

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

FRANK J. DIPALMA : CIVIL ACTION  
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 v. :  
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 MEDICAL MAVIN, LTD., et al. : NO. 95-8094

MEMORANDUM ORDER

This case arises out of the sale of plaintiff's podiatric practice to defendant Michael LaLiberte. Plaintiff has asserted various breach of contract and tort claims against Dr. LaLiberte and his wife, Patricia LaLiberte.<sup>1</sup> Plaintiff also has asserted tort and breach of contract claims against defendants Medical Mavin and DeBiasse, the brokerage house and broker who agreed to use their best efforts to find a suitable purchaser for plaintiff's practice. Defendant Ryan was the lawyer for Dr. LaLiberte in the sale transaction and allegedly was also the lawyer and CEO of Medical Mavin. Plaintiff has asserted claims of negligence, breach of fiduciary duty against Ryan and his law firm of Crawford, Wilson, Ryan, & Agulnick, P.C. Plaintiff has asserted claims of fraud and civil conspiracy against all six defendants.

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1. The LaLibertes defaulted in this action and a default judgment against Dr. LaLiberte has been entered.

Presently before the court is the motion of defendants Ryan and Crawford, Ryan, Wilson & Agulnick, P.C. for an order terminating Mr. Ryan's deposition because of plaintiff's counsel's alleged tactic of needlessly extending the deposition to a third day or alternatively for a protective order barring plaintiff's counsel from asking certain questions which they claim elicit information protected by the attorney-client privilege. Also before the court is plaintiff's motion to compel Mr. Ryan to answer the questions he has refused to answer. Plaintiff contends that the challenged questions seek discoverable non-privileged information and that any privilege has been waived in any event.

A court may terminate an ongoing deposition upon a showing that "the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party." Fed. R. Civ. P. 30(d)(3). A "strong showing" is generally required before a party will be denied the right to complete a deposition. Caplan v. Fellheimer Eichen Braverman & Kaskey, 161 F.R.D. 29, 30 (E.D. Pa. 1995).

Defendants' contention that the Ryan deposition has been unreasonably protracted is not without merit. Plaintiff has deposed Mr. Ryan for more than nine hours over two days. From a review of the record, it appears that his testimony could have been completed in that time. The length of the deposition alone,

however, is not indicative of bad faith, see Smith v. Logansport Comm. School Corp., 139 F.R.D. 637, 644 (N.D. Ind. 1991), and it is not clear that plaintiff's counsel bears sole responsibility for the unnecessary delay. The moving defendants have not made a "strong showing" for the termination of Mr. Ryan's deposition.

Plaintiff's counsel asked Mr. Ryan to relate any conversation he had with Mrs. LaLiberte concerning the sale transaction and her execution of promissory notes which formed part of the transaction underlying this lawsuit. Plaintiff's counsel also asked Mr. Ryan whether he ever inspected billing records which show that plaintiff engaged in billing fraud.<sup>2</sup> Mr. Ryan declined to answer these questions on the ground that they would elicit information protected by Dr. LaLiberte's attorney-client privilege.

In diversity cases such as this, federal courts apply the state law of privilege. Fed. R. Evid. 501; United Coal Cos. v. Powell Constr. Co., 839 F.2d 958, 965 (3d Cir. 1988); Cedrone v. Unity Sav. Ass'n, 103 F.R.D. 423, 426 (E.D. Pa. 1984); Super Tire Eng'g Co. v. Bandag Inc., 562 F. Supp. 439, 440 (E.D. Pa. 1983).

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2. Among their defenses, defendants assert that plaintiff's own actions caused or contributed to the losses for which he now sues. Defendants allege that plaintiff engaged in fraudulent billing practices which inflated the true value of his podiatric practice.

The Pennsylvania attorney-client privilege provides that "[i]n 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. Cons. Stat. Ann. § 5928 (West 1982). The statute is essentially a codification of the common law attorney-client privilege. See Garvey v. National Grange Mut. Ins. Co., 167 F.R.D. 391, 395 (E.D. Pa. 1995); Eastern Techs., Inc. v. Chem Solv., Inc., 128 F.R.D. 74, 7 (E.D. Pa. 1989).<sup>3</sup>

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3. The traditional elements of the attorney-client privilege that identify communications protected from disclosure 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.

See Rhone-Poulenc Rorer Inc. v. Home Indem. Co., 32 F.3d 851, 862 (3d Cir. 1994); United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950); 8 Wigmore, Evidence, § 2292, at 554 (McNaughton rev. 1961).

The purpose of the attorney-client privilege is to foster a confidence between the attorney and the client that will lead to a trusting and open dialogue. See Estate of Kofsky, 409 A.2d 1358, 1362 (Pa. 1979). See also United States Fidelity & Guar. Co. v. Barron Indus., Inc., 809 F. Supp. 355, 363-64 (M.D. Pa. 1992). When deciding whether the attorney-client privilege applies, courts look "not only to the privilege itself, but to the well-established rationale behind the privilege." United States Fidelity & Guar. Co., 809 F. Supp. at 364.

The attorney-client privilege only protects confidential communications between the client and the attorney in cases where the attorney is acting in an advisory capacity. Id. The general nature of the privileged matter, the occasion and circumstances of any communications and the factual circumstances of the attorney-client relationship remain discoverable even when the communication itself is protected. See Stabilus v. Haynsworth, Baldwin, Johnson & Greaves, 144 F.R.D. 258, 268 (E.D. Pa. 1992). See also, Rhone-Poulenc Rorer Inc., 32 F.3d at 862.

Under Pennsylvania law, the party seeking disclosure of attorney-client communications bears the burden of showing that such communications are not protected. See Cedrone v. Unity Sav. Ass'n, 103 F.R.D. 423, 427 (E.D. Pa. 1984); Estate of Kofsky, 409 A.2d at 1362-63 (Pa. 1979). See also Commonwealth v. Maquigan,

511 A.2d 1327, 1334 (Pa. 1985). But see Garvey, 167 F.R.D. at 395 (placing the burden in a diversity case on the party resisting discovery).

It is acknowledged that no attorney-client relationship ever existed between Mrs. LaLiberte and Mr. Ryan. Defendants maintain, however, that Mrs. LaLiberte at all times during the pertinent transaction acted as Dr. LaLiberte's agent and any conversation she had with Mr. Ryan was necessary for his provision of legal services to Dr. LaLiberte.

The attorney-client privilege may extend beyond the parties in the attorney-client relationship to an agent to whom disclosure of otherwise privileged communications is necessary for the client to obtain legal advice. It is not sufficient, however, that information was communicated through a third-party as a matter of convenience. See Advanced Tech. Assocs. Inc. v. Herley Indus., Inc., 1996 WL 711018, \*8 (E.D. Pa. Dec. 5, 1996). See also, Giovan v. St. Thomas Diving Club, Inc., 1997 WL 360867, \*3 (D.V.I. June 16, 1997).

Based on the record presented, it is far from clear that Mrs. LaLiberte was an essential or necessary "conduit" for the transmission of communications between Dr. LaLiberte and his attorney. Plaintiff is entitled to probe the circumstances surrounding any conversation between Mr. Ryan and Mrs. LaLiberte regarding the sale transaction to determine whether they were

necessarily relayed between Dr. LaLiberte and Mr. Ryan through her. In this regard, it is particularly difficult to discern how a statement by Mrs. LaLiberte about her willingness to sign promissory notes could constitute a transmittal of a communication between Mr. Ryan and Dr. LaLiberte, let alone one that was necessarily undertaken through her.<sup>4</sup>

Defendants also contend with apparent force that there was a commonality of interest between the LaLibertes. Thus, had Mrs. LaLiberte merely been present at and privy to conversations between Dr. LaLiberte and Mr. Ryan, her presence would not vitiate the privilege. See In re Grand Jury Investigation, 918 F.2d 374, 386 (3d Cir. 1990); Schreiber v. Kellogg, 1992 WL 309632 (E.D. Pa. Oct. 19, 1992). The commonality of interest concept is designed to preserve and not extend the privilege. Every communication between a lawyer and someone who has a commonality of interest with his client does not become privileged.

Plaintiff's questioning about whether Dr. LaLiberte ever showed Mr. Ryan billing records from Dr. DiPalma's practice which either thought were false or inaccurate would tend to

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4. Mrs. LaLiberte was deposed for two days. It is virtually inconceivable that she was not questioned about any prior statements regarding her execution of the promissory notes. There is no suggestion that she invoked the privilege in response to such questions on the ground such statements were merely authorized transmissions between lawyer and client.

reveal the content of discussions between Mr. Ryan and his client, and are privileged.

Plaintiff's questions regarding whether Mr. Ryan had seen false or inaccurate billing records that may have been supplied by sources other than Dr. LaLiberte are not improper. Only communications between the client and his attorney are protected from disclosure by the attorney-client privilege.

Plaintiff also argues that Dr. LaLiberte's attorney-client privilege has been waived as to any conversations between Dr. LaLiberte and Mr. Ryan regarding Dr. DiPalma's billing records. Plaintiff argues that the privilege was waived when Mr. Ryan discussed the general allegations of fraudulent billings at his deposition; when defendants raised Dr. DiPalma's alleged fraudulent billings as an affirmative defense; when Dr. LaLiberte filed a civil action in a state court against Dr. DiPalma based on alleged fraudulent billing practices; and when Dr. LaLiberte authorized Ryan to disclose the possibility of fraudulent billing in a letter to a third-party.

The attorney-client privilege belongs to the client and can be waived only by the client. See 42 Pa. Cons. Stat. Ann. § 5928 (West 1982); Emejota Eng'g Corp. v. Kent Polymers Inc., 1985 WL 4019, \*2 (E.D. Pa. 1985).<sup>5</sup> While Dr. LaLiberte may waive the

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5. Mr. Ryan may properly assert the privilege on behalf of Dr. LaLiberte. See Fisher v. United States, 425 U.S. 391, 402 (continued...)

attorney-client privilege by disclosing the substance of the communication with his attorney in a pleading or in a letter to a third-party, only the actual statements divulged in those documents lose their privileged status. See Frieman v. USAir Group, Inc., 1994 WL 675221, \*7 (E.D. Pa. Nov. 23, 1994). The attorney-client privilege is not waived merely by the filing of a lawsuit or the assertion of a defense by a party who is not invoking the privilege. See Barr Marine Prods. Co., Inc. v. Borg-Warner Corp., 84 F.R.D. 631, 635 (E.D. Pa. 1979).

**ACCORDINGLY**, this                      day of February, 1998, upon consideration of the Motions of defendants Kevin J. Ryan and Crawford, Wilson, Ryan & Agulnick, P.C.'s for a Protective order Relating to Plaintiff's Deposition of Defendant Kevin J. Ryan, Esq. (Doc. #48), and plaintiff's Motion to Compel Answers at Deposition (Doc. #50, Part 1), **IT IS HEREBY ORDERED** that said Motions are **GRANTED IN PART** and **DENIED IN PART** in that the parties shall complete defendant Ryan's deposition at a mutually agreeable time but in no event later than February 20, 1998 at which time the plaintiff may inquire into the circumstances surrounding communications as to which the privilege is reasserted and at which Mr. Ryan shall answer the questions regarding statements made by Mrs. LaLiberte which are not within

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(...continued)  
n.8 (1976)(noting it is universally held that attorney-client privilege may be raised by the attorney).

the limits of the attorney-client privilege as discussed by the court herein. Any assertion by a witness of a privilege which is unfounded may result in the imposition of appropriate sanctions.

**BY THE COURT:**

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**JAY C. WALDMAN, J.**