

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

CECILIA LAND : CIVIL ACTION
 :
 v. :
 :
 GENERAL MOTORS CORP. and :
 JOSEPH DOOLEY : NO. 99-642

MEMORANDUM ORDER

Presently before the court is defendant General Motors Corporation's Motion for Reconsideration of a court order of June 21, 2000 granting plaintiff's Motion to Compel the appearance of Edward Ivey for a Second Deposition.

The initial deposition was truncated when defense counsel directed Mr. Ivey not to answer questions suggested by notes of interviews of Mr. Ivey in 1981 and 1983 by defendant's then counsel. Defendant contends that Mr. Ivey need not answer these questions because the notes are protected by the attorney-client privilege and work product doctrine. Defendant now submits two affidavits of counsel dated September 9, 1998 and February 25, 1999. It does not explain why these affidavits, executed long before plaintiff filed her motion to compel, were not presented earlier.

Defendant does not take issue with the court's conclusion that the interviews of Mr. Ivey were conducted by defendant's then counsel in anticipation of litigation and the

notes were thus encompassed by the work product doctrine. Defendant suggests, however, that the notes in their entirety should be viewed as "opinion" work product and not a combination of "ordinary" and "opinion" work product. Defendant asks the court now to rule that the notes are also privileged attorney-client communications.

The gist of defendant's argument is that the court should not apply the bind or authorized to act on behalf of test set forth in In re Ford Motor Co., 110 F.3d 954 (3d Cir. 1997) because the Court in that case "misstates Pennsylvania and Michigan law" regarding privilege, but instead should apply the broader test set forth in Upjohn Co. v. U.S., 449 U.S. 383 (1981). It is defendant which misstates the law, and misconstrues the court's order.

Upjohn was a federal question case involving federal common law pertaining to the attorney-client privilege. Questions regarding attorney-client privilege in diversity cases are resolved by reference to state law. See Fed. R. Evid. 501; In re Ford Motor Co., 110 F.3d at 965. Contrary to defendant's contention, the Circuit Court in that case correctly concluded that Pennsylvania law and Michigan law regarding the privilege are essentially the same and that both employ the bind or authorized to act test in determining whether a corporate employee is a "client."

Defendant's assertion that "Michigan and Pennsylvania both follow Upjohn" is not supported.¹

Defendant cites In re Investigating Grand Jury of Philadelphia, 593 A.2d 402 (Pa. 1991). That case involved notes of confidential communications about the subject of a grand jury investigation between a target of that investigation and his lawyer which were seized from the client's desk by use of a search warrant. There was no question that this individual was a "client" seeking advice from his attorney. Moreover, as the president of the bank which was also under investigation, he clearly could act on behalf of that institution. Defendant then relies on Gould v. City of Aliquippa, 750 A.2d 934 (Pa. Cmwlth. 2000). The Court in that case in fact employed the authorized to act test. Id. at 937 ("entities may claim privilege for communications between their attorney and their agents or employees who are authorized to act on behalf of the entities" and noting police chief, city administrator and department superintendent were apparently positions of such authority).

Defendant cites Co-Jo, Inc. v. Strand, 572 N.W.2d 251 (Mich. App. 1998) for the proposition that "an employee's statement obtained by the corporation's attorney is protected by

¹That a state court may cite Upjohn or other federal law cases in connection with a shared principle does not constitute a wholesale importation of all federal common law rules articulated in those cases.

the attorney-client privilege." Defendant appears, however, to overlook the fact that the employee in that case was a named defendant communicating with an attorney retained by an insurer to represent him. Defendant correctly notes a Michigan Court of Appeals case in which the author recited the Upjohn test in rejecting a claim of privilege. See Fruehauf Trailer Corp. v. Hagelthorn, 528 N.W.2d 778, 781 (Mich. App. 1995). In cases subsequent to Upjohn and Fruehauf, however, that Court has applied Michigan law to conclude that an employee or agent must act in a representative capacity and be authorized to bind or act on behalf of the corporation regarding the subject matter at issue to qualify as a "client" for purposes of the attorney-client privilege. See Reed Dairy Farm v. Consumers Powers Co., 576 N.W.2d 709, 711-12 (Mich. App. 1998).

In rejecting a claim of privilege in Reed Dairy Farm, the Court also made clear that a corporation cannot in any event prevent inquiry of an employee by an adverse litigant regarding relevant factual matters because the information may also have been communicated to counsel. Id. at 712. In rejecting a claim of privilege in Fruehauf, the Court relied in part on the absence of any advice to the employee that his discussions with the corporation's attorneys were confidential. Fruehauf, 528 N.W.2d at 781.

The affidavits now submitted by defendant do not state that Mr. Ivey was advised that his statements in the interviews by counsel were confidential, or indeed even that the statements were made for the purpose of obtaining legal advice. They state only that counsel interviewed Mr. Ivey to evaluate him as a potential, and possible adverse, witness and to prepare the defense of General Motors in pending and anticipated product liability litigation.² As noted, the court assumed the notes of the interviews were work product.

The one "new" thing which appears from the affidavit regarding the notes of the second interview is that although they appear to be verbatim, they were selective and summarized. Had this affidavit been timely presented, the court may have concluded that these notes constituted purely opinion work product.³ Nothing defendant now presents, however, would have changed the ultimate ruling on plaintiff's motion to compel.

²Mr. Ivey was interviewed about a potentially damaging memorandum he had prepared, purportedly on his own initiative, which surfaced during discovery in prior litigation.

³Defendant states that the Ivey notes were held to be protected opinion work product in Baker v. General Motors Corp., 209 F.3d 1051 (8th Cir. 2000). It is not clear that the documents available on the internet were at issue in that case. It appears that at issue were a number of additional documents requested by the plaintiffs after reading those available on the internet. Id. at 1053. One panel member concluded that notes of interviews of Ivey by defendant's then counsel were privileged under Michigan law. Two members agreed that the notes were protectible work product. In any event, Baker involved a court ordered disclosure of attorneys' notes which the instant case does not.

Defendant states that the challenged "order declines to protect [the notes] from discovery and from use as evidence." This is untrue.

It is uncontroverted that the Ivey notes are in the public domain. They have been produced and admitted into evidence in other cases and are readily available on the internet. The court did not order disclosure of the notes. Plaintiff had already lawfully acquired the notes. The court did not rule that the notes are admissible as evidence at any trial.

The actual ruling of the court was that neither the attorney-client privilege nor the work product doctrine preclude inquiry of Mr. Ivey about relevant factual matters because the information was also communicated to counsel or use by counsel of any material lawfully in his possession to frame deposition questions, or attempt to refresh the recollection of a witness, in an effort to obtain independently discoverable factual information. See Rhone-Poulenc Rorer, Inc. v. Home Indem. Co., 32 F.3d 851, 864 (3d Cir. 1994) (under Pennsylvania attorney-client privilege party cannot prevent discovery of factual information by claiming it has been communicated to attorney); Reed Dairy Farm, 576 N.W.2d at 712 (Michigan attorney-client privilege); U.S. v. Dentsply Intern., Inc., 187 F.R.D. 152, 155 (D. Del. 1999) (work product doctrine); Maertín v. Armstrong World Industries, Inc., 172 F.R.D. 143, 150 (D.N.J. 1997) (work product doctrine). That ruling stands.

Accordingly, this day of July, 2000 upon
consideration of the Motion to Reconsider of defendant General
Motors (Doc. #30) and plaintiff's response thereto, **IT IS HEREBY**
ORDERED that said Motion is **DENIED**, however, consistent with the
agreement of counsel for the convenience of the witness, the
redeposition may be conducted during the week of July 17, 2000.

BY THE COURT:

JAY C. WALDMAN, J.