

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION**

| | | |
|--------------------------|---|-----------------------|
| THE NATIONAL ASSOCIATION |) | |
| OF BOARDS OF PHARMACY, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | CIVIL ACTION |
| |) | NO.: 3:07-CV-84 (CDL) |
| THE BOARD OF REGENTS OF |) | |
| THE UNIVERSITY SYSTEM OF |) | |
| GEORGIA and FLYNN |) | |
| WARREN, JR., |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

**REPLY TO RESPONSE TO PLAINTIFF’S MOTION FOR
THE DETERMINATION OF THE PRIVILEGED
STATUS OF CERTAIN DOCUMENTS**

This Court has before it two documents (marked Documents A and B) that the attorneys for Plaintiff National Association of Boards of Pharmacy (“NABP”) obtained as a result of the execution of the Temporary Restraining Order and Seizure and Impoundment Order (“Order”) entered by this Court. The issue before this Court is whether or not those documents are protected by Defendants’ attorney-client privilege or the work-product privilege. Defendants bear the burden of proving all of the elements of those privileges. Defendants have failed to show

that the two communications at issue contain confidential information intended to be maintained as confidential.

I. IMPORTANT FACTS DEFENDANTS HAVE FAILED TO ESTABLISH

Documents A and B are communications from Defendant Warren. One is to an attorney who was employed by the University of Georgia. Another is to an attorney who was an assistant attorney general for the State of Georgia.

Defendants' responses to the pending motion lack any explanation of how these specific communications and their contents related either to securing an opinion of law or legal services from those two individuals. The Defendant Board offers the Declaration of Arthur Leed (Document No. 84). It states in a conclusory fashion that the two documents "are clearly confidential communications from Mr. Warren to his lawyers." Declaration of Arthur Leed ¶ 4. However, Mr. Leed does not specifically claim to have any personal knowledge of the events that occurred in 1994 and 1995 when the communications apparently were made. Mr. Leed further contends that the documents were "prepared in anticipation of litigation."

Id. However, he does not offer any explanation or basis for his assertion.

Mr. Leed does not claim to have ever been a recipient of the communications or to have been a party to any discussion about those communications prior to their coming into the hands of the attorneys for the NABP.

Notably lacking from the submissions of Defendant Warren and the Defendant Board are any declarations from Ms. Jones or Ms. Guilday, the recipients of Documents A and B. There is no specific information as to why Professor Warren was communicating these facts to them, what use they made of those facts, the identities of any other persons to whom they disclosed the facts contained in the communication or what use they made of the contents of the communication in performing any legal services for the Defendant Board or Defendant Warren.

Presumably Defendant Warren should be able to supply such information. However, Defendant Warren offers no details as to the purpose of the two communications reflected in Documents A and B. He offers no explanation as to why the facts in the documents are confidential and no explanations as to the purpose for communicating the information contained in these documents or how these two particular communications related to either securing legal opinions or providing legal services to the Defendant Board or to Defendant Warren. Defendant Warren merely states that he sent the two communications “with the understanding that they were acting as my attorneys, and I considered that these were confidential communications with my attorneys.” Declaration of Flynn Warren, Jr., (Document No. 92) ¶ 5.

Of some significance is the manner in which Documents A and B were maintained. Mr. Leed includes in his Declaration a recitation of events that occurred at the College of Pharmacy when the attorneys for the NABP were present for the execution of the Order. Declaration of Arthur Leed (Document No. 84) ¶ 5. However, Documents A and B were not obtained at the College of Pharmacy. Documents A and B were obtained from a zip drive in a box containing numerous other zip drives at Defendant Warren's home. Declaration of Todd Williams (Exhibit A hereto) ¶ 11; Declaration of Kerri A. Hochgesang (Exhibit B hereto) ¶ 3.

Defendants appear to suggest that the privileged nature of Documents A and B is self-evident from their contents. However, the documents have no "confidential" legend and do not mention confidentiality. Nothing in those two documents asks for a legal opinion, states a legal opinion, expresses a belief as to the merit or lack of merit of any legal position or describes any legal issue or legal problem. They merely recite the facts in a fairly neutral, matter-of-fact manner.

II. ARGUMENT AND CITATION OF AUTHORITY

A. The Attorneys for the NABP Properly Obtained Documents A and B as a Result of the Execution of the Order

The Order authorized the United States Marshal or other law enforcement officers, assisted by NABP's attorneys to, among other things, search Defendant Warren's residence and seize disks that contained "NABP's copyrighted examination questions" and "books, records, correspondence and other documents in Defendant Warren's possession, custody or control which relate to said copyrighted examination questions" Order ¶ 1(a)-(b).

The attorneys for the NABP Obtained Documents A and B as a result of the execution of the Order at Defendant Warren's home. Documents A and B were contained on a zip drive at Defendant Warren's home. Declaration of Kerri A. Hochgesang (Exhibit B hereto) ¶ 3. The zip drive had a label that reasonably led counsel for the NABP to believe that it contained documents within the scope of the Order. Declaration of Todd Williams (Exhibit A hereto) ¶ 11. Documents A and B were properly obtained

B. Defendants Have Failed to Show That Documents A and B Were Communications Made For the Purpose of Securing a Legal Opinion Or Legal Services

The attorney-client privilege "is not a favored evidentiary concept in the law since it serves to obscure the truth, and should be construed as narrowly as is

consistent with its purpose.” *United States v. Suarez*, 820 F.2d 1158, 1160 (11th Cir. 1987). Defendants bear the burden of proving the elements of a claim of attorney-client privilege. *In re Grand Jury Subpoena*, 788 F.2d 1511, 1511-12 (11th Cir. 1986). If a document contains both privileged and non-privileged information, a court can require the production of the document with only the privileged information removed. *See In re Grand Jury Proceedings*, 896 F.2d 1267, 1275-76 (11th Cir. 1990).

Among the elements that Defendants must prove is that the two communications were for the purpose of securing primarily either an opinion of law or legal services or some assistance in a legal proceeding. *In re Grand Jury Proceedings*, 899 F.2d 1039, 1042 (11th Cir. 1990). The attorney-client privilege “protects only those disclosures –necessary to obtain legal advice– which might not have been made absent the privilege.” *Fisher v. United States*, 425 U.S. 391, 403, 96 S. Ct. 1569 (1976). Defendants appear to believe that it is sufficient for them merely to show that NABP had threatened litigation against the Defendant Board and Defendant Warren in 1994 and that Ms. Jones and Ms. Guilday were attorneys representing Defendants. The attorney-client privilege “does not allow the withholding of documents simply because they are the product of an attorney-client relationship *It must also be demonstrated that the information is*

confidential.” *State of Maine v. U.S. Dep’t of Interior*, 298 F.3d 60, 71-72 (1st Cir. 2002) (emphasis in original)(internal quote omitted).

What Defendants’ submissions lack is any specific explanation as to how Documents A and B embody privileged information. On their face, Documents A and B do not embody privileged information. They do not contain requests for legal opinions. They do not embody any legal opinions. Defendants offer no explanation of how the information contained in Documents A and B relates to any requests for legal services. They do not embody anything that could be construed as a “candid” disclosure that would only have been made with the expectation of confidentiality. On their face, they merely recite facts. Defendants have failed to meet their burden to establish how those facts were confidential or had any relationship to any legal advice that was to be provided to Ms. Jones or Ms. Guilday.

C. Defendants Have Failed to Show That the Contents of Documents A and B Were Maintained as Confidential

To establish their claim of privilege, Defendants must prove that they maintained Documents A and B and their contents as confidential. Defendants have failed to make that showing.

Neither the Declaration of Mr. Leed nor the Declaration of Defendant Warren makes any specific representation of how the documents were maintained

or how the information contained in those documents was used. The NABP directed discovery to Defendants on precisely those issues. However, Defendant Warren objected to that discovery and refused to answer. Warren's Response to Plaintiff's Interrogatory No. 14 (Document No. 77, Exhibit 2 thereto). Defendant Board stated only that it has "no knowledge" of the documents having been received by or discussed with others. Defendant's Response to Plaintiff's Interrogatory No. 17 (Document No. 79, Exhibit 2 thereto). Defendants have an affirmative obligation to show that the documents and their contents were not disseminated. *See Bogle v. McClure*, 332 F.3d 1347, 1358 (11th Cir. 2003) (rejecting claim of privilege in part because the parties claiming the privilege "did not present evidence regarding who, if anyone, received a memoranda" or "what the recipients did with the memoranda once received").

Defendants offer no specific evidence demonstrating that these two communications or their contents were maintained as confidential. The attorney-client privilege "protects only the client's confidences, not things, which at the time, are not intended to be held in the breast of the lawyer." *Clanton v. United States*, 488 F.2d 1069, 1071 (5th Cir. 1974). "[C]ourts have consistently refused to apply the privilege to information that the client intends his attorney to impart to others . . . , or which the client intends shall be published or be made known to

others.” *In re Grand Jury Proceedings*, 727 F.2d 1352, 1356 (4th Cir. 1984) (internal quotation omitted). *See In re Grand Jury Investigation*, 557 F.Supp. 1053, 1056 (E.D. Pa. 1983) (documents not privileged when they contain information “disclosed to third parties” or “a matter of public record”).

Documents A and B contain no confidentiality legend, a fact found to be significant by the Eleventh Circuit in affirming the rejection of a claim of attorney-client privilege. *See Bogle*, 332 F.3d at 1358. Defendants offer no declarations from Ms. Guilday or Ms. Jones stating that they maintained the communications and their contents as confidential. If Defendants were expecting to maintain Documents A and B as confidential, their conduct belies that fact. Documents A and B were not in a lawyer’s office or in some type of litigation case file maintained by the Defendant Board. They were, in effect, lying around in Defendant Warren’s house. That undermines any claim that Defendants treated Documents A and B and their contents as confidential.

D. Documents A and B are Not Protected by the Work-Product Doctrine

The Defendant Board also asserts the work-product privilege as to Documents A and B.¹ However, Documents A and B do not contain or reveal the

¹ Defendant Warren asserts only the attorney-client privilege. Declaration of Fynn Warren, Jr. (Document No. 92) ¶ 6.

mental impressions of any attorneys or any clients. They state facts. “[E]ither party may compel the other party to disgorge whatever facts he has in his possession.” *Hickman v. Taylor*, 329 U.S. 495, 507, 67 S.Ct. 385, 392 (1947).

An element of the claim of the work-product privilege is showing that the relevant document was prepared by a party or his representative “because of the prospect of litigation.” *Shipes v. BIC Corp.*, 154 F.R.D. 301, 305 (M.D. Ga. 1994). Defendants have made no showing of what specifically caused Defendant Warren to create Documents A and B. That NABP had asserted a claim against Defendant Warren in September 1994 does not, without more, explain why Defendant Warren created these specific documents in 1995. Defendant Warren offers no specific explanation for creating Documents A and B. Mr. Leed merely states that “they were prepared in anticipation of litigation.” Declaration of Arthur Leed (Document No. 84) ¶ 4. However, he states nothing to show specifically that he has personal knowledge of the motivation for creating the documents or of NABP’s 1994 claim. A document is not protected by the work-product privilege merely because a client sends it to his lawyer.

Because Documents A and B contain no attorney opinions or mental impressions, even if they are deemed work product, NABP could receive them upon showing a substantial need and that it is unable to obtain without undue

hardship the substantial equivalent of the materials by other means. Fed. R. Civ. P. 26(b)(3). An issue in this case is the settlement of the earlier NABP claim and Defendants awareness of underlying facts surrounding that claim. To the extent that Documents A and B embody Defendant Warren's recitation of facts, they are in effect contemporaneous witness statements about events that occurred more than 12 years ago. Courts have required the production of such documents over a work-product objection because, due to the passage of time, other discover tools such as depositions and interrogatories are not an adequate means to discovery such facts. *See* 6 James Wm. Moore et al., *Moore's Federal Practice* § 26.70[5][c] (3d ed. 2007) at p. 26-272.6.

III. CONCLUSION

Plaintiff respectfully asks that this Court determine that Documents A and B are not privileged.

This 25th day of October, 2007.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 25th day of October, 2007, the foregoing “Reply to Response to Plaintiff’s Motion for the Determination of the Privileged Status of Certain Documents” was electronically filed with the Clerk of the Court using the Court’s ECF system which automatically generates a Notice of Electronic Filing of such Pleading to the following attorney of record and that a copy of the same has also been electronically transmitted to:

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