

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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MONTGOMERY COUNTY,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	NO. 97-6331
	:	
MICROVOTE CORP., CARSON	:	
MANUFACTURING CO., INC., and	:	
WESTCHESTER FIRE INSURANCE	:	
CO., INC.,	:	
Defendant.	:	

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**MEMORANDUM**

R.F. KELLY, J. SEPTEMBER 24, 1998

Montgomery County has brought this action against the MicroVote Corporation ("MicroVote"), Carson Manufacturing ("Carson"), and Westchester Fire Insurance Company ("Westchester") alleging that the electronic voting machines it purchased were negligently designed and manufactured, defective and failed to operate properly during elections. During discovery, Carson filed a Motion to Compel against Montgomery County. MicroVote and Westchester joined in that Motion. The Motion was granted in part and denied in part by Order dated August 21, 1998. One issue, the discoverability of a "report" compiled by Dr. Michael Shamos, Esquire, required a hearing which was held on August 21, 1998. The parties have submitted supplemental briefs. After considering the testimony and exhibits offered at that hearing, I make the following findings of fact and conclusions of law:

**A. FINDINGS OF FACT.**

1. On May 25, 1994, Montgomery County purchased nine hundred (900) "MicroVote 464 Electronic Voting Computer and Direct Electronic Voting Units" manufactured by Carson, from MicroVote. N.T. 8/21/98, at 14.

2. Montgomery County used the voting machines in three elections: the November, 1994 general election, the April, 1995 primary election and the November, 1995 general election. N.T. at 14-15.

3. Montgomery County experienced problems with the voting machines in all three elections and sought to remedy those problems before the next election in April of 1996. N.T. at 15.

4. Montgomery County was faced with deciding whether or not to continue working with the MicroVote voting machines or obtaining new machines from a different source. N.T. at 23.

5. Montgomery County officials decided to retain a consultant to analyze past elections and make recommendations as to how to remedy the voting machine difficulties in the future. Def.'s Ex. 6.

6. Joseph R. Passerella, the Director of Voter Services for Montgomery County, Pennsylvania, sought to retain Dr. Michael I. Shamos, Esquire ("Shamos") of the law firm of Webb Ziesenhein Bruening Logsdon Orkin & Hanson P.C. ("the Webb firm") as a consultant to assist the County in regards to the voting machine

problems. N.T. at 14, 17-18.

7. Passerella testified that Shamos was chosen from a list of five individuals who were recommended by both the County Commissioners and the State Department of Pennsylvania. N.T. at 53-54.

8. Passerella testified that Shamos was the only individual on the list who was an attorney in addition to being an election consultant. Id.

9. At 9:00 a.m. on February 1, 1996, at MicroVote's request, a private meeting was held between officials of MicroVote and Montgomery County to discuss options available to the County regarding the voting machines and determine what, if anything, Carson and MicroVote could do to fix those problems. Def.'s Ex. 8.

10. Shamos attended this meeting although he arrived late. Def.'s Ex. 1 at 124; Def.'s Ex. 8.

11. At 10:00 a.m. on February 1, 1996, the County Board of Elections held a public meeting. Def.'s Ex. 6; Def.'s Ex. 8.

12. Meeting minutes indicate that Mario Mele, a member of the Board of Elections, stated that Shamos was being hired "to ensure there will not be a repetition of the previous election day problems." Def.'s Ex. 6.

13. Mele introduced Shamos and described him as "an outside consultant familiar with the Pennsylvania Department of State

voting machine certification." Id.

14. Further, the minutes indicate that "in order for the County of Montgomery to engage Dr. Shamos the County of Montgomery will be required to execute an Engagement Letter dated January 30, 1996" with the Webb firm. Id.

15. At the conclusion of the meeting, the Board formally resolved to execute the Engagement letter of the Webb Firm subject to the approval of the County Solicitor. Id.

16. At 2:00 p.m. on February 1, 1996, at a private meeting between Shamos and MicroVote officials, Shamos indicated that in order to give MicroVote a positive recommendation to the County Board he would need "very specific information and proposals." Def.'s Ex. 8.

17. On February 2, 1996 at a private meeting between Shamos, MicroVote officials, and William Carson, Shamos further clarified the requirements for a positive recommendation indicating that "a 100% performance bond or letter of credit by MicroVote, where specific performance requirements had to be met by the system to salvage the bond" was necessary. Id.

18. On February 6, 1996, Shamos sent a letter to James Ries, president of MicroVote, critiquing an outline of MicroVote's proposal to the County Board. Def.'s Ex. 9.

19. Minutes from a public meeting of the County Board of Elections held on February 22, 1996, outline "a list of actions

to be taken by MicroVote" prior to the April election and refer to Shamos as "the County's Consultant." Def.'s Ex. 10.

20. Carson seeks to discover the contents of a "report" issued by Shamos (the "Shamos Report"). Def.'s Mot. to Compel Disc.; Reply Br. of Def. in Supp. of its Mot. to Compel; Supplemental Br. in Supp. of Def.'s Mot. to Compel.

21. The Shamos Report consists of the following documents:

- (a) 1/30/96 fee agreement letter
- (b) 2/29/96 bill
- (c) 3/31/96 bill
- (d) 2/5/96 one page letter from Shamos to  
Passerella
- (e) 2/13/96 telecopy sheet from Passerella to Shamos
- (f) 2/20/96 seven page letter from Shamos to  
Passerella

N.T. at 31-33.

22. Montgomery County has refused to provide the "Shamos Report" to Carson claiming that the documents are not discoverable either (a) because they are protected by the attorney-client privilege or (b) because they are the "work-product" of an attorney or expert retained in anticipation of litigation not expected to be called at trial. Pl.'s Opp'n to Def.'s Mot. to Compel Additional Supp. Answers to Interrogs. and Attorney-Client and Work-Product Privileged Docs. of the Webb

Firm; Pl.'s Surrep. Concerning Def's Mot. to Compel Additional Supp. Answers to Interrogs. and Attorney-Client and Work-Product Privileged Docs. of the Webb Firm; Pl.'s Supp. Hr'g Br. in Opp'n to Pl.'s Mot. to Compel the Produc. of Attorney-Client or Work Product.

23. To the contrary, Carson contends that Shamos (a) was not acting as Montgomery County's attorney and (b) was not retained in anticipation of litigation. Def.'s Mot. to Compel Disc.; Reply Br. of Def. in Supp. of its Mot. to Compel; Supplemental Br. in Supp. of Def.'s Mot. to Compel.

**B. CONCLUSIONS OF LAW.**

24. Privileged material is not discoverable, even if relevant. FED.R.CIV.PRO. 26(b)(1).

25. Because the claims and defenses in this action arise under Pennsylvania law, this court is bound to apply the Pennsylvania law of privilege as well. Rhone-Poulenc Rorer Inc. v. Home Indem. Co., 32 F.3d 851, 861-62 (3d Cir. 1994)(citing Fed.R.Evid. 501, 1101(c)).

26. In Pennsylvania, the attorney-client privilege is codified as:

In a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same unless in either case this privilege is waived upon the trial by the client.

42 Pa.C.S.A. § 5928.

27. The elements of the attorney-client privilege are:

(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his or her subordinate, and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client; (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding, and (d) not for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Rhone-Poulenc Rorer Inc., 32 F.3d at 862.

28. The parties agree that the critical element in this case is whether Shamos was hired by the County "for the purpose of securing legal advice." In re Ford Motor Co., 110 F.3d 954, 965 (3d Cir. 1997).

29. Montgomery County alleged, but failed to prove, that Shamos and the Webb firm were retained to render legal advice in the form of recommendations, one of which was the possibility of litigation, regarding the voting machines supplied by Carson and MicroVote. N.T. at 23.

30. To the contrary, although litigation was always a possibility, the evidence shows that Shamos was hired as an election consultant; he just happened to also be an attorney. N.T. 52-53.

31. The evidence showed that Montgomery County was required to execute the Engagement Letter with the Webb firm in order to retain the services of Shamos as an election consultant. Def.'s

Ex. 6.

32. Thomas E. Waters, Jr., the Montgomery County solicitor, testified that the County was "looking for an expert who could evaluate the performance of the machines, tell us what was wrong with them tell us whether it was fixable, and tell us whether or not we could use the machines if we wanted to." Def.'s Ex. 1.

33. Although Dean E. Richards, MicroVote's attorney, states in a letter to Thomas E. Waters, Jr., the Montgomery County solicitor, dated March 1, 1996, that Shamos "previously represented the County in this matter," it is clear from the context of the letter that Waters, not Shamos, in fact represented Montgomery County in this matter. Pl.'s Ex. 2.

34. Although Shamos negotiated an addendum to the contract with MicroVote, he did so in his capacity as an election consultant, not in his capacity as an attorney. N.T. at 28.

35. Although Shamos directed Carson and MicroVote to obtain a bond in order to receive his positive recommendation, the "Addendum to the May 25, 1994 Agreement" and the details of that bond were handled by Waters and Richards. N.T. at 43; Pl.'s Ex. 1, 2, and 3.

36. Unlike an attorney representing an adverse party, Shamos met with officials of MicroVote and Carson privately on several occasions. Def.'s Ex. 8.

37. Were Shamos actually representing Montgomery County,

these meetings would potentially violate Rule 4.2 of the Pennsylvania Rules of Professional Conduct. Rules of Prof. Conduct, Rule 4.2, 42 Pa.C.S.A.

38. In sum, I find that the evidence shows that Shamos was retained as an expert and not as an attorney, therefore, the attorney-client privilege does not protect the Shamos Report from discovery.

39. The "work product" doctrine prohibits the discovery of materials "prepared in anticipation of litigation," by an attorney or expert, except upon a showing of substantial need and undue hardship. FED. R. CIV. PRO. 26(b)(3).

40. Because Shamos was not acting as Montgomery County's attorney the Shamos Report is not the "work product" of an attorney, it would however be the "work-product" of an expert if Montgomery County proved that Shamos was hired "in anticipation of litigation." Id.

41. "The appropriate inquiry is 'whether in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.'" George v. Siemens Indust. Automation, Inc., \_\_ F.Supp.2d. \_\_, No. 94-27(MTB), 1998 WL 565975, at \*5 (D.N.J. Aug. 26, 1998)(quoting Martin v. Bally's Park Place Hotel & Casino, 983 F.2d 1252, 1258 (3d Cir. 1993)(citing U.S. v. Rockwell International, 897 F.2d

1255, 1266 (3d Cir. 1990))).

42. "Only by looking to the state of mind of . . . the party ordering preparation of the document, can we determine whether this test has been satisfied." Martin, 983 F.2d at 1260.

43. "The rule is limited, however, by the requirement that the preparer's anticipation of litigation be objectively reasonable." Id.

44. Materials prepared "in the ordinary course of business, or pursuant to public requirements unrelated to litigation" are not protected. Rockwell, 897 F.2d at 1265-66 (quoting United States v. El Paso Co., 682 F.2d 530, 542 (5th Cir. 1982), cert. denied, 466 U.S. 944 (1984)).

45. Montgomery County alleged, but failed to prove that Shamos was hired and his report was prepared "in anticipation of litigation."

46. The Shamos Report was not prepared "because of the prospect of litigation," rather, the Shamos Report was prepared to avoid litigation by recommending other courses of action to the County regarding the voting machine difficulties and the upcoming April 1996 election. N.T. at 23.

47. The minutes of the February 1, 1995 public meeting of the County Board of Elections do not mention litigation, but rather evidence that Shamos was retained "to ensure there will not be a repetition of the previous election day problems."

Def.'s Ex. 6.

48. Based on this evidence it is apparent that the County Board of Elections did not subjectively intend to hire Shamos "because of the prospect of litigation." Martin, 983 F.2d at 1260.

49. Because the Board did not subjectively intend to hire Shamos "because of the prospect of litigation," there is no need to determine whether or not the Board's belief is objectively reasonable. Id.

50. Montgomery County's contention that Shamos was acting as both their attorney and their expert is disingenuous because such conduct is prohibited by Rule 3.7 of the Pennsylvania Rules of Professional Conduct. Rules of Prof. Conduct, Rule 3.7, 42 Pa.C.S.A. N.T. at 22-23, 80.

51. In sum, I find that Shamos was hired as an expert rather than as an attorney. I also find that he was not hired "in anticipation of litigation," therefore, the Shamos Report is discoverable. An Order follows.

