

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

UNITED STATES OF AMERICA ex rel. :  
DEBORAH RIVA MAGID : CIVIL ACTION  
:  
v. :  
:  
BARRY WILDERMAN, M.D., P.C., : NO. 96-CV-4346  
BARRY WILDERMAN, M.D., ERIC :  
GERWIRTZ, M.D., STEVEN PALLONI, :  
M.D. :

**SURRICK, J.**

**AUGUST 10, 2006**

**MEMORANDUM & ORDER**

Presently before the Court is Relator Deborah Riva Magid's Motion to Compel Testimony Of Diane Levy And To Produce Materials Described In Privilege Log (Doc. No. 176). For the following reasons, Relator's Motion will be granted.

**I. BACKGROUND**

Relator Deborah Riva Magid, M.D., Ph.D., filed this *qui tam* action pursuant to the False Claims Act, 31 U.S.C. §§ 3729, *et seq.*, on behalf of herself and the United States. At all times relevant to this case, Defendant Barry Wilderman, M.D., P.C. ("Wilderman, P.C.") was a corporation engaged in an anesthesiology practice. Defendants Barry Wilderman, M.D., Eric Gewirtz, M.D., and Steven Palloni, M.D., as well as Relator, were all employed by Wilderman, P.C. as anesthesiologists.

On June 13, 1996, Relator filed a Complaint alleging that Defendants violated the False Claims Act by submitting false Medicare reimbursement claims to the United States.<sup>1</sup> According

---

<sup>1</sup> The Complaint also named North Penn Hospital as a defendant. On April 29, 2004, we granted North Penn Hospital's Motion for Summary Judgment on all of Relator's claims. *United States ex rel. Magid v. Wilderman*, Civ. A. No. 96-4346, 2004 U.S. Dist. LEXIS 8459 (E.D. Pa. Apr. 29, 2004).

to Relator's Complaint, between 1990 and 1996, Defendants routinely altered records to falsely reflect the amount of services and time for which they could bill Medicare. During the relevant time period and until 2001, Wilderman, P.C. employed Diane L. Levy as its Office Manager. (Mar. 8, 2005 Levy Dep. at 19-20.) The parties to this case originally deposed Levy on October 19, 1999. (*Id.* at 5.) In the months following her deposition, Levy engaged in a number of communications with Charles P. Elliott, C.P.A., C.F.E., an investigator employed by Arthur R. Shuman, Esq., counsel for Defendants Wilderman, P.C., and Drs. Wilderman, Palloni, and Gewirtz.<sup>2</sup> (Doc. No. 176 at Ex. B.)

At the final pretrial conference for this case, Shuman privately revealed to the Court his concerns over the disclosure of certain evidentiary materials, particularly certain communications between Levy and Elliott. The following day, February 23, 2005, we held an *in camera* conference with Shuman, Elliott, and Monte in order to memorialize these concerns on the record. John F. Innelli, Esq., counsel for Relator Magid, was not present at this proceeding, the transcript of which was filed under seal. (Feb. 23, 2005 Tr. at 1-2, 27-28; Doc. No. 171.) Later that day, we issued an Order directing Defendants to disclose and/or produce:

1. All correspondence, reports, and other documents exchanged between (1) Defendants, Elliott, or Levy and (2) the Health Care Financing Administration ("HCFA") as well as a copy of the check accompanying Elliott's November 15, 2000 letter to the HFCA;

---

<sup>2</sup> Defendant Palloni has been represented by his own attorney, Alfred J. Monte, Jr., Esq., since November 2004. (Doc. No. 149.)

2. The contents of the file created and maintained by Elliott in connection with the correspondence with the HCFA; and
3. The existence and nature of a statement made by Levy to Elliott on October 29, 1999.

(Doc. No. 165.) This Order also permitted Relator and Defendant Palloni to depose Levy and Elliott and to request additional discovery with regard to information obtained through those depositions. (*Id.*)

Before these additional depositions were held, Shuman prepared a “Privilege Log” listing ten documents, all of which concern the “billing procedures of [Wilderman, P.C.] during the period of 1990 to 1995.” (Doc. No. 176 at Ex. B.) With one exception,<sup>3</sup> these documents constitute notes from an interview of Levy, a statement given by Levy on October 20, 1999 and signed by her on October 22, 1999, fax communications between Levy and Elliott made in 2000 and 2001, and a report authored by Levy and provided to Elliott. (*Id.*) With respect to each document, Defendants asserted either attorney-client privilege, attorney work-product privilege, or both privileges. (*Id.*)

At the second deposition of Levy, which was held on March 8, 2005, Innelli questioned Levy about the billing practices at Wilderman, P.C. (*Id.* at Ex. C.) Levy explained that she undertook an analysis of the Medicare claims submitted by Wilderman, P.C. during the years 1990 through 1995. (*Id.* at Ex. C, pp. 27-28.) This work, which was performed in 1999, was done at the request of Dr. Wilderman and consisted of a comparison of the anesthesia time

---

<sup>3</sup> The first document on the log is a summary of “work performed, [o]bservations, and [s]uggested [f]urther [a]ctions” prepared by Arthur W. Barnes, C.P.A. (Doc. No. 176 at Ex. B.) Only work-product protection is asserted with respect to this material.

recorded on billing tickets with the time reported on the HFCA 1500 forms submitted to Medicare. (*Id.* at Ex. C, pp. 28, 55-56.) Levy revealed that she discovered certain instances where the HFCA 1500 form listed five minutes more time than the corresponding billing ticket. (*Id.* at Ex. C, pp. 56, 86.)

As expected, the documents on the privilege log, all of which involve Wilderman, P.C.'s billing procedures, became an issue during the course of Levy's second deposition. At that time, Shuman made known his express willingness both to waive any assertion of work-product privilege and to turn over the documents, if Levy did not object.<sup>4</sup> (*Id.* at Ex. C, pp. 87-88.) In turn, Levy was asked a series of questions about the potential applicability of attorney-client privilege and her desire to assert such privilege. (*Id.* at Ex. C, pp. 89, 106.) Upon review of the documents, Levy asked that they not be disclosed based on an assertion of attorney-client privilege. (*Id.* at Ex. C, p. 107.) Shortly after the deposition, Levy wrote a letter to the Court requesting that the Court appoint counsel to represent her.<sup>5</sup> On April 6, 2005, we appointed

---

<sup>4</sup> We conclude that Federal Rule of Civil Procedure 26(b)(3) requires production of these materials, regardless of Defendants' waiver of privilege. Relator has a substantial need for these materials in the preparation of her case and "is unable without undue hardship to obtain the substantial equivalent of the materials by other means." In addition, these materials do not involve the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of" Defendants. Fed. R. Civ. P. 26(b)(3).

<sup>5</sup> The letter, which was received by the Court on March 12, 2005, stated:

I am writing to ask for your help in getting legal representation. I have received a subpoena and did appear at a deposition on March 8, 2005 as requested but it appears the three attorneys also present felt I need my own counsel to represent me. I was employed in the past for Barry Wilderman, M.D., P.C. and at the time this complaint was filed I was told I was represented by the practice attorney Arthur Shuman. I am now being told he does not represent me and I need to obtain my own attorney. It is unclear to me exactly why. I live in a small town outside of Allentown and support myself. I am not married. For me to hire an

William J. Winning, Esq., to represent Levy. (Doc. No. 172.) By letters dated May 23, 2005, Winning informed this Court and the parties that Levy would not waive the attorney-client privilege “as to her communications with [Shuman] and the materials described on the privilege log.” (Doc. No. 176 at Ex. D.) No mention was made of self-incrimination. Relator Magid then filed the instant Motion, arguing that, based on the nature of the documents on the log and Levy’s role at Wilderman P.C., Levy had no right to invoke or waive the attorney-client privilege in her individual capacity.

## **II. DISCUSSION**

The attorney-client privilege limits the normally broad disclosure requirements of Rule 26, which provides that relevant but privileged matters are not discoverable. Fed. R. Civ. P. 26(b)(1); *Martin Marietta Materials, Inc. v. Bedford Reinforced Plastics, Inc.*, 227 F.R.D. 382, 389 (W.D. Pa. 2005). As the “oldest of the privileges for confidential communications known to the common law,” it serves the purpose of “foster[ing] disclosure and communication between the attorney and the client.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *In re Grand Jury Investigation*, 599 F.2d 1224, 1235 (3d Cir. 1979). The privilege “recognizes that sound

---

attorney from Allentown to come to Philadelphia or to hire a lawyer from Philadelphia to review this case would cost a fortune. I would have to take out a loan and pay for years for something that is a dispute between physicians. I am not clear if I am in danger of criminal implications or not since none of the attorneys represent me and none of them want to explain why I need counsel[.] I will greatly appreciate it if you could assign a public defender to review this case on my behalf and let me know my legal rights. I don’t know if I am in danger of incriminating myself or not at this point. Thank you for considering my request. I know you are busy, I hope you are understanding.

Letter from Diane L. Levy to Chambers (Mar. 9, 2005).

legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn*, 449 U.S. at 389.

However, courts have recognized that "the privilege obstructs the search for the truth and because its benefits are, at best 'indirect and speculative,' it must be 'strictly confined within the narrowest possible limits consistent with the logic of its principle.'" *In re Grand Jury Investigation*, 599 F.2d at 1235 (quoting 8 *Wigmore on Evidence* § 2291, at 545 (1961)).

Whether the privilege applies is a question of law to be decided by the court. *Andritz Sprout-Bauer, Inc. v. Beazer E., Inc.*, 174 F.R.D. 609, 632 (M.D. Pa. 1997). It will only apply where the party asserting it can demonstrate that:

(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 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 © for the purpose of securing primarily either (I) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

*In re Grand Jury Investigation*, 599 F.2d at 1233 (citing *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950)). "The central inquiry is whether the communication was made by a client to an attorney for the purpose of obtaining legal advice." *In re Spalding Sports Worldwide*, 203 F.3d 800, 805 (Fed. Cir. 2000).

This Motion hinges on the question of whether a corporate employee, like Levy, may shield certain materials from discovery based on an assertion of attorney-client privilege, even where the corporate defendant is willing to waive its privilege claims and disclose the materials. In general, "any privilege that attaches to communications on corporate matters between

corporate employees and corporate counsel belongs to the corporation, not to the individual employee, and . . . employees generally may not prevent a corporation from waiving the attorney-client privilege arising from such communications.” *United States v. Int’l Bd. of Teamsters*, 119 F.3d 210, 215 (2d Cir. 1997); *see also In re Grand Jury Subpoena*, 272 F.3d 563, 571 (1st Cir. 2001) (“[A] corporation’s attorney-client privilege may be waived by current management.”); *In re Grand Jury Investigation*, 599 F.2d at 1236 (observing that employees have no control over assertion or waiver of attorney-client privilege). However, under certain circumstances, a corporate employee may still be able to assert a *personal* privilege with respect to certain communications with corporate counsel. *Int’l Bd. of Teamsters*, 119 F.3d at 215.

There is a presumption that a corporation’s attorney “only represents the corporate entity, not the individuals within the corporate sphere.” *In re Grand Jury Subpoena*, 274 F.3d at 571. A claim of personal privilege by an employee must meet a demanding standard. “This makes perfect sense because an employee has a duty to assist his employer’s counsel in the investigation and defense of matters pertaining to the employer’s business.” *Id.* The employee seeking to assert the claim of privilege must satisfy the following five-prong test:

First, they must show they approached counsel for the purpose of seeking legal advice. Second, they must demonstrate that when they approached counsel they made it clear that they were seeking legal advice in their individual rather than in their representative capacities. Third, they must demonstrate that the counsel saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise. Fourth, they must prove that their conversations with counsel were confidential. And, fifth, they must show that the substance of their conversations with counsel did not concern matters within the company or the general affairs of the company.

*In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 123 (3d Cir. 1986) (internal quotation omitted). The burden of showing that some evidentiary privilege applies rests squarely

with the party resisting discovery. *Applied Tech. Int'l, Ltd. v. Goldstein*, Civ. A. No. 03-848, 2005 U.S. Dist. LEXIS 1818, at \*10 (E.D. Pa. Feb. 7, 2005).

In this instance, Levy's Response to Relator's Motion to Compel provides no guidance as to her ability to comply with the five-factor analysis set forth in *In re Bevill*. Levy acknowledges her intention to assert a "personal attorney-client privilege with respect to her communications with Mr. Shuman and the documents described on the privilege log," as well as her continued belief that these documents and communications are protected from disclosure by such privilege. (Doc. No. 179.) However, she provides little to support the existence of a prior or present personal attorney-client relationship between her and Shuman. Rather, she requests an *in camera* evidentiary hearing to assist the Court in determining the validity of her privilege claims.

We have had the opportunity to review certain of the documents on the privilege log *in camera*, as well as the testimony provided by Shuman at the *in camera* conference held on February 23, 2005. It is clear from our review of these materials that Levy cannot sustain her personal privilege claim in the face of Wilderman P.C.'s waiver of its privilege claims. According to Shuman, after Levy's 1999 deposition, she approached him in order to disclose certain information to him. In response to Levy's disclosure, Shuman initiated an investigation on behalf of his clients, the Defendants. Levy was then interviewed by Elliott on October 20, 1999 and signed a statement memorializing that interview on October 22, 1999.<sup>6</sup> This statement begins:

Diane, my name is Charles Elliott . . . I represent Barry Wilderman M.D.P.C. by whom you are employed. I was retained by Arthur Shuman Esq., the attorney for your employer. My duties include determining the nature and extent of any

---

<sup>6</sup> This is item 4 on the Privilege Log. (Doc. No. 176 at Ex. B.)

Medicare over[-]billings that occurred while you have been an employee of Dr. Wilderman.

In the months that followed this statement, Levy sent a number of fax communications to Elliott, to which privilege are now asserted. This includes a worksheet of numerical calculations comparing billing times that was faxed to Elliott on November 16, 2000 and a table of anesthesia patients comparing “Time on Ticket” and “Time on Medicare Form” that was faxed to Elliott on February 20, 2001.<sup>7</sup>

During the *in camera* conference held February 23, 2005, Shuman asserted that, upon Levy’s post-deposition disclosure, an attorney-client relationship arose between him and Levy. Initially, we would observe that it is by no means clear that when Levy approached Shuman, she was seeking legal advice in her individual capacity, rather than in a representative capacity. It is even less clear that Shuman spoke to Levy in her individual capacity, knowing that a conflict could arise. Immediately upon talking with Levy, Shuman initiated an investigation to determine whether Levy was embezzling from his client. This led to Levy’s interviews with Elliott. It can not reasonably be argued that Shuman represented Levy at this point. In any event, any privilege that may have existed at the initial meeting between Levy and Shuman was eviscerated through the communications that followed. In Levy’s statement to Elliott, it was abundantly clear that Levy was communicating to Elliott in his capacity as a representative of Wilderman, P.C. Elliott left no doubt about this in his introduction. *See In re Grand Jury Subpoenas*, 144 F.3d 653, 659 (10th Cir. 1998) (even “reasonable belief” of individual representation by corporate counsel is

---

<sup>7</sup> These are items 6 and 8, respectively, on the Privilege Log. (Doc. No. 176 at Ex. B.) It appears that the calculations in item 6 were used to arrive at the amount, \$12,275.65, paid by Wilderman, P.C. to HGS Administrators in November 2000 “as a voluntary disclosure related to anesthesia claims.”

insufficient to support finding of personal privilege for corporate employee). Moreover, this communication and the fax transmissions that followed it all concerned matters within the general affairs of Wilderman, P.C., specifically Wilderman's billing practices. Clearly, Levy cannot satisfy the requirements for attorney-client privilege articulated in *In re Bevill*. Accordingly, she cannot assert a personal attorney-client privilege.

An appropriate Order follows.

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

UNITED STATES OF AMERICA ex rel. :  
DEBORAH RIVA MAGID : CIVIL ACTION  
 :  
v. :  
 :  
BARRY WILDERMAN, M.D., P.C., : NO. 96-CV-4346  
BARRY WILDERMAN, M.D., ERIC :  
GERWIRTZ, M.D., STEVEN PALLONI, :  
M.D. :

**ORDER**

AND NOW, this 10th day of August, 2006, upon consideration of Relator's Motion To Compel Testimony Of Diane Levy And To Produce Materials Described In Privilege Log (Doc. No. 176), and all documents filed in support thereof and in opposition thereto, it is ORDERED that Relator's Motion is GRANTED. It is further ORDERED as follows:

1. The documents named in the "Privilege Log" must be produced within five (5) days of the date of this Order.
2. Diane Levy is directed to appear for a deposition at a mutually convenient time within thirty (30) days of the date of this Order.

IT IS SO ORDERED.

BY THE COURT:

/s/ R. Barclay Surrick  
U.S. District Court Judge