

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

GEORGE A. HIGGINS, : CIVIL ACTION
Plaintiff, : Nos. 96-6215 & 97-235
 :
v. :
 :
ERIC EICHLER and :
THE L.P. CORPORATION, :
Defendants. :

M E M O R A N D U M

BUCKWALTER, J.

April 16, 1998

I. INTRODUCTION

Currently before the Court is Plaintiff's Motion to Compel Production of Documents and to Extend the Discovery Deadline, which I will grant in part and deny in part based on the following findings.

II. DISCUSSION

Familiarity with the factual underpinning of this case is assumed. Because Defendants have already turned over some of the contested documents, this Memorandum and the accompanying Order cover those remaining documents contained in the Consolidated Privilege Log attached to Defendants' Response to the Motion to Compel at Exhibit B.

A. Privilege

Defendants claim that the remaining documents are protected by both the attorney-client privilege and, apparently, the work product privilege. Initially, I reject any attempt by Defendants to invoke the work product privilege, as there has been no showing that any document was prepared in anticipation of litigation, Federal Rule of Civil Procedure 26 (b)(3), nor is the prospect of tax litigation, rather than actual strategizing for concrete litigation, sufficient to trigger the work-product privilege. See United States v. United Technologies Corp., 979 F.Supp. 108, 115 (D. Conn. 1997).

For each document for which Defendants claim the attorney-client privilege, they have the burden of demonstrating 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 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. Glenmede

Trust Company v. Thompson, 56 F.3d 476, 486 n. 15 (3d. Cir. 1995). It is settled that the privilege applies to communications between a corporation's officers and agents and the corporation's in-house counsel. Upjohn Co. v. United States, 449 U.S. 383, 395-396 (1981). The Court is required to narrowly construe the privilege's application, Westinghouse Electric Corporation v. The Republic of the Philippines, 951 F.2d 1414, 1423 (3d Cir. 1991), while at the same time guarding it "jealously." Haines v. Liggett Group Inc., 975 F.2d 81, 90 (3d Cir. 1992).

Here, determination of whether the contested documents are privileged hinges on whether Defendants' in-house counsel, Glenn Madere, was acting as a lawyer in connection with the documents, and whether the communications sought to be protected were made for the purpose of obtaining Madere's legal opinion, legal services or assistance in some legal proceeding. Although Madere served as Defendants' in-house counsel, he is also a corporate officer: Secretary and Vice-President. Thus it cannot be assumed that he acted, in every instance, as a lawyer, or that each document he prepared is automatically imbued with a legal purpose. Nor does the mere presence of Madere's handwritten notes on any document automatically confer privilege upon it. Although Defendants rely heavily on United Technologies for the proposition that "in the area of taxation, it is often difficult

to determine where business ends and the law begins," 979 F.Supp. at 112, that court expressly found the documents in question to "pertain to the development of a common legal strategy regarding the tax structure. . . ." Id.

Finally, I note that, as the parties asserting privilege, it was incumbent upon Defendants to provide opposing counsel and the Court with sufficient information to determine the existence of privilege. Defendant has had several opportunities to provide such information. Where Defendants have nonetheless persisted in vague and conclusory assertions that a document is privileged, with nothing more, I have determined that, rather than order submission of the document for in camera review, they have failed to sustain their burden of demonstrating privilege.

B. The documents

D195-196. Privileged.¹ Defendants assert that this memorandum from Madere contains legal advice specifically requested by certain partners.

D311-313. Not privileged. There is no assertion that this memorandum from Madere regarding "tax goals in connection with potential 1990 restructuring of the IPA system and

¹ The privilege, of course, protects only the communication itself and not the underlying facts. Upjohn, 449 U.S. at 389.

[Madere]'s recommendation of achieving said tax goals" contained legal, as distinct from business advice.

D314-316. Not privileged. There is no assertion that this document involved the exchange of legal advice.

D317-321. Not privileged. There is no assertion that this document involved the exchange of legal advice. As with the previous document, Defendants have merely marked the document as privileged but provided no information with which to distinguish between legal and business-related exchanges among the partners.

D322-323. Privileged. Defendants have clearly indicated that this document contains an exchange of legal advice between Madere acting as counsel and certain partners, as well as Madere's consultation with outside counsel.

D347-350. Privileged. Madere prepared this memorandum for certain partners in his counsel capacity and performed legal analysis of various financial transactions.

D352-354. Not privileged. As noted above, these documents -- Madere's draft summary and handwritten notes of process to enact IPA Cleanup Program -- cannot qualify for the work product privilege, as they were not produced "in anticipation of litigation." F.R.C.P. 26(b)(3).

D355-356. Privileged. This memorandum is specifically addressed to Madere in his capacity as counsel seeking legal advice.

D357-360. Not privileged. Defendants do not assert that the document contains or reflects an exchange of legal advice.

D361-385. Not privileged. Defendants do not assert that the document contains or reflects an exchange of legal advice.

D399-403. Not privileged. Defendants do not assert that the document contains or reflects an exchange of legal advice. Again, the mere presence of Madere's handwriting on a document, absent any indication that he was acting as counsel or that there was any exchange of legal advice, does not convey privileged status on a document.

D404-406. Not privileged. Beyond a mere assertion, Defendants have provided no basis for finding that these memoranda by Madere summarizing a meeting "concerning IPA Cleanup Program and Related Tax Issues" relate to legal advice.

D407-411 & D412-414. Not privileged. These documents were prepared by another employee and submitted to Madere for his comments and use in preparation for a partners' meeting. Defendants do not assert that the documents involved any exchange of legal advice, and their use of the term "work product" does

not convey privileged status when there is no showing that the document was prepared in anticipation of litigation.

D415-421. Privileged in part. Defendants will turn over a redacted copy of this document excluding only those portions in which Madere "provides legal advice regarding the status of partners participating in the IPA program." The mere stamping of the document as privileged does not shield the entire document.

D422-427. Not privileged. The document was provided to Madere for review, but not for exchange of legal advice, and it was also provided to another, non-attorney partner.

D428-434. Not privileged. This is a topic outline which Madere prepared for an oral presentation at a partners' meeting, discussing the legal aspects of collection risks, tax law ramifications, etc. Defendants again fail to demonstrate an entitlement to work product privilege as there is no showing that the documents were produced in anticipation of litigation.

D435-436. Not privileged. There is no indication that Madere was acting in his capacity as counsel, or that he was giving, sharing or receiving legal advice.

D437-450. Not privileged. Aside from the conclusory allegation that this memorandum of projected debt forgiveness which was sent to certain partners was privileged, Defendants do not assert the exchange of actual legal advice.

D451-453. Not privileged. "Three illustrations of IPA Accounting" were prepared by L.P. employees and submitted to Madere in preparation for a partner's meeting, and they contain Madere's handwritten notes and an explanation of how debt will be allocated under each illustration. There is no assertion of an actual exchange of legal advice.

D488-521. Not privileged. Again, despite Defendants' assertion that these documents contain Madere's notes, there is no allegation that they were done in anticipation of litigation, nor that they were made in the course of his functions as in-house counsel. As with most of these documents, the lines dividing Madere's roles as in-house counsel, Corporate Secretary and Vice-President are unclear, and I will not merely assume that any notes he made in preparation for a meeting are necessarily legal in nature.

D522. Not privileged. Defendants have made no showing that this August 16, 1993 memorandum, which memorialized an understanding reached on April 29, 1993 regarding the IPA Cleanup plan was prepared for the purpose of rendering legal advice. Cf., United Technologies, 979 F.Supp. at 113.

D534. Not privileged. There is no indication that Madere was acting in his capacity as counsel, or that he was giving, sharing or receiving legal advice.

D613-629. Not privileged. While Defendants assert that these partners' financial statements partners were provided to Madere for legal advice, the privilege attaches to the communication and not the information, yet Defendants are attempting to prevent release of the financial statements themselves.

D676-685. Privileged. An exchange between Madere and an outside attorney over the tax law ramifications of Defendants' plans. (Madere Affidavit at ¶5).

D686-741. Not Privileged. The document is a draft of certain partners' net worth with respect to their interests in LCOR/Linpro Entities. They were authored by Defendants' employees and provided only to Madere for him to render tax advice. Although Madere has stated that the documents were used to advise Defendants on tax and other legal issues, and that the advice was not unprivileged business advice, (Madere Affidavit at ¶9), the privilege protects the communication and not the information, and Defendants may not use it to prevent release of the information about net worth.

An Order follows.

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

GEORGE A. HIGGINS, : CIVIL ACTION
Plaintiff, : Nos. 96-6215 & 97-235
 :
v. :
 :
ERIC EICHLER and :
THE L.P. CORPORATION, :
Defendants. :

O R D E R

AND NOW, this 16th day of April 1998, upon consideration of Plaintiff's Motion to Compel Production of Documents and to Extend the Discovery Deadline (Dkt. # 56), Defendants' Response thereto (Dkt. # 58), and Plaintiff's Reply, it is hereby **ORDERED** that, in accordance with the accompanying Memorandum, Plaintiff's Motion is **GRANTED IN PART AND DENIED IN PART**, as follows:

(1) The motion is **GRANTED** with regard to the following documents, which Defendants will produce to Plaintiff, within seven (7) days of this Order: **D311-313; D314-316; D317-321; D352-354; D361-385; D399-403; D404-406; D407-411; 412-414; D422-427; D428-434; D435-436; D437-450; D451-453; D488-521; D522; D534; D613-629 & D686-741.**

(2) The Motion is **DENIED** to the extent that the following documents are found to be **Privileged: D195-196; D322-323; D347-350; D355-356; D357-360; D415-421² & D676-685.**

(3) The Motion to Extend the Deadline for Discovery is **GRANTED**, and the deadline is **EXTENDED** by thirty (30) days.

BY THE COURT:

RONALD L. BUCKWALTER, J.

² The document is found to be privileged in part in accordance with the accompanying Memorandum. Defendants will provide those portions not covered by the privilege to Defendants, along with the other non-privileged documents.