

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

DANIEL N. LAVIN, EXECUTOR OF THE)
ESTATE OF MARTHA K. LOTTMAN,)
DECEASED)

Plaintiff)

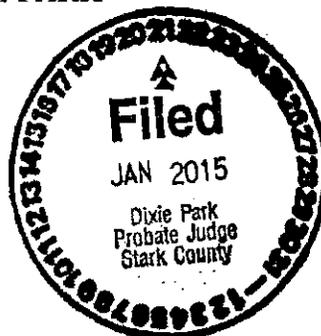
vs)

PAUL B. HERVEY, ESQ., ET AL.,)

Defendants)

CASE NO.: 221652

JUDGE DIXIE PARK



JUDGMENT ENTRY

This matter came before the Court for a pretrial on November 19, 2014. During the pretrial, issues regarding Defendants' production of the Decedent Martha K. Lottman's client file and email communications were discussed. Plaintiff seeks the client file in order to ascertain the nature and extent of Decedent's financial interests in order to prepare the Federal Estate Tax Return. Defendants produced some of the information contained in the client file, but argue that the remaining information is protected by the attorney client privilege and/or the work product doctrine.

On November 24, 2014, Defendants submitted documents to the Court, together with a privilege log ("Log 1"), for *in camera* review. On December 2, 2014, Defendants submitted supplemental documents to the Court, together with a privilege log ("Log 2"), for *in camera* review. Plaintiff filed an Objection to Defendants' Privilege Log on December 15, 2014, and Defendants filed a Response to Plaintiff's Objections to Privilege Log on December 29, 2014.

Decedent was represented during her life by longtime family friend and Defendant herein, Attorney Paul Hervey, for her estate planning and business matters. Defendant Hervey is an attorney with Defendant law firm Fitzpatrick, Zimmerman and Rose, Co.

On or about June of 2013, Defendant Hervey arranged for Kyla Benson to assist Decedent as Decedent's personal bookkeeper. Ms. Benson is an employee of Attorney Ian Crawford, Defendant's attorney in this matter. Ms. Benson assisted the Decedent with maintenance of her finances and, occasionally, with computer issues. Defendant Hervey also assisted Decedent with various computer issues, including backing up Decedent's computer, removing and adding files and documents to the Decedent's computer, reinstalling deleted information, and taking Decedent's computer for repair and recovery of files. Decedent kept her business records primarily on her computer.

During the months preceding her death, Decedent and her children were involved in a contentious effort to sell one of the family's businesses, a Texas real estate business called M-K-L Properties, Inc. ("MKL"). Daniel Lavin, one of Decedent's children, Executor of her Estate and the Plaintiff herein, originally opposed the sale of the business. A great deal of negotiation took place in order to effectuate the sale and the potential for litigation over the Texas matter not only existed, but ultimately came to fruition.¹

Upon Decedent's February 17, 2014 death, Defendant Hervey allegedly took items from Decedent's home, including files, keys to a safety deposit box, Decedent's computer and/or a flash drive containing data from Decedent's computer. In addition, Plaintiff submits that Defendants possess information regarding the Decedent's estate planning matters, gifting,

¹ The MKL case was heard by the 190th District Court of Texas in Cause No. 2014-16494. The Texas litigation eventually settled sometime in or around August of 2014. As part of the Texas litigation Settlement Agreement, three of Decedent's four children agreed to the appointment of Daniel Lavin s Fiduciary of their mother's estate. Daniel was appointed Fiduciary on August 11, 2014.

donations and businesses. The Plaintiff must prepare the Decedent's complex federal estate tax return and asserts that access to this information is necessary to do so. Defendants claim the information sought by Plaintiff is protected by attorney client privilege and/or the work product doctrine and refuse to provide the information to Plaintiff.

The Court conducted an *in camera* review of all documents submitted by Defendants and which Defendants claim are protected by attorney client privilege and/or the work product doctrine.

A. Attorney Client Privilege

Defendants claim that much of the information sought by Plaintiff is protected by the attorney client privilege. R.C. §2317.02 addresses privileged communications and acts, and states in pertinent part:

The following persons shall not testify in certain respects:

(A)(1) An attorney, concerning a communication made to the attorney by a client in that relation or concerning the attorney's advice to a client, except that the attorney may testify by express consent of the client or, if the client is deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of the deceased client. However, if the client voluntarily reveals the substance of attorney-client communications in a nonprivileged context or is deemed by section 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the attorney may be compelled to testify on the same subject.

The testimonial privilege established under this division does not apply concerning a communication between a client who has since died and the deceased client's attorney if the communication is relevant to a dispute between parties who claim through that deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction, and the dispute addresses the competency of the deceased client when the deceased client executed a document that is the basis of the dispute or whether the deceased client was a victim of fraud, undue influence, or duress when the deceased client executed a document that is the basis of the dispute.

(Emphasis added.) Plaintiff is the duly appointed Executor of the Decedent's Estate and has consented to the production of the requested information. Accordingly, the attorney client

privilege does not operate to protect communications between Defendant Hervey and the Decedent if the Executor expressly consents to the divulging of the communication.

Ohio case law supports this conclusion. The Fifth District Court of Appeals addressed attorney client privilege in the case of *Caiazza v. Mercy Medical Center*, 5th Dist. Stark No. 2012-CA-83, 2012-Ohio-3940:

“The attorney-client privilege is one of the oldest recognized privileges for confidential communications.” *Swidler & Berlin v. United States*, 524 U.S. 399, 403, 118 S.Ct. 2081, 141 L.Ed.2d 379(1998). In *Jackson v. Greger*, 110 Ohio St.3d 488, 2006-Ohio-4968, 854 N.E.2d 487, the court stated, “R.C. 2317.02(A) provides a testimonial privilege—i.e., it prevents an attorney from testifying concerning communications made to the attorney by a client or the attorney's advice to a client. **A testimonial privilege applies not only to prohibit testimony at trial, but also to protect the sought-after communications during the discovery process.**” *Id.* at ¶ 7, fn. 1, 854 N.E.2d 487. There are a number of well-established exceptions to the attorney-client privilege. *Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 127 Ohio St.3d 161, 937 N.E.2d 533, 2010-Ohio-4469, ¶ 24-43. The privilege is not absolute, and there is no presumption of confidentiality of all communications made between an attorney and client. *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 660-661, 635 N.E.2d 331(1994). The determination whether a communication should be afforded the cloak of privilege depends on the circumstances of each case, and the privilege must yield when justice so requires. *Lemley v. Kaiser*, 6 Ohio St.3d 258, 264, 452 N.E.2d 1304(1983).

(Emphasis added.) *Id.* at ¶15. Contrary to the argument set forth in Defendants' Response to Plaintiff's Objections to Privilege Log, the testimonial privilege applies not only to testimony, but also to communications sought during discovery.

The Ohio Supreme Court addressed the attorney client privilege in the case of *Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 127 Ohio St.3d 161, 2010-Ohio-4469, 937 N.E.2d 533, stating at ¶16:

... As we explained in *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508, 824 N.E.2d 990, “ ‘Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves the public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.’ *Upjohn Co. v. United States* (1981), 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584; *Cargotec, Inc. v.*

Westchester Fire Ins. Co., 155 Ohio App.3d 653, 2003-Ohio-7257, 802 N.E.2d 732, ¶ 7. '[B]y protecting client communications designed to obtain legal advice or assistance, the client will be more candid and will disclose all relevant information to his attorney, even potentially damaging and embarrassing facts.' (Footnote omitted.) 1 Rice, Attorney-Client Privilege in the United States (2d Ed.1999) 14-15, Section 2.3." *Leslie* at ¶ 20.

However, as set forth in R.C. §2317.02(A)(1), *supra*, the attorney client privilege may be waived upon the express consent of the client or, if deceased, the surviving spouse or executor of the estate. In *Estate of Hohler v. Hohler*, 185 Ohio App.3d 420, 2009-Ohio-7013, 924 N.E.2d 419 (7th Dist.), the decedent's surviving spouse argued that decedent's communication with his attorney regarding the prenuptial agreement signed by decedent and surviving spouse was discoverable. Decedent's attorney argued that the communications were privileged, or, if discoverable, subject to limitations. The *Hohler* court stated that the language of R.C. §2317.02 "puts the consent of the client and the consent of the client's surviving spouse on equal footing." *Id.* at ¶21 (citing *State v. Doe*, 2nd Dist. Montgomery No. 19408, 2002-Ohio-4966, *affirmed*, *State v. Doe*, 101 Ohio St.3d 170, 2004-Ohio-705, 803 N.E.2d 777). This is true even if the consent of the surviving spouse is inconsistent with the decedent's wishes. *Hohler* at ¶21.

The *Hohler* court ultimately held that "[b]ecause the surviving spouse's waiver is elevated to the same status as the decedent's waiver, there are no limitations on the waiver if it is done voluntarily by a surviving spouse." *Id.* at ¶28. The court of appeals affirmed the decision of the trial court, and remanded the matter back to the trial court for an *in camera* inspection of documents allegedly protected by the work product doctrine.

The reasoning in *Hohler* is equally applicable to waivers by executors of a decedent's estate. Accordingly, so long as the Plaintiff expressly waives the attorney client privilege, the privilege does not operate to prevent production of the requested client file documents. Defendants therefore must produce the requested documents without limitation.

B. Work Product Doctrine

The Defendants also argue that some of the information sought by the Plaintiff is protected by the work product doctrine. The court in *Caiazza, supra*, discussed the work product doctrine as follows:

In *Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, the Court discussed the work-product privilege,

The work-product doctrine emanates from *Hickman v. Taylor* (1947), 329 U.S. 495, 511, 67 S.Ct. 385, 91 L.Ed. 451, in which the Supreme Court of the United States recognized that “[p]roper preparation of a client's case demands that [the attorney] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. * * * This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case (153 F.2d 212, 223) as the ‘Work product of the lawyer.’ Were such materials open to opposing counsel on mere demand, 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.”

Addressing these concerns, the work-product doctrine provides a *qualified* privilege protecting the attorney's mental processes in preparation of litigation, establishing “a zone of privacy in which lawyers can analyze and prepare their client's case free from scrutiny or interference by an adversary.” *Hobley v. Burge* (C.A.7, 2006), 433 F.3d 946, 949. However, as the Supreme Court of the United States has explained, “the doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system,” and the privilege afforded by the work-product doctrine is not absolute. *United States v. Nobles* (1975), 422 U.S. 225, 238 and 239, 95 S.Ct. 2160, 45 L.Ed.2d 141.

Civ.R. 26(B)(3) describes the work-product doctrine as it applies in civil cases in Ohio: “Subject to the provisions of subdivision (B)(5) of this rule [relating to retained experts], a party may obtain discovery of documents, electronically stored information 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 (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing of good cause therefor.”

In *Jackson v. Greger*, 110 Ohio St.3d 488, 2006-Ohio-4968, 854 N.E.2d 487, we examined the meaning of “good cause,” stating that “a showing of good cause under Civ.R. 26(B)(3) requires demonstration of need for the materials—i.e., a showing that the

materials, or the information they contain, are relevant and otherwise unavailable. The purpose of the work-product rule is '(1) to preserve the right of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases and (2) to prevent an attorney from taking undue advantage of his adversary's industry or efforts.' Civ.R. 26(A). To that end, Civ.R. 26(B)(3) places a burden on the party seeking discovery to demonstrate good cause for the sought-after materials.

While the protections for attorney work product provided in Civ.R. 26(B)(3) expressly apply to "documents, electronically stored information and tangible things prepared in anticipation of litigation," protection also extends to intangible work product. *Hickman*, 329 U.S. at 511, 67 S.Ct. 385, 91 L.Ed. 451; *In re Cendant Corp. Securities Litigation* (C.A.3, 2003), 343 F.3d 658, 662; *United States v. One Tract of Real Property* (C.A.6, 1996), 95 F.3d 422, 428, fn. 10, 8, Wright, Miller, Kane & Marcus, Federal Practice and Procedure (3d Ed.2009), Section 2024. The protection for intangible work product exists because "[o]therwise, attorneys' files would be protected from discovery, but attorneys themselves would have no work product objection to depositions." *In re Seagate Technology, L.L.C.* (C.A.Fed., 2007), 497 F.3d 1360, 1376.

Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp., 127 Ohio St.3d 161, 937 N.E.2d 533, 2010-Ohio-4469, ¶¶ 54-58.

Caiazza at ¶16.

The work product doctrine was also discussed in *Estate of Hohler v. Hohler*, 197 Ohio App.3d 237, 2011-Ohio-5469, 967 N.E.2d 219:

The work-product privilege is rooted in Civ.R. 26(B)(3), which states, "[A] party may obtain discovery of documents * * * and tangible things prepared *245 in anticipation of litigation or for trial by or for another party or * * * that other party's representative * * * only upon a showing of good cause therefor."

Through work-product jurisprudence, much of which descends from *Hickman v. Taylor* (1946), 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451, a United States Supreme Court case involving the federal analogue to Civ.R. 26(B)(3), two distinct categories of work product have been identified: ordinary fact work product and opinion work product.

"Ordinary fact or 'unprivileged fact' work product, such as witness statements and underlying facts, receives lesser protection. Written or oral information transmitted to the attorney and recorded as conveyed may be compelled upon a showing of good cause by the subpoenaing party. 'Good cause,' as set forth in Civ.R. 26(B)(3), requires a showing of substantial need, that the information is important in the preparation of the party's case, and that there is an inability or difficulty in obtaining the information without undue hardship.

“The other type of work product is ‘opinion work product,’ which reflects the attorney’s mental impressions, opinions, conclusions, judgments, or legal theories. Because opinion work product concerns the mental processes of the attorney, not discoverable fact, opinion work product receives near absolute protection. Notes made by the attorney or his agents that record the witness’s statement, but that also convey the impressions of the interviewer, are protected as opinion work product, because such notes reveal the attorney’s or agent’s thoughts.” (Citations omitted.) *State v. Hoop* (1999), 134 Ohio App.3d 627, 642, 731 N.E.2d 1177. See, also, *State v. Today’s Bookstore, Inc.* (1993), 86 Ohio App.3d 810, 621 N.E.2d 1283; *Jackson v. Greger*, 160 Ohio App.3d 258, 2005-Ohio-1588, 826 N.E.2d 900, *aff’d*, 110 Ohio St.3d 488, 2006-Ohio-4968, 854 N.E.2d 487.

Id. at ¶¶ 27-30. The distinction between “ordinary fact” or “unprivileged fact” work product is important to the analysis in this matter. Much of the information Defendants’ claim is protected by work product falls into the “ordinary fact” work product category and is thus discoverable upon a showing of good cause.

“Attorney work product, including but not limited to mental impressions, theories, and legal conclusions, may be discovered upon a showing of good cause if it is directly at issue in the case, the need for the information is compelling, and the evidence cannot be obtained elsewhere.” *Squire, supra*, at paragraph two of the syllabus; *Hohler*, 197 Ohio App.3d 237, 2011-Ohio-5469, 967 N.E.2d 219, at ¶33.

The documents sought by Executor deal primarily with the Decedent’s financial information, the bulk of which Decedent maintained on her computer. Additional information regarding Decedent’s financial interests may also be contained in Defendants’ client file. The information is necessary for Plaintiff’s preparation of the Decedent’s Federal Estate Tax Return and cannot be obtained elsewhere, thus establishing a compelling reason for production of the information.

The Court in *Caiazza, supra*, concluded that a trial court must “hold an evidentiary hearing or an in-camera review to analyze the requested material alleged to be work-product or

work product, and are therefore discoverable. The Court finds further that the 7/17/2013 notes from Defendant's meeting with Decedent were not prepared in anticipation of litigation, are not work product, and are therefore discoverable.

The notes on the back of the 9/6/13 email from Decedent to Defendant and her oldest son, and the notes from the 10/30/13 meeting with Defendant, Decedent and her financial advisor, are ordinary fact work product, as they were prepared in anticipation of litigation in Texas regarding MKL. However, they deal with Decedent's finances and the Executor has established good cause for production of any information relating to Decedent's finances. Therefore, the Court finds that the notes are not protected by the work product doctrine and must be produced to the Plaintiff.

Finally, the Court finds that the Estate Flowcharts are not work product as claimed by Defendant, as they were not prepared in anticipation of litigation. Thus, they are discoverable. Even if they were prepared in anticipation of litigation, they deal with Decedent's finances, and as set forth above, Plaintiff has established good cause for production of information regarding Decedent's finances. Thus, the documents are not protected by the work product doctrine and are discoverable.

C. Lottman Emails – Privilege Log (Log 2 of 2)

On December 2, 2014, the Defendant submitted Lottman Emails - Privilege Log (2 of 2) ("Log 2") and documents comprised of emails by and between various parties, including but not limited to Defendant and Decedent. The Log includes 712 items dating from July 2, 2012 to February 16, 2014 that are "coded" as follows:

1. PER - Personal emails Defendant claims have nothing to do with representing Decedent;
2. A/C - Emails Defendant claims are protected by attorney client privilege; and,

3. W/P - Emails Defendant claims are protected by the work product doctrine.

Each of these "codes" are discussed below.

1. PER - Personal emails Defendant claims have nothing to do with representing Decedent

Defendant argues that the emails coded as personal "have nothing to do with representing Martha and for which she was not billed, such as a computer filled with viruses, meeting for Thanksgiving or making donations to charity." First, such emails are protected by neither the attorney client privilege nor the work product doctrine, and are therefore subject to production. Second, some of the emails coded "personal" deal with Decedent's donations to charity, which clearly deals with Decedent's finances and is information necessary for Plaintiff's preparation of Decedent's federal estate tax return.

Third, emails regarding Decedent's computer are important because she maintained her business affairs primarily on her computer. There is evidence that Defendant Hervey removed and/or added files to Decedent's computer, and took Decedent's computer to Stark Computer Exchange for repair and recovery. Plaintiff argues in his Objections to Defendants' Privilege Log that he consulted with a forensic computer expert who stated that lost emails would either be in the PST icon on the Decedent's computer desktop or on a disk or flash drive. When Plaintiff paid a forensic computer expert to retrieve missing email folders from the PST files, it was discovered that all the PST files had been wiped out. Defendants continue to deny the existence of a disk or flash drive containing information from Decedent's computer. Based upon the above, the Court finds that Plaintiff is entitled to all items coded PER.

2. A/C - Emails Defendant claims are protected by attorney client privilege

As set forth above, the attorney client privilege has no application to this matter, as the

Executor has expressly consented to the waiver of the privilege. Accordingly, the Court finds that the emails Defendant claims are protected by attorney client privilege must be produced to the Plaintiff.

3. W/P - Emails Defendant claims are protected by the work product doctrine

The work product doctrine can be broken down into two distinct categories. The first, called ordinary fact work product, includes witness statements and underlying facts, and receives lesser protection. Production of this type of work product may be compelled upon a showing of good cause. The second, called opinion work product, includes the attorney's mental impressions, opinions, conclusions, judgments, or legal theories. Opinion work product receives almost absolute protection because it involves the mental processes of the attorney.

In order for information or documents to be protected by the work product doctrine, the information or documents must have been prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent). If the information or documents sought was prepared in anticipation of litigation, and is therefore work product, a determination must be made as to whether it is fact work product or opinion work product. Fact work product may be divulged upon a showing of good cause. Opinion work product is nearly always absolutely protected.

The Court finds that the items located at Log 2, pages 440, 482, 503, 522, 530, 542, 544, 547, 548, 549, 555, and 592 are ordinary fact work product that are not discoverable because the items do not involve Decedent's financial interests. The Court further finds that the items located at Log 2 at pages 372, 438, 439, 443 and 593 are opinion work product and are therefore protected from production. The Court finds that the remaining documents deal with the sale of

MKL, were prepared in anticipation of the Texas litigation, and are therefore work product. However, the sale of MKL had and continues to have a direct impact on the Decedent's finances. As such, the information surrounding the sale of MKL is necessary for the Plaintiff's preparation of the Decedent's Federal Estate Tax Return. This establishes good cause, and the Plaintiff is entitled to the information.

WHEREFORE, it is hereby

ORDERED, ADJUDGED AND DECREED that Defendants produce all of the information contained in Privilege Log 1; and it is further

ORDERED, ADJUDGED AND DECREED that Defendants produce all of the information contained in Log 2 except the following: the items located at Log 2, pages 372, 438, 439, 440, 443, 482, 503, 522, 530, 542, 544, 547, 548, 549, 555, 592 and 593.

IT IS SO ORDERED.

JAN 21 2015

Date

Dixie Park
JUDGE DIXIE PARK

NOTICE TO CLERK

It is ORDERED that the foregoing judgement entry shall be served on all parties of record within 3 days after docketing of this entry and the service shall be noted on the docket.

Dixie Park
HON. DIXIE PARK
Probate Judge