

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

ELAINE L. CHAO, SECRETARY OF :
LABOR, UNITED STATES DEPARTMENT :
OF LABOR :
Petitioner :
v. :
JOHN KORESKO, et al. :
Respondents : No. 04-MC-74

MEMORANDUM AND ORDER

McLaughlin, J.

August 2, 2004

On May 11, 2004, the Court issued a decision, rejecting the respondents' general challenge to the enforceability of subpoenas duces tecum issued by the Secretary of Labor pursuant to § 504 of the Employee Retirement Home Security Act ("ERISA"), 29 U.S.C. § 1134. The Court did not decide the respondents' specific objections to the subpoenas that were based on claims of privilege. The Court ordered the parties to try to resolve the specific objections to the subpoenas by June 1, 2004. The parties did not do so.

The Court held a hearing on the specific objections on June 16, 2004. After the hearing, counsel for the parties spent several hours trying to resolve the remaining objections. The

Court then met with counsel in chambers for a substantial amount of time to try to understand the respondents' objections and to see if it could assist the parties in negotiating a settlement of the dispute. The Court was unsuccessful. The Court ordered the respondents to provide the Court with a privilege log and any argument with respect to privilege. The respondents responded on July 9, 2004. The petitioner filed an opposition to the respondents' privilege arguments on July 19, 2004.

The respondents submitted a large binder with a table of contents on the outside. Exhibit A consists of the respondents' general objections most of which have already been overruled by the Court's May 11 decision. There follows a "statement of privileges" that appears to be a non-paginated discussion of various privileges. It is not signed by anyone. There follow copies of three cases, two Department of Labor Advisory Opinions, and certain Pennsylvania Rules of Disciplinary Enforcement. Tab 8 to Exhibit A appears to be a copy of the subpoena with notations next to each request, such as "P = privilege asserted and set forth herein."

Exhibit B in the binder consists of the privilege log and 30 tabbed documents. The privilege log consists of four pages listing 30 types of documents. The following privileges are apparently asserted with respect to each document: attorney client privilege; attorney work product; identity privilege; 7525

communication; and accountant/client privilege. There is a description of the subject matter of each category of document. The 30 documents that follow appear to be samples of the categories of documents the respondents want to withhold as privileged. Some of the documents have been redacted.

Two of the five privileges asserted by the respondents are inapplicable: privilege under 26 U.S.C. § 7525; and accountant/client privilege. The tax practitioner privilege under § 7525 of the Internal Revenue Code may only be asserted in either a noncriminal tax matter before the Internal Revenue Service or a noncriminal tax proceeding in Federal Court brought by or against the United States. 26 U.S.C. § 7525(a)(2). This case is an action to enforce administrative subpoenas under the Employee Retirement Income Security Act (hereinafter "ERISA"), not a tax proceeding.

The state law accountant-client privilege also does not apply here. Only federal privileges apply to claims arising out of federal law. Pearson v. Miller, 211 F.3d 57, 66 (3d Cir. 2000). Because federal law applies in proceedings to enforce administrative subpoenas, only federal privileges are relevant. See, e.g., NLRB v. N. Bay Plumbing, Inc., 102 F.3d 1005, 1009 (9th Cir. 1996) (finding state-law privilege irrelevant in an agency subpoena enforcement case). Federal law does not

recognize an accountant-client privilege. See United States v. Arthur Young & Co., 465 U.S. 805, 817 (1984).

As to the other three privileges, the respondents have not supported their claims with the kind of specific information that is required. The Court cannot tell what documents the respondents claim are protected by what privilege[s], by whom the document was prepared, from whom and to whom it was sent, and why it is a privileged communication.

The Court has considered ordering the respondents to try again to prepare an adequate privilege log. But the Court concludes that the respondents have been given more than enough time to support their claim that they should not be ordered to produce documents in response to these subpoenas. The subpoenas were issued on January 28, 2004. The petitioner tried over the next several months to negotiate with the respondents. On April 19, 2004 the petitioner filed her motion to enforce the subpoenas. This Court had a hearing on May 10, 2004, issued its decision on the general objections on May 11, 2004, had another hearing on June 16, 2004, ordered the parties to negotiate the dispute, and met with counsel again in chambers. The respondents were not able orally to state with any precision why any of the documents are privileged. The Court gave the respondents another chance to do it in writing but that too has proved futile.

The Court has spent hours trying to understand the nature of the respondents' claims of privilege. The petitioner's response was not very helpful. The petitioner submitted a general response to the privilege log, arguing that it was inadequate as support for the claims of privilege. The Court understands the petitioner's frustration; but, the Court cannot reject claims of privilege without an analysis of the respondents' arguments. That is why the Court has spent so much time with this binder. What follows is the Court's decision with respect to many categories. With respect to other categories, the Court asks the petitioner to answer certain questions.

The 30 types of documents claimed to be privileged fall into the following categories:

1. Transaction documents, such as plan documents, summary plan descriptions, beneficiary nomination forms, etc. (Tabs 1, 2, 4, 5, 6, 7, 8, 10, 12, 22, 23, 24, and 25). The Court can see no possible privilege to these documents. They are transaction documents that relate to various benefit plans. In any event, the respondents have now given them to the petitioner so any privilege has been waived. Apparently, the respondents claim privilege in connection with the names that have been redacted from a few of the documents. This is apparently where the so-called "identity" privilege comes in. The respondents appear to argue that now that they have given the substance of

the documents to the petitioner, they are entitled to conceal the names of participants in the various plans because to give the names would reveal privileged information. The Court rejects this argument as to the transaction documents described above. They were never privileged from the beginning.

2. Retention letter from Koresko and Associates related to its representation of someone in connection with an IRS request for information about a certain tax return. (Tab 3). The names of the persons involved have been redacted. This retention letter is apparently a form letter sent by Koresko and Associates to persons seeking their help in connection with an IRS request such as the one included behind tab 3. A retention letter from a lawyer is usually not privileged. But it may be that the petitioner does not want these kinds of documents. The petitioner shall explain to the Court its position with respect to documents of this type.

3. Letters from Penn-Mont to various participants in plans advising them of certain compliance requirements. (Tabs 9 and 11). Again, names of the participants are redacted. The respondents have given over the substance of the documents and now argue that to give the names of the recipients would breach the privilege. Although the Court does not know what privilege is being asserted because Penn-Mont is not a lawyer, the

petitioner should explain its position on any privilege relating to these type documents.

4. Census data forms. (Tabs 13 and 21). These are not privileged but does the petitioner want these forms?

5. Various insurance forms. (Tabs 18, 19 and 20). The Court assumes that these are the documents that the respondents claim are private medical documents. Does the petitioner want these documents?

6. Various documents that relate to the day to day activity of the benefit plans, such as blank benefit forms, wire transfer requests, cancelled checks, bank statements, premium amounts, etc. (Tabs 14, 15, 16, 17, 26, 27, and 29). These do not appear to be privileged, but does the petitioner even want them?

7. Letters from Koresko & Associates to third parties making various demands on behalf of the Real VEBA. (Tab 28). A letter from a lawyer to a third party is not privileged; but does the petitioner want these types of documents?

8. Tab 30 is a copy of a bill from Anderson Kill & Olick, P.C. Law firm bills can usually be redacted to protect any privileged information; but the Court understood that the petitioner did not want law firm bills from Anderson Kill & Olick, P.C. Is that correct?

At this time, the Court does not see any category of documents that is privileged; but the Court instructs the petitioner to answer the questions listed in this memorandum. The respondents may reply briefly.

An appropriate order follows.

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ORDER

AND NOW, this 27th day of July, 2004, following a hearing in the above captioned case on June 16, 2004, and upon consideration of the Petition to Enforce Administrative Subpoenas (Docket No. 1), the responses thereto, the Respondents' Privilege Log (Docket No. 36), and the responses thereto, IT IS HEREBY ORDERED that the petitioner shall respond to the questions raised in a memorandum of today's date by August 10, 2004. The respondents may reply by August 17, 2004.

BY THE COURT:

MARY A. McLAUGHLIN, J.