege and discovery issues on remand for a new trial.

3. Work Product Doctrine

8 The district court concluded that the work product doctrine did not apply to this case. Citing *Waste Management, Inc. v. International Surplus Lines Insurance Co.*, 144 Ill.2d 178, 161 Ill.Dec. 774, 783, 579 N.E.2d 322, 331 (1991), the court found that Frontier prepared the material Gorman-Rupp sought “in anticipation of the underlying litigation, not in anticipation of the present litigation.” Order Granting Motion to Compel Discovery at 7. It therefore concluded the work product protection had ended. The district court further ruled that Frontier could not claim work product protection because it had placed the material at issue by filing suit for indemnity. The district court stated that the protection of Federal Rule of Civil Procedure 26(b)(3) does not apply when the information sought is “directly at issue and it would be unfair to deny the discovering party access to the information.” *Id.* at 7-8. According to the district court, “[t]he work product doctrine serves as a shield, not as a sword.” *Id.* at 8 (citing *Waste Management*, 161 Ill.Dec. at 783, 579 N.E.2d at 331).

That part of the district court ruling which failed to extend work product protection merely because the relevant materials were prepared in anticipation of other, albeit related litigation, is against the great weight of well-reasoned authority. A consideration of the Rule 26(b)(3) requirements of substantial need and undue hardship do not support that part of the district court ruling which denied protection on the grounds that the filing of this lawsuit placed the materials at issue. Consequently, the district court abused its discretion in failing to extend the work product protection of Rule 26(b)(3) to the Teig and Holland & Hart materials.

9 The appropriate starting point is obviously Rule 26(b)(3)¹⁰ which provides:

10 “Unlike the attorney client privilege, the work product privilege is governed, even in diversity cases, by a uniform federal standard embodied in Fed.R.Civ.P. 26(b)(3).” *United Coal Cos. v. Powell Constr. Co.*, 839 F.2d 958, 966 (3d Cir.1988).

*703 [A] party may obtain discovery of documents and tangible things ... prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative ... only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party 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.

Fed.R.Civ.P. 26(b)(3).

10 The Supreme Court has recognized in dicta¹¹ that “the literal language of [Rule 26(b)(3)] protects materials prepared for *any* litigation or trial as long as they were prepared by or for a party to the subsequent litigation.” *FTC v. Grolier Inc.*, 462 U.S. 19, 25, 103 S.Ct. 2209, 2213, 76 L.Ed.2d 387 (1983). According to the Supreme Court's dicta, Rule 26's language does not indicate that the work product protection is confined to materials specifically prepared for the litigation in which it is sought. Work product remains protected even after the termination of the litigation for which it was prepared. *See id.* The language from *Grolier* set out above, although dicta, provides a particularly strong indication that Rule 26(b)(3) applies to subsequent litigation. *See Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir.) (stating that “this court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements”), *cert. denied*, 517 U.S. 1211, 116 S.Ct. 1830, 134 L.Ed.2d 934 (1996).

11 In *Grolier*, the Supreme Court held that under the work product doctrine contained in Exemption 5 of the Freedom of Information Act, “attorney work product is exempt from mandatory disclosure without regard to the status of the litigation for which it was prepared.” *FTC v. Grolier Inc.*, 462 U.S. 19, 28, 103 S.Ct. 2209, 2215, 76 L.Ed.2d 387 (1983); *see also* 5 U.S.C. § 552(b)(5) (exempting from mandatory public disclosure “inter-agency or intra-agency memorandums or letters which would not be available by law to a party ... in litigation with the agency”). In reaching this decision, the Court stated that it was “not rely[ing] exclusively on any particular construction of Rule 26(b)(3),” but was instead independently relying on the statutory language of Exemption 5. *Grolier*, 462 U.S. at 26, 103 S.Ct. at 2214.

In addition to the compelling Supreme Court dicta, it appears every circuit to address the issue has concluded that, at least to some degree, the work product doctrine does extend to subsequent litigation. At least one circuit, the Third, has suggested that the doctrine should only apply to closely

related subsequent litigation, although it has declined to expressly so hold. See *In re Grand Jury Proceedings*, 604 F.2d 798, 803-04 (3d Cir.1979). At least two additional circuits, the Fourth and Eighth, extend the privilege to all subsequent litigation, related or not. See *United States v. Pfizer, Inc. (In re Murphy)*, 560 F.2d 326, 335 (8th Cir.1977); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 487 F.2d 480, 484-85 & n. 15 (4th Cir.1973). Finally, at least three circuits, the Second, Fifth, and Sixth, have recognized that the work product doctrine extends to subsequent litigation, but have either declined to decide or have failed to discuss whether the doctrine extends only to subsequent litigation which is "closely related" to the underlying proceedings. See *In re Grand Jury Proceedings*, 43 F.3d 966, 971 (5th Cir.1994) (explicitly recognizing two approaches and refusing to choose between the two); *United States v. Leggett & Platt, Inc.*, 542 F.2d 655, 660 (6th Cir.1976) (no discussion of issue in appeal where subsequent litigation is closely related to underlying litigation); *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551, 557 (2d Cir.1967) (same).

11 Based on the compelling dicta in *Grolier* and the reasoning set out in the circuit court opinions cited above, we conclude that the work product doctrine extends to subsequent litigation. This court need not, however, determine whether the subsequent litigation must be closely related because this indemnity action is unquestionably "closely related" to the underlying suit between Frontier and the injured contractors. See *704 *In re Grand Jury Proceedings*, 43 F.3d at 971 (refusing to choose between two approaches where more rigorous "closely related" test was met). Because the work product doctrine does indeed extend to subsequent litigation, we must move on to consider the alternative grounds of the district court's discovery order.

Rule 26(b)(3) prevents discovery of an attorney's work product unless (1) the discovering party can demonstrate substantial need for the material and (2) the discovering party is unable to obtain the substantial equivalent of the material by other means without undue hardship.¹² See Fed.R.Civ.P. 26(b)(3) (codifying work product doctrine first recognized by Supreme Court in *Hickman v. Taylor*, 329 U.S. 495, 511-12, 67 S.Ct. 385, 393-94, 91 L.Ed. 451 (1947)); see also Moore's Federal Practice § 26.70[5][b] (Daniel R. Coquillette et al. eds., 3d ed.1997). This doctrine encourages attorneys to prepare thoroughly for trial without fear that their thoughts and efforts will be disclosed to an opponent. See *Hickman*, 329 U.S. at 516, 67 S.Ct. at 396 (Jackson, J., concurring).

12 The courts have generally recognized a difference between fact work product and opinion work product. See generally 6 Moore's Federal Practice § 26.70[5][b], [e] (Daniel R. Coquillette et al. eds., 3d ed.1997). The substantial need/undue burden test applies only to fact work product. *Id.* § 26.70[5][b]. The circuits are divided on whether there is absolute protection for opinion work product. Some courts have held that opinion work product is absolutely protected; others have concluded it may be discovered under compelling circumstances. Compare *Holmgren v. State Farm Mut. Auto. Ins. Co.*, 976 F.2d 573, 577 (9th Cir.1992) (holding opinion work product may be discovered when mental impressions are at issue and need for material is compelling), and *In re Sealed Case*, 676 F.2d 793, 809-10 (D.C.Cir.1982) (requiring showing of extraordinary justification to overcome protection of opinion work product), with *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 735 (4th Cir.1974) (holding opinion work product to be absolutely protected). The Supreme Court has not yet decided whether opinion work product is absolutely immune from discovery. Cf. *Upjohn Co. v. United States*, 449 U.S. 383, 401-02, 101 S.Ct. 677, 688-89, 66 L.Ed.2d 584 (1981) (declining to decide whether any showing of necessity can overcome opinion work product protection but stating that showing of substantial need and inability to obtain information without undue hardship is insufficient to compel disclosure). As set out more fully in the text above, we conclude that the district court erred in ordering production of the fact work product without applying the substantial need/undue burden test. If the less rigorous standard for fact work product was not met, neither of the possible opinion work product standards could be met.

12 Although the district court recognized the substantial need/undue burden test as controlling the issue of waiver of work product protection, it declined to apply that test because it concluded Frontier had otherwise waived the protection when it "placed this material at issue by filing suit for indemnity." Order Granting Motion to Compel Discovery at 7. This conclusion is faulty as a matter of law and thus constitutes an abuse of discretion. See *Whitney v. New Mexico*, 113 F.3d 1170, 1173 (10th Cir.1997) (holding abuse of discretion is established if district court decision was based on an error of law).

13 As the district court correctly suggested, a litigant cannot use the work product doctrine as both a sword and shield by selectively using the privileged documents to prove a point but then invoking the privilege to prevent an opponent from

challenging the assertion. See Moore's, *supra*, § 26.70[6] [c]; *Niagara Mohawk Power Corp. v. Stone & Webster Eng'g Corp.*, 125 F.R.D. 578, 587 (N.D.N.Y.1989). Frontier, however, did not use any work product as a sword merely by filing a suit for equitable indemnification; nor did it thereby automatically waive work product protection or place work product in issue. The record on appeal reveals Frontier did not rely on the work product in any manner to justify its right to recovery or to respond to Gorman-Rupp's defense that the initial settlements were not reasonable. Contrary to the conclusion of the district court, Frontier did not use the work product as a sword and is not, therefore, prohibited from shielding the material from discovery.

Furthermore, for many of the same reasons that preserved the attorney-client privilege, namely that information regarding the reasons for and reasonableness of the settlement was available elsewhere, Gorman-Rupp failed to establish a substantial need for the work product and undue burden if the protected materials were not disclosed. Accordingly, the district court erred in allowing *705 discovery of the Holland & Hart materials and ordering that Teig submit to deposition.¹³

¹³ For the same reasons set out earlier in this opinion, we conclude that the district court need not revisit this issue on remand for a new trial. See *supra* note 9 (discussing Gorman-Rupp's admission that none of the discovered material could be legitimately used by the jury to decide the issues in this case).

¹⁴ Gorman-Rupp argues for the first time on appeal that the work product doctrine does not apply because the materials at issue were prepared for the mutual benefit of Frontier and Gorman-Rupp against the contractors, the plaintiffs in the underlying litigation. In support of this argument, Gorman-Rupp relies on a novel twist to the "common interest" doctrine. That doctrine normally operates as a shield to preclude waiver of the attorney-client privilege when a disclosure of confidential information is made to a third party who shares a community of interest with the represented party. See *NL Indus., Inc. v. Commercial Union Ins. Co.*, 144 F.R.D. 225, 230-31 (D.N.J.1992). Citing a case from Illinois, Gorman-Rupp argues that the "common interest" doctrine can also act as a sword to overcome the work product doctrine. See *Waste Management*, 161 Ill.Dec. at 779-81, 579 N.E.2d at 327-29.

Even assuming that the "common interest" doctrine applies in the work product context, the doctrine does not apply to the instant case. A growing majority of courts appear

to reject the applicability of the doctrine unless the current adversaries were actually represented by the same attorney in the prior litigation. *Remington Arms Co. v. Liberty Mut. Ins. Co.*, 142 F.R.D. 408, 417-18 (D.Del.1992) (collecting cases). This court, however, need not decide the issue. Even absent the requirement of actual joint representation, Gorman-Rupp and Frontier did not share a community of interest. Although Gorman-Rupp and Frontier may have shared an interest in minimizing the amount of the settlement in the underlying lawsuits, they did not at any time share an interest in identifying the cause of the fire or Frontier's response to the accident. *NL Indus., Inc. v. Commercial Union Ins. Co.*, 144 F.R.D. 225, 230-31 (D.N.J.1992) ("A community of interest exists where different persons or entities 'have an identical legal interest with respect to the subject matter of a communication between an attorney and a client concerning legal advice.... The key consideration is that the nature of the interest be identical, not similar.' " (quoting *Duplan Corp. v. Deering Milliken, Inc.*, 397 F.Supp. 1146, 1172 (D.S.C.1974))). Under these circumstances, this court cannot conclude that Frontier and Gorman-Rupp shared a community of interest or that Frontier ever intended to share protected materials with Gorman-Rupp.

IV. PREJUDICIAL ERROR

¹⁵ Although the district court erred in allowing discovery and use at trial of materials and testimony protected by the attorney-client privilege and work product doctrine, such error requires reversal only if it affected the substantial rights of the parties. See *U.S. Indus. v. Touche Ross & Co.*, 854 F.2d 1223, 1252-53 (10th Cir.1988); 28 U.S.C. § 2111 ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."); Fed.R.Evid. 103 ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected.").

¹⁶ Gorman-Rupp argues that admission of the Teig testimony and Holland & Hart evidence was harmless because "[t]here is nothing contained in that material which could allow the jury to engage in any meaningful analysis of whether or not the Gorman-Rupp pump was negligently manufactured, designed or distributed, or whether the pump was defective." Appellee Br. at 33. It also argues that any error was harmless because virtually the same evidence was admitted through other witnesses.

Gorman-Rupp's first argument highlights precisely why the district court's error adversely affected Frontier's substantial rights. Although the Teig testimony and the Holland *706 & Hart evidence may not have contained any admissible or truly meaningful evidence as to the manufacture, design, or distribution of the Gorman-Rupp pump, our close review of the record indicates there is a significant probability that the evidence may have unduly influenced the jury to conclude the cause of the accident was Frontier's negligence rather than the Gorman-Rupp pump. There is a significant risk that the jury resolved the causation issue on the basis of the Holland & Hart and Teig evidence rather than on the substantive evidence regarding the manufacture, design or distribution of the Gorman-Rupp pump. Cf. *Green v. Denver & Rio Grande W. R.R. Co.*, 59 F.3d 1029, 1033-34 (10th Cir.1995).

Although similar evidence may have been admitted through other witnesses, there is a qualitative difference between evidence received from Frontier's own attorneys and evidence received from other witnesses. There is too great a risk that a jury would accord significant or undue weight to the testimony and admissions of a party's own lawyers. The district court itself recognized the harm in using the Holland & Hart files at trial:

[D]isclosures that have been made in the course of the evidence in this trial, particularly the exhibit board that was admitted in evidence this morning with the Holland & Hart logo on it, convinces me I was absolutely wrong.

....

I don't know what our Magistrate was doing, but I never would have allowed discovery of something like that. I don't think it should have been. I think the Magistrate may have gone entirely too far....

It strikes me that the hearing of an appeal of this nature at this point after the disclosure has already been made and the Holland & Hart file has been photocopied could be a process in unringing a bell....

And I think that that is making Holland & Hart's work product work against them and I think that's just plain wrong.

Although this court cannot describe the substance of the subject evidence without further compromising the privilege, our careful review of the record convinces us that the error in admitting the Teig testimony and Holland & Hart material

was significant, harmful, and affected Frontier's substantial rights.

V. JOINDER OF INSURANCE COMPANIES

17 In the proceedings below, Gorman-Rupp filed a Motion for Joinder of Real Parties in Interest. It requested joinder as real parties in interest of eleven insurance companies, which had underwritten liability insurance for Frontier. The motion was referred to a magistrate judge who granted Gorman-Rupp's motion. Frontier did not appeal that ruling to the district court. Instead, it proceeded to trial and first raised the issue as error in its Motion for New Trial.

Frontier's failure to appeal the magistrate's ruling to the district court precludes it from raising the issue on appeal to this court. Rule 72(a) of the Federal Rules of Civil Procedure provides in relevant part:

Within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; *a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made.*

(Emphasis added.)

In *Niehaus v. Kansas Bar Ass'n*, 793 F.2d 1159, 1165 (10th Cir.1986), this court held that a party waives its right to appeal a magistrate's order when it has not filed objections with the district court. In *Niehaus* we noted that by failing to file timely objections with the district court, the party "stripped the district court of its function of effectively reviewing the magistrate's order" and "frustrated the policy behind the Magistrate's Act, i.e., to relieve courts of unnecessary work." *Id.* These policies are particularly relevant in the instant case. Frontier proceeded through trial without objecting to the magistrate's order, thereby allowing significant judicial resources to be expended on a trial in which Frontier contends inappropriate parties were joined. The text of Rule 72 *707 and precedent preclude Frontier from now raising an objection to the magistrate's ruling allowing joinder.¹⁴ See *Ayala v. United States*, 980 F.2d 1342, 1352 (10th Cir.1992); *Video Views, Inc. v. Studio 21 Ltd.*, 797 F.2d 538, 539 (7th Cir.1986); *United States v. Schronce*, 727 F.2d 91, 94 (4th Cir.1984); *McCarthy v. Manson*, 714 F.2d 234, 237 (2d Cir.1983); *United States v. Renfro*, 620 F.2d 497, 500 (5th Cir.1980).

14 We express no opinion as to whether Frontier can raise the issue of joinder upon remand for a new trial.

We **REVERSE** the judgment and **REMAND** for a new trial consistent with this opinion.

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VI. CONCLUSION

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MICROSOFT CORPORATION, Plaintiff,

v.

IMMERSION CORPORATION, Defendant.

No. C07-936RSM. | March 7, 2008.

Attorneys and Law Firms

Blake Edward Marks-Dias, Paul Joseph Kundtz, Wendy E. Lyon, Riddell Williams, Seattle, WA, for Plaintiff.

Alan J. Heinrich, David R. Kaplan, Morgan Chu, Richard M. Birnholz, Irell & Manella, Los Angeles, CA, Bradley S. Keller, Jofrey M. McWilliam, Byrnes & Keller, Seattle, WA, for Defendant.

Opinion

ORDER DENYING MICROSOFT'S MOTION TO DISQUALIFY

RICARDO S. MARTINEZ, District Judge.

I. INTRODUCTION

*1 This matter comes before the Court on "Microsoft's Motion to Disqualify Irell & Manella LLP for Violation of Washington's Rule of Professional Conduct 3.7." (Dkt.# 26). Plaintiff Microsoft Corporation ("Microsoft") argues that the law firm of Irell & Manella LLP ("Irell & Manella") should be disqualified from representing Defendant Immersion Corporation ("Immersion") on the grounds that an attorney may not act as both an advocate and a witness pursuant to Washington Rule of Professional Conduct ("RPC") 3.7. Immersion responds that Microsoft misconstrues Washington RPC 3.7, and further argues that Microsoft has not met its burden in justifying disqualification.

For the reasons set forth below, the Court DENIES "Microsoft's Motion to Disqualify Irell & Manella LLP for Violation of Washington's Rule of Professional Conduct 3.7."

II. DISCUSSION

A. Background

The instant lawsuit stems from an underlying case filed by Immersion in the Northern District of California on February 11, 2002, styled *Immersion Corp. v. Sony Computer Entertainment of American, Inc., et. al.*, No. C02-00710 CW (the "Sony Lawsuit"). (Dkt. # 1, Pl.'s Compl., ¶ 7). In that case, Immersion alleged that two Sony entities ("Sony") and Microsoft, through certain gaming consoles, violated patents held by Immersion. (*Id.*) On July 25, 2003, Immersion settled its claims against Microsoft. (*Id.* at ¶ 8). As part of the settlement, the parties entered into a Sublicense Agreement ("SLA") wherein Immersion agreed to pay Microsoft certain amounts in the event that Immersion settled its remaining claims with Sony. (*Id.* at ¶ 9). Following its settlement with Microsoft, Immersion proceeded with its case against Sony, and ultimately obtained a jury verdict in the amount of \$82 million on September 21, 2004. (*Id.* at ¶ 12). The trial court also awarded Immersion approximately \$8.7 million in prejudgment interest and costs, bringing the total amount of the judgment to \$90,703,608. (Dkt. # 27, Decl. of Marks-Dias, Ex. D). The trial court also issued a permanent injunction prohibiting Sony from "manufacturing, using, and/or selling in, or importing into, the United States the infringing Sony Playstation system, including its Playstation consoles." (*Id.*, Ex. E).

Sony appealed the jury verdict on February 9, 2006. (Pl.'s Compl., ¶ 15). However, prior to having its case heard on appeal, Sony and Immersion entered into an agreement on March 1, 2007, whereby Sony dropped its appeal, and Immersion agreed not to enforce the permanent injunction it had against Sony. (*Id.* at ¶¶ 23, 28). Sony also paid approximately \$97.3 million to Immersion. (*Id.* at ¶ 25); (Dkt. # 30 at 6).

Based on these facts, Microsoft characterizes the agreement between Immersion and Sony as a settlement, thereby triggering Immersion's obligation to pay Microsoft pursuant to the SLA. Immersion argues that its agreement with Sony after the jury verdict and prior to Sony's appeal was not a settlement for purposes of the SLA. Rather, Immersion maintains that it won the Sony Lawsuit. As a result, Microsoft brought the instant breach of contract claim in this Court.

*2 Microsoft now moves to disqualify the law firm of Irell & Manella from representing Immersion on the grounds that Irell & Manella participated in the drafting of the agreement between Immersion and Sony. (Dkt. # 26 at 1). Microsoft further alleges that the attorneys "attempted to

disguise that agreement so that it not appear as a settlement agreement.” (*Id.* at 2). In addition, Microsoft specifically points out that Richard Birnholz (“Mr. Birnholz”) of Irell & Manella played a key role in negotiating and drafting the underlying agreement between Immersion and Sony. (*Id.* at 6-7). Consequently, Microsoft argues that disqualification is justified pursuant to Washington RPC 3.7 because the attorneys at Irell & Manella are material witnesses to the instant case. (*Id.*) In addition, Microsoft notes that Immersion will not suffer prejudice because Immersion is also represented by the law firm of Byrnes & Keller LLP, a firm Microsoft characterizes as “highly skilled counsel.” (*Id.*)

B. Disqualification of an Attorney

Washington RPC 3.7 provides:

(a) A lawyer shall not act as an advocate *at a trial* in which the lawyer is likely to be a *necessary witness* unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case;
- (3) disqualification of the lawyer would work substantial hardship on the client; or
- (4) the lawyer has been called by the opposing party and the court rules that the lawyer may continue to act as an advocate.

(b) A lawyer may act as advocate *in a trial* in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Id. (emphasis added).

Disqualification is considered “a drastic measure which courts should hesitate to impose except when absolutely necessary.” *United States ex rel. Lord Elec. Co., Inc. v. Titan Pac. Constr. Corp.*, 637 F.Supp. 1556, 1562 (W.D.Wash.1986) (citing *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 721 (7th Cir.1982)); *see also Venable v. Keever*, 960 F.Supp. 110, 113 (N.D.Tex.1997) (“Depriving a party of the right to be represented by the attorney of his or her choice is a penalty that must not be imposed without careful consideration”). Disqualification motions are therefore subject to “particularly strict judicial scrutiny.” *Optyl Eyewear Fashion Int'l Corp. v. Style Cos.*, 760 F.2d 1045, 1050 (9th Cir.1985). When interpreting Washington RPC 3.7, “[Washington] courts have been

reluctant to disqualify an attorney absent compelling circumstances.” *Pub. Util. Dist. No. 1 of Klickitat County v. Int'l Ins. Co.*, 124 Wash.2d 789, 812, 881 P.2d 1020 (1994) (citations omitted). Despite this heightened judicial scrutiny, compelling circumstances do exist where (1) an attorney will give evidence material to the determination of the issues being litigated, (2) the evidence is unobtainable elsewhere, and (3) the testimony is or may be prejudicial to the testifying attorney's client. *See id.* (citations omitted). A Washington court has also justified disqualification of an attorney where the attorney will act as a witness trying to persuade the jury as to a particular set of factual events, and also as an advocate for the same set of factual events. *See State v. Schmitt*, 124 Wash.App. 662, 667, 102 P.3d 856 (2004).

*3 In the instant case, the Court finds no merit in Microsoft's argument to disqualify the entire firm of Irell & Manella. Microsoft has failed to present sufficient evidence to show that each and every attorney at Irell & Manella are necessary witnesses to the instant litigation. Specifically, Microsoft makes no showing that *every* attorney at Irell & Manella will give evidence material to the determination of the issues being litigated. Microsoft merely states that all the attorneys should be disqualified by virtue of their representation of Immersion in the underlying lawsuit against Sony. Such bald assertions are insufficient in the context of a motion to disqualify. *See Weeks v. Samsung Heavy Industries Co., Ltd.*, 909 F.Supp. 582, 583 (N.D.Ill.1996). Additionally, Microsoft's argument to disqualify Mr. Birnholz in particular is also without merit at this time. While the Court certainly agrees with Microsoft that Mr. Birnholz played a role in the underlying agreements, the mere fact that an attorney participates in an agreement's negotiation is not by itself sufficient to justify disqualification. *See Standard Quimica de Venezuela, C.A. v. Central Hispano Int'l, Inc.*, 179 F.R.D. 64, 66 (D.P.R.1998); *see also American Special Risk Ins. Co. v. Delta Am. Re Ins. Co.*, 634 F.Supp. 112, 122 (S.D.N.Y.1986) (finding that attorneys who observe negotiations and review draft agreements need not be disqualified).

In any event, the plain language of Washington RPC 3.7(a) is unequivocally clear in only prohibiting attorneys from acting as an advocate *at trial*. Here, discovery has recently begun and is not scheduled to conclude until June 16, 2008. Trial is not set until October 14, 2008. Thus, disqualification of any attorney at Irell & Manella is premature. But if it becomes likely that the attorneys at Irell & Manella are necessary witnesses after the conclusion of discovery, or on the eve of trial, Microsoft is free to move the Court for disqualification at that time. *See Host Marriot Corp. v. Fast Food Operators*,

Inc., 891 F.Supp. 1002, 1010 (D.N.J.1995) (denying a motion to disqualify without prejudice where it was premature to determine whether an attorney would be a necessary witness); *see also Chapman Engineers, Inc. v. Natural Gas Sales Co. Inc.*, 766 F.Supp. 949, 958 (D.Kan.1991) (holding that a court may “suspend its ruling [on a motion to disqualify] until a determination is made if another witness could testify to those same matters”).

III. CONCLUSION

Having reviewed Plaintiff's motion, Defendant's response, Plaintiff's reply, the declarations and exhibits attached

thereto, and the remainder of the record, the Court hereby finds and orders:

(1) “Microsoft's Motion to Disqualify Irell & Manella LLP for Violation of Washington's Rule of Professional Conduct 3.7” (Dkt.# 26) is DENIED without prejudice. Microsoft is free to renew their motion to disqualify in the event this case goes to trial with respect to any or all of the attorneys at Irell & Manella LLP.

*4 (2) The Clerk is directed to forward a copy of this Order to all counsel of record.

Parallel Citations

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West's Revised Code of Washington Annotated

Part I Rules of General Application

Rules of Professional Conduct (Rpc)

Title 3. Advocate

Rules Of Professional Conduct, RPC 3.7

RULE 3.7 LAWYER AS WITNESS

Currentness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case;
- (3) disqualification of the lawyer would work substantial hardship on the client; or
- (4) the lawyer has been called by the opposing party and the court rules that the lawyer may continue to act as an advocate.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Credits

[Amended effective September 1, 2006.]

Editors' Notes

COMMENT

2012 Electronic Pocket Part Update.

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

Advocate-Witness Rule

[2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] **[Washington revision]** To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(4). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.

[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.

Conflict of Interest

[6] **[Washington revision]** In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer, the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a) (3) or (a)(4) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(e) for the definition of "informed consent."

[7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

Additional Washington Comment (8)

[8] When a lawyer is called to testify as a witness by the adverse party, there is a risk that Rule 3.7 is being inappropriately used as a tactic to obtain disqualification of the lawyer. Paragraph (a)(4) is intended to confer discretion on the tribunal in determining whether disqualification is truly warranted in such circumstances. The provisions of paragraph (a)(4) were taken from former Washington RPC 3.7(c).

[Comment adopted effective September 1, 2006.]

Notes of Decisions (13)

Current with amendments received through 11/15/11

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