1	BRADLEY T. WEEKS, Bar No. 173745 CHARLTON WEEKS LLP								
2	2 1007 West Avenue M-14, Suite A Palmdale, CA 93551								
3									
4	Attorney for Quartz Hill Water District								
5	Defendant/Cross Complainant								
6									
7									
8		HE STATE OF CALIFORNIA							
9	FOR THE COUNTY OF LOS A	ANGELES-CENTRAL DISTRICT							
10	ANTELOPE VALLEY GROUNDWATER	Judicial Council Coordination Proceeding No.							
11	CASES	4408							
12									
13	Los Angeles County Waterworks District No. 40 v. Diamond Farming Co.	Santa Clara Case No. 1-05-CV-049053 Assigned to the Honorable Jack Komar Dept. I							
14	Superior Court of California, County of Los Angeles, Case No. BC325201;	NON-CALIFORNIA AUTHORITY							
15	Los Angeles County Waterworks District								
16	No. 40 v. Diamond Farming Co.	Date: March 22, 2011 Time: 9:00 a.m.							
17	Superior Court of California County of Kern, Case No. S-1500-CV-254-	Before Judge Komar							
18	348;								
19	Wm. Bolthouse Farms, Inc. v. City of Lancaster								
20	Diamond Farming Co. v. City of Lancaster Diamond Farming Co. v. Palmdale Water Dist.								
21	Superior Court of California County of Riverside, consolidated actions								
22	Case Nos. RIC 353840, RIC 344436, RIC 344668.								
23	<u>KIC 344008.</u>								
24	All parties set forth below provide copies	s of non-California authorities in support of their							
25	opposition to Willis Class motion for order comp	pelling discovery of privileged billing documents:							
26									
27									
28									
	1								
	NON-CALIFORNIA AUTHORITY								
	II								

CHARLTON WEEKS LLP 1007 West Avenue M-14, Suite A Palmdale, CA 93551

1	RICHARDS WATSON & GERSHON
2	James L. Markman, Bar No. 43536 Steven Orr, Bar No. 136615
	355 S. Grand Avenue, 40th Floor
3	Los Angeles, CA 90071-3101
4	Phone: (213) 626-8484 Fax: (213) 626-0078 Attorneys for City of Palmdale
5	
6	LEMIEUX & O'NEILL
	Wayne Lemieux, Bar No. 43501 2393 Townsgate Road, Ste. 201
7	Westlake Village, CA 91361
8	Phone: (805) 495-4770 Fax: (805) 495-2787
9	Attorneys for Littlerock Creek Irrigation District, Palm Ranch Irrigation District, et. al.
10	LAGERLOF SENECAL GOSNEY & KRUSE
11	Thomas Bunn III, Bar No. 89502 301 North Lake Avenue, 10th Floor
	Pasadena, CA 91101-5123
12	Phone: (626) 793-9400 Fax: (626) 793-5900
13	Attorneys for Palmdale Water District
14	CALIFORNIA WATER SERVICE COMPANY
15	John Tootle, Bar No. 181822 2632 West 237th Street
16	Torrance, CA 90505
17	Phone: (310) 257-1488 Fax: (310) 325-4605
18	BEST BEST & KRIEGER LLP
	Eric L. Garner, Bar No. 130665
19	Jeffrey V. Dunn, Bar No. 131926 Stefanie D. Hedlund, Bar No. 239787
20	5 Park Plaza, Suite 1500
21	Irvine, CA 92614
22	Phone: (949) 263-2600 Fax: (949) 260-0972 Attorneys for Los Angeles County Waterworks District No. 40
23	OFFICE OF COUNTY COUNSEL COUNTY OF LOS ANGELES
24	Andrea Ordin, Bar No. 38235
	COUNTY COUNSEL
25	Warren Wellen, Bar No. 139152 PRINCIPAL DEPUTY COUNTY COUNSEL
26	500 West Temple Street
27	Los Angeles, CA 90012
28	Phone: (213) 974-8407 Fax: (213) 687-7337 Attorneys for Los Angeles County Waterworks District No. 40
	2
	NON-CALIFORNIA AUTHORITY

CHARLTON WEEKS LLP 1007 West Avenue M-14, Suite A Palmdale, CA 93551

1	MURPHY & EVERTZ		
2	Douglas J. Evertz		
3	650 Town Center Drive, Suite 550		
	Costa Mesa, CA 92626 Phone: (714) 277-1700 Fax: (714) 277-1777		
4	Attorneys for City of Lancaster and Rosamond Community Services District		
5	SMITHTRAGER LLP		
6	Susan Trager		
7	19712 MacArthur Blvd., Suite 120 Irvine, CA 92612		
8	Phone: 949-752-8971 Fax: 949-863-9804		
9	Attorneys for Phelan Pinon Hills Community Services District		
10	ALESHIRE & WYNDER, LLP		
11	Wesley Miliband 18881 Von Karman Ave., Ste. 400		
12	Irvine, CA 92612		
	Phone: 949-223-1170 Fax: 949-223-1180 Attorneys for Phelan Pinon Hills Community Services District		
13	Automoty's for Therail Thion Thirs Community Services District		
14			
15	NON-CALIFORNIA AUTHORITY		
16			
17	Los Angeles County Bar Association's Ethics Committee, Formal Opinion No. 456		
18	(August 21, 1989)		
19	Real v. Continental Group Inc. (N.D. Cal 1986) 116 F.R.D. 211		
20	Amsterdam Project Mgmt. Hum. Found v. Laughrin (N.D. Cal. Jan. 14, 2009, No. 07-		
21	00935) [2009 WL 102816]		
22	Clark v. American Commerce Natl. Bank (9 th Cir. 1992) 974 F.2d 127		
23			
24	Date: March 7, 2011 Respectfully Submitted,		
25			
26	CHARLTON WEEKS LLP		
27	thally he		
28	Bradley T. Weeks Attorneys for Quartz Hill Water District		
	3		
	NON-CALIFORNIA AUTHORITY		

CHARLTON WEEKS LLP 1007 West Avenue M-14, Suite A Palmdale, CA 93551

CHARLTON WEEKS LLP 1007 West Avenue M-14, Suite A Palmdale, CA 93551

LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

FORMAL OPINION NO. 456

(August 21, 1989)

CONFIDENTIAL COMMUNICATIONS -- Without the client's informed consent, a lawyer may not voluntarily disclose to a third party who has agreed to indemnify the lawyer's client pursuant to a non-insurance contract information contained in the lawyer's bills for services rendered to the client about the specific work performed, the time spent on the client's matter and the fees and costs incurred.

AUTHORITIES CITED:

LACBA Op. Nos. 267, 305, 374, 386, 409, 417, 436; Commercial Standard Title Co. v. Superior Court (1979) 92 Cal. App. 3d 934; Goldstein v. Lees (1975) 46 Cal. App. 3d 614; Hays v. Wood (1979) 25 Cal. 3d 772; Russo, Johnson, Russo & Ebersold v. Superior Court; (1987) 191 Cal. App. 3d 1514; Willis v. Superior Court (1980) 112 Cal. App. 3d 277; Bus. & Prof. Code § 6068(e); Evid. Code § 952

The inquiring attorney's client has been indemnified by a third party under a written contract. Pursuant to the indemnity, the client has made a demand on the third party for reimbursement of the attorney's fees. In turn, the third party has demanded copies of the attorney's bills.

The attorney's inquiry poses five questions: (1) are the bills confidential, (2) if so, must the attorney preserve the confidentiality of the information in the bills, (3) is the attorney required to provide the bills to the third party, (4) may the attorney expurgate portions of the bills containing confidential information before producing them to the third party, and (5) does it make any difference that the indemnity pertains only to reimbursement of reasonable attorney's fees.

It is assumed that the bills contain detailed descriptions of work performed and state time spent and the expenses and fees incurred while representing the client. It is also assumed that the attorney and client have maintained the confidentiality of the information contained in the bills. It is further assumed that the contract in question is not an insurance policy and that the inquiring lawyer is therefore not subject to the duties imposed by Civil Code Section 2860. Finally, this opinion does not address disclosure of billing information in connection with an application for payment of attorney fees in a judicial proceeding.

An attorney has a duty "to maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his or her client." (Bus. & Prof. Code §6068(e).) The duty is owed to both present and former clients. (<u>Commercial Standard</u> <u>Title Co. v. Superior Court</u> (1979) 92 Cal.App.3d 934, 945.) Unless the disclosure is compelled by law, a lawyer cannot disclose client confidences or secrets to a third party without the client's informed consent. (Opinion No. 389; <u>Commercial</u>

-2-

Standard, supra, at 945.)

For purposes of the attorney-client privilege, the Evidence Code defines a confidential communication between a client and lawyer as "information transmitted between a client and his lawyer in the course of that relationship in confidence." (Evid. Code §952.) While the foregoing definition would include information in an attorney's bills to a client, the protection afforded client confidences under Business and Professions Code section 6068(e) is broader than the attorney-client privilege. (<u>Goldstein v. Lees</u> (1975) 40 Cal.App.3d 614, 612 n.5.) In previous opinions this Committee has adopted the definition of "confidence" and "secret" in former A.B.A. Code of Professional Responsibility DR 4-101(A) which states:

> "'Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely to be detrimental to the client." (Opinions 386 and $436.)^{1/2}$

^{1/} The A.B.A. Model Rules of Professional Conduct, which supersedes the Code of Professional Conduct, expands the standard by eliminating the "confidence"/"secret" distinction. Rule 1.6 states that a lawyer shall not reveal "information relating to the representation of a client" without the client's consent. Continued

Consistent with the definitions in DR 4-101(A), this Committee has found that section 6068(e) applies to information and documents obtained from third parties in the course of a lawyer's representation of the client. (Opinion Nos. 305, 386, 417 and 436.) The Committee has also found that the rule applies where the facts are already part of the public record or where there are other sources for the information. (Opinion No. 267.)

In Opinion No. 374, the Committee noted that "detailed time records describing the service performed are likely to contain information which is confidential." In particular, specific work descriptions, time charges and amounts of fees and expenses are all types of information commonly found in attorney bills that relate to the representation of the client. Such information may also concern matters affecting the client's finances in situations where the client is paying all or part of the fees. For any number of reasons a client might not want such information disclosed to third parties, including that the information may be embarrassing or detrimental to the client.

In Opinion No. 374, this Committee also recognized that not all of the information in a lawyer's bill is necessarily confidential or secret. The Committee noted that information

The Rule also eliminates the requirement that the client request the information be held inviolate or that disclosure be embarrassing or detrimental to the client. However, because section 6068(e) continues to use the terms "confidence" and "secrets", this Committee continues to rely on the definitions in DR 101(A).

about the name, address, and nature of a client's matter does not normally involve section 6068(e) "since such information usually constitutes neither a confidential communication nor a secret." Information about the nature of the client's fee arrangement is also generally not considered a confidence or secret. (<u>Willis v.</u> <u>Superior Court</u> (1980) 112 Cal.App.3d 277, 291.) However, such information may be within the scope of section 6068(e) if disclosure would expose the client to criminal or civil liability (<u>Hays v. Wood</u> (1979) 25 Cal.3d 772, 785) or necessarily reveals other confidential information (<u>Russo, Johnson, Russo & Ebersold</u> <u>v. Superior Court</u> (1987) 191 Cal.App.3d 1514, 1519).

Based on the foregoing principles, this Committee concludes that information in a lawyer's bills to a client about time spent, expenses and fees incurred and specific work performed in connection with the lawyer's representation of that client may be within the scope of section 6068(e). However, absent special circumstances, information in the bills identifying the client or referring generally to the nature of the work and fee arrangement is not within the scope of section 6068(e). The lawyer must not disclose information in the bills that is within the scope of section 6068(e) without the client's informed consent.

For a client's consent to be informed, the lawyer should fully advise the client about the nature of the information in the bills, the purpose of the disclosure, the benefits and detri-

-5-

ments, both legal and otherwise, which may result from the disclosure or non-disclosure and any other facts could have an important bearing on the client's decision. (See Opinion No. 409.) It is advisable that both the lawyer's advice and the client's consent to be in writing, although the Rules of Professional Conduct do not require it. (Id.)

If the client consents to disclosure of only part of the information in the bills, the lawyer may be required to redact information or rewrite the statements in order to protect information which the client chooses to keep confidential. The fact that the contract calls for reimbursement of reasonable fees has no bearing on the confidentiality of information in the bills or on the attorney's duty to maintain the confidentiality of that information.

It is the client's choice whether to reveal the information, not the lawyer's. The Committee expresses no opinion on whether failure to disclose information in the bills might prejudice the client's right to enforce the indemnity agreement. However, the potential for such a result should be considered in advising the client about consenting to disclose.

This opinion is advisory only. The Committee acts on specific questions submitted <u>ex parte</u>, and its opinions are based only on such facts as are set forth in the questions submitted.

-6-

CHARLTON WEEKS LLP 1007 West Avenue M-14, Suite A Palmdale, CA 93551



116 F.R.D. 211, 43 Fair Empl.Prac.Cas. (BNA) 926, 44 Fair Empl.Prac.Cas. (BNA) 242, 42 Empl. Prac. Dec. P 36,937 (Cite as: 116 F.R.D. 211)

United States District Court, N.D. California.

Emil V. REAL, Plaintiff,

The CONTINENTAL GROUP, INC., a corporation, and Continental Can Company, a corporation, Defendants.

> No. C-83-2871. Nov. 10, 1986.

Employee who had prevailed on age discrimination claim filed motion to compel discovery of certain information allegedly relevant to attorney fee application. The District Court, Myron L. Gordon, Senior District Judge for the Eastern District of Wisconsin, held that: (1) defense counsel's hours and hourly rates were at least minimally relevant to employee's fee application; (2) defense counsel's hours and hourly rates were not information protected either by work-product doctrine or attorney-client privilege; but (3) defense counsel's statement of fees and billing printouts were not discoverable by employee, as documents would necessarily reveal nature of legal services provided.

Motion granted in part and denied in part.

West Headnotes

[1] Federal Civil Procedure 170A -1272.1

<u>170A</u> Federal Civil Procedure <u>170AX</u> Depositions and Discovery <u>170AX(A)</u> In General <u>170Ak1272</u> Scope <u>170Ak1272.1</u> k. In General. <u>Most Cited</u>

Cases

(Formerly 170Ak1272)

Number of hours expended by defense counsel in age discrimination suit, as well as counsel's hourly rates, were at least minimally relevant to employee's attorney fee application, so as to be discoverable by employee in connection therewith. <u>Fed.Rules Ev-id.Rule 401, 28 U.S.C.A.</u>; Fed.Rules Civ.Proc.Rule

<u>26(b)(1), 28 U.S.C.A</u>.

[2] Privileged Communications and Confidentiality 311H 2000-146

<u>311H</u> Privileged Communications and Confidentiality <u>311HIII</u> Attorney-Client Privilege <u>311Hk144</u> Subject Matter; Particular Cases <u>311Hk146</u> k. Client Information; Retainer and Authority. <u>Most Cited Cases</u> (Formerly 170Ak1600(2), 170Ak1600.1)

Defense counsel's statement of fees and billing printouts were not discoverable by employee in age discrimination suit, though documents were allegedly relevant to employee's attorney fee application, where documents would necessarily reveal nature of legal services provided; documents were protected by attorney-client privilege. <u>Fed.Rules Civ.Proc.Rule</u> 26(b)(1), 28 U.S.C.A.

[3] Privileged Communications and Confidentiality 311H Immedia

<u>311H</u> Privileged Communications and Confidentiality <u>311HIII</u> Attorney-Client Privilege <u>311Hk144</u> Subject Matter; Particular Cases <u>311Hk146</u> k. Client Information; Retainer and Authority. <u>Most Cited Cases</u> (Formerly 170Ak1600(2), 170Ak1600.1)

€~~~1604(1)

<u>170A</u> Federal Civil Procedure <u>170AX</u> Depositions and Discovery <u>170AX(E)</u> Discovery and Production of Documents and Other Tangible Things <u>170AX(E)3</u> Particular Subject Matters <u>170Ak1604</u> Work Product Privilege; Trial Preparation Materials <u>170Ak1604(1)</u> k. In General. <u>Most</u> <u>Cited Cases</u> (Formerly 170Ak1600(3), 170Ak1600.2)

Number of hours expended by defense counsel in age discrimination suit and defense counsel's hourly rates were not information protected either by

(Cite as: 116 F.R.D. 211)

work-product doctrine or attorney-client privilege, so as to be discoverable by employee in connection with attorney fee application. <u>Fed.Rules Civ.Proc.Rule</u> <u>26(b)(1), 28 U.S.C.A</u>.

4 Federal Civil Procedure 170A -1483

<u>170A</u> Federal Civil Procedure <u>170AX</u> Depositions and Discovery <u>170AX(D)</u> Written Interrogatories to Parties <u>170AX(D)1</u> In General <u>170Ak1483</u> k. Objections and Grounds for Refusal. <u>Most Cited Cases</u>

Interrogatories submitted by employee in connection with attorney fee application in age discrimination case, which sought disclosure of defense counsel's hours and hourly rates, were not "unduly burdensome." <u>Fed.Rules Civ.Proc.Rule 26(b)(1), 28</u> <u>U.S.C.A.</u>

***212** Guy Saperstein, Saperstein, Mari & Mayeta, Farnsworth, Saperstein & Seligman, fee counsel for Orrick, Herrington & Sutcliffe, Oakland, Cal., for plaintiff.

Janet Bentley, Thelen, Marrin, Johnson & Bridges, San Francisco, Cal., for defendants.

DECISION and ORDER

MYRON L. GORDON, Senior District Judge for the Eastern District of Wisconsin.

This age discrimination action was filed by the plaintiff, Emil Real, in June 1983. After a jury trial and post-trial motions, judgment was entered in favor of Mr. Real in the amount of \$50,000. <u>627 F.Supp. 434.</u> On September 15, 1986, plaintiff's counsel filed a motion for an award of reasonable attorneys' fees seeking fees in the amount of \$570,000, together with costs incurred. Currently before me is a motion to compel certain discovery sought by the plaintiff in conjunction with the attorneys' fees motion. At issue in this motion to compel is the defendant's refusal to comply with certain discovery requests concerning the number of hours, hourly rates and bills and costs paid or incurred by the defendant in this litigation. This motion will be granted in part and denied in part.

In anticipation of an attorneys' fees dispute, the plaintiff served the defendant with a set of interroga-

tories and a set of document requests in April 1986. The defendant filed responses on June 12, 1986, in which it provided partial answers and asserted general objections to the requests on grounds of irrelevance, privilege and burdensomeness. Each one of these objections will be addressed separately.

However, before considering these objections, I note that among the plaintiff's discovery requests, certain information and documentation other than information concerning hours, hourly rates and bills and costs paid or incurred by the defendant is requested. For example, information is sought regarding defendants' attorneys' past experience and education. Although the defendant has only provided partial responses to these types of requests, the plaintiff has not specifically identified these answers as areas of concern. In light of this silence, and the substantial period of time that passed between the filing of the defendant's responses and the filing of the instant motion to compel, I assume that the parties have resolved their differences with respect to these matters; I decline to order additional responses from the defendant concerning these matters.

RELEVANCY

[1] Rule 401, Federal Rules of Evidence, defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." In view of this broad definition, I disagree with the defendant's assertion that all information requested by the plaintiff is irrelevant to the plaintiff's extant application for fees and *213 costs. The starting point for determining the amount of reasonable fees and costs pursuant to federal prevailing party statutes "is the number of hours reasonably expended on the litigation multiplied by a reasonable rate." Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983). Defendant's counsel's hours and rates are relevant to this determination.

For instance, in its brief opposing the plaintiff's motion to compel, defendant's counsel characterizes the number of hours it expended on this case as "economical." What constitutes an "economical" number of hours with respect to this case is relevant, in my opinion, to the plaintiff's fee petition. Further, among twelve factors identified by the court of appeals for the ninth circuit as relevant in determining 116 F.R.D. 211, 43 Fair Empl.Prac.Cas. (BNA) 926, 44 Fair Empl.Prac.Cas. (BNA) 242, 42 Empl. Prac. Dec. P 36,937

(Cite as: 116 F.R.D. 211)

reasonable attorneys' fees is the novelty and difficulty of questions presented by the case. See Kerr v. Screen Extras Guild, 526 F.2d 67, 70 (9th Cir.1975). The number of hours recorded by defendant's lawyers in pursuing questions in this case certainly has some tendency to make more or less probable the plaintiff's contention on this factor. Moreover, "[e]ach party must prepare to question the same witnesses, must review the same documents and other evidence, and must anticipate a presentation by the opposition of a complexity related to the facts in issue. Similarly, work on pretrial motions would reflect what volume of work opposing attorneys deemed reasonable." Stastny v. Southern Bell Telephone & Telegraph Co., 77 F.R.D. 662, 663-64 (W.D.N.C.1978). Thus the hours spent on this case, whether it be by the plaintiff's counsel or the defendant's counsel, is relevant information.

Defendant's counsel's hourly rate is similarly relevant to a determination of reasonable fees under *Hensley*. Determining what constitutes a reasonable rate requires, among other things, an examination of the community's prevailing hourly rate. *See <u>Kerr</u>, <u>supra, 526 F.2d at 70. Accord Blum v. Stenson, 465</u> U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984); N.D. Cal. Local Rule 270-2(c) (requiring submission of a statement of "prevailing" hourly rate to support petition for fees). Thus, information regarding the prevailing hourly rate tends to make more or less probable the plaintiff's assertion on this point.*

In the instant case, the hourly rates of defendant's counsel, a San Francisco law firm, should shed some light on the reasonableness of the plaintiff's trial counsel's rates because the latter attorneys are also members of a San Francisco law firm; defendant's hourly legal rates would appear to be germane to the question of the community standard.

Thus, I conclude that the hours expended by the defendant on matters pertaining to this case, counsel's hourly rates, as well as total billings and costs, are at least minimally relevant to the plaintiff's fees and costs petition.

Defendant's counsel argues that the number of hours necessary adequately to represent a defendant in a discrimination case typically exceeds the time required to represent a plaintiff. I am not persuaded that this contention precludes my finding of relevance. The defendant's considerations on this point may be significant in deciding what weight to give the evidence regarding its attorneys' fees and costs, but they do not render such evidence irrelevant.

PRIVILEGE

Pursuant to <u>Rule 26(b)(1), Federal Rules of Civil</u> <u>Procedure</u>, even relevant evidence is not discoverable if such evidence is privileged. The defendant asserts, accordingly, that all information requested by the plaintiff is privileged pursuant to the attorney-client privilege and attorney work-product doctrine. This assertion is overbroad.

The court of appeals for the ninth circuit has held that the attorney-client privilege embraces attorney time, records and statements to the extent that they reveal litigation strategy and the nature of the services provided. "[B]ills, ledgers, statements, time records and the like which also reveal the nature of law, also should fall within ***214** the privilege. On the other hand, a simple invoice requesting payment for unspecified services rendered reveals nothing more than the amount of the fee and would not normally be privileged...." <u>In re Grand Jury Witness</u>, 695 F.2d 359, 362 (9th Cir.1982).

[2] Plaintiff seeks "[a]ll documents which record the time expended by any attorney, house counsel, legal assistant, and/or paralegal on behalf of the defendants in this action " See Document Request No. 1. Document Requests Nos. 2 and 3 also request all bills for legal services paid by or submitted to the defendant. Full compliance with these document requests would provide the plaintiff with the defendant's counsel's statement of fees and billing computer printouts. According to the affidavit of Attorney Bentley, the defendant, Continental Group, demands highly detailed itemizations of all work performed on its behalf; production of such bills and printouts would necessarily reveal the nature of legal services provided. These documents are, therefore, privileged under In re Grand Jury Witness, supra.

[3] However, simply the number of hours billed, the parties' fee arrangement, costs and total fees paid do not constitute privileged information. *See, e.g., <u>In</u> <u>re Osterhoudt, 722 F.2d 591 (9th Cir.1983)</u> (amounts and dates of payment of legal fees not privileged); <u>In</u> <u>re Grand Jury Proceeding, 721 F.2d 1221 (9th</u> <u>Cir.1983)</u> (fee arrangement not privileged); <u>United</u>*

116 F.R.D. 211, 43 Fair Empl.Prac.Cas. (BNA) 926, 44 Fair Empl.Prac.Cas. (BNA) 242, 42 Empl. Prac. Dec. P 36,937 (Cite as: 116 F.R.D. 211)

<u>States v. Sherman, 627 F.2d 189 (9th Cir.1980)</u> (amount of fees paid not privileged).

Accordingly, I direct defendants to serve and file complete responses to plaintiff's fourth set of interrogatories nos. 1, 2, 4, 5, and 6. However, I decline to order the defendant to respond to the plaintiff's fifth production of documents requests no. 1, 2 and 3, as production of these documents would reveal information protected by the attorney-client privilege.

Moreover, in the interest of economy of time and avoiding a protracted second litigation with respect to attorneys' fees, *see <u>Hensley</u>, supra*, 461 U.S. at 437, 103 S.Ct. at 1941 ("A request for attorneys fees should not result in a second major litigation."), I will not order the defendant to submit the disputed documents to me for an *in camera* inspection. Indeed, the relevant and unprivileged information sought by the plaintiff will be adequately provided through the defendant's completed answers to the interrogatories referred to above.

BURDENSOMENESS

[4] In light of my determination regarding the nondiscoverability of the defendants billing sheets and computer printouts on time, I am satisfied that the discoverable information requested is not overly burdensome. The defendant is directed to respond to five fairly straightforward interrogatories. This is not an unduly burdensome demand.

Therefore, IT IS ORDERED that plaintiff's motion to compel discovery be and hereby is granted with respect to plaintiff's fourth set of interrogatories nos. 1, 2, 4, 5, and 6.

IT IS ALSO ORDERED that defendant serve and file its responses by November 10, 1986.

IT IS FURTHER ORDERED that plaintiff's motion to compel discovery be and hereby is denied with respect to plaintiff's fifth request for production of documents and plaintiff's fourth set of interrogatories no. 3.

IT IS FURTHER ORDERED that each party shall bear its own costs in connection with this motion.

N.D.Cal.,1986.

Real v. Continental Group, Inc. 116 F.R.D. 211, 43 Fair Empl.Prac.Cas. (BNA) 926, 44 Fair Empl.Prac.Cas. (BNA) 242, 42 Empl. Prac. Dec. P 36,937

END OF DOCUMENT

CHARLTON WEEKS LLP 1007 West Avenue M-14, Suite A Palmdale, CA 93551

Not Reported in F.Supp.2d, 2009 WL 102816 (N.D.Cal.) (Cite as: 2009 WL 102816 (N.D.Cal.))

Only the Westlaw citation is currently available.NOT FOR CITATION

United States District Court, N.D. California, San Jose Division. NEW AMSTERDAM PROJECT MANAGEMENT HUMANITARIAN FOUNDATION, a Dutch non-profit corporation, Plaintiff,

Kelly M. LAUGHRIN, Campbell, Warburton, Fitzsimmons, Smith, Mendell & Pastore, a California Corporation, Defendants.

No. 07-00935-JF (HRL). Jan. 14, 2009.

<u>Michael D. Dempsey</u>, <u>Heather Margaret Noelte</u>, <u>Stephen</u> <u>Christopher Johnson</u>, Dempsey & Johnson P.C., Los Angeles, CA, for Plaintiff.

Lindy Robin Gonzalez, <u>Richard Martin Williams</u>, <u>Jon</u> <u>Mark Thacker</u>, Ropers, Majeski, Kohn & Bentley, San Jose, CA, for Defendants.

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTIONS TO COMPEL DISCOVERY

HOWARD R. LLOYD, United States Magistrate Judge. FACTUAL BACKGROUND^{FN1}

<u>FN1.</u> The "facts" set out in this order are a combination of plaintiff's and defendants' allegations. Where a party gave some support for an allegation, the court has attempted to note the evidence as presented. This court is not making findings of fact.

*1 In 2001, plaintiff New Amsterdam Project Management Humanitarian Foundation ("NAF") invested \$10 million dollars with Margaret Laughrin, Clinton Holland (her business partner), Hartford Holding Corporation (controlled by Laughrin and Holland), Riki Graham Mangere, and Euro Capital Markets Limited (Mangere's business). Pursuant to an agreement made with Mangere, NAF wired the money to a U.S. Bank account held by Hartford Holding Company. (Pl's Factual Submission, Exhibit 5.) The money was supposed to be used to pur-

chase Treasury Bills, but it was not. Instead, some \$800,000 of the money appears to have been transferred to bank accounts held by C.T. Ventures (another entity Laughrin owned with Holland), Meyer and Connolly (a law firm representing Laughrin), and various others. (Id. at Exhibit 6.) Later in the month, \$1.5 million dollars was wired to A. Zeegars. (Id. at Exhibit 8.) U.S. Bank began questioning the legitimacy of the account once Hartford Holding Corporation attempted to wire around \$1 billion dollars into it. (See Id. at Exhibits 9-16.) Unsure that the funds were "clean," U.S. Bank refused the transfer and closed the account. (Id. at Exhibit 17.) Before the account was closed, \$200,00 was wired from it to Kelly Laughrin, Margaret's daughter, \$100,000 was wired to Robert MacKay, and the remaining balance was transferred to C.T. Ventures. (Id. at Exhibit 18.)

Around the same time that Kelly Laughrin received the \$200,000, Margaret retained defendant law firm Campbell, Warburton, Fitzsimmons, Smith, Mendell & Pastore ("Campbell Warburton"), where Kelly was an attorney, to provide legal services to herself, Clinton Holland, Hartford Holding Company and C.T. Ventures. Campbell Warburton received \$67,000 from Margaret, apparently as a retainer for estate planning and business consulting services (although the defendants represented at the hearing that no retainer agreement or document confirming its retention, describing the contemplated services, or detailing the billing arrangement was prepared).

Although it appears that the theft itself took place in the summer of 2001 (immediately after NAF's money was transferred to the U.S. Bank account), NAF did not learn that its money was missing for years, partly because attorneys at Meyer and Connolly helped to cover up the theft. In 2003, NAF filed suit against Margaret Laughrin, Clinton Holland, Rick Mangere, their various entities, and the attorneys that had helped them. NAF obtained a default judgment against Laughrin, Holland, Hartford Holding Corporation, Riki Graham Mangere, and Euro Capital Markets Limited. At some point, NAF learned about the \$200,000 transfer to Kelly, and the money Campbell Warburton had received. NAF filed the instant case in 2007, seeking to recover the \$267,000 under theories of conversion, unjust enrichment, and common count.

PROCEDURAL HISTORY

The parties were referred to an early settlement con-

Not Reported in F.Supp.2d, 2009 WL 102816 (N.D.Cal.) (Cite as: 2009 WL 102816 (N.D.Cal.))

ference by the presiding judge, but NAF claimed that discussions would be fruitless until discovery was obtained. NAF requested said discovery, and defendants responded with objections based on various privileges and attorney work-product protection, accompanied by a rather sketchy privilege log. NAF then filed five motions, seeking to compel: (1) additional document production from Kelly Laughrin; (2) additional responses to requests for admission from Kelly Laughrin; (3) additional responses to special interrogatories from Kelly Laughrin; (4) additional responses to special interrogatories from Campbell Warburton; and (5) additional document production from Campbell Warburton. This order addresses all five motions.

*2 This court held a hearing on July 1, 2008. Following the hearing, the court's first interim order required defendants to produce new privilege logs. The court also requested supplemental briefing on two points of law that has been argued at the hearing, but not clearly briefed. In addition, the court invited NAF's counsel to identify those documents that supported its assertion that Margaret had retained Campbell Warburton to aid her in committing fraud. Finally, the court overruled all defendants' objections based on third party privacy rights.

The revised privilege log was submitted in August, as was the supplemental briefing. In its second interim order, the court granted NAF's request for permission to object to the revisions, and allowed defendants to respond. In their response, defendants withdrew their objections to many of the documents originally withheld, and produced them.

In its third interim order, the court considered NAF's argument that the attorney-client privilege was trumped by the crime-fraud exception. There was not yet enough evidence in the record to support such a finding. There was, however, enough evidence to trigger an *in camera* review. To that end, defendants were ordered to produce "all documents defendants have withheld on the basis of privilege created between July and August of 2001, and documents from any other time period that either (1) explain or reference the purpose of Campbell Warburton Warburton's representation of Margaret Laughrin, Clinton Holland, Hartford Holding Company or C.T. Ventures; or (2) indicate that Margaret Laughrin acquired money through either theft or fraud."

NAF asked to submit additional documents that had been produced in the time since it had filed its crime-fraud briefing. In its fourth interim order, the court granted plaintiff's request. Not content to merely submit the documents, NAF filed seven additional pages of argument. Defendants objected, and asked to respond. In its fifth interim order, the court permitted defendants to respond to plaintiff's unasked-for argument.

Having considered the voluminous moving papers, ^{EN2} the arguments presented at the hearing, and the numerous supplemental filings, the court now GRANTS IN PART and DENIES IN PART plaintiff's motions.

FN2. Plaintiff filed three documents asserting evidentiary objections. The first was titled "Objections to Declaration of Kelly M. Laughrin and Nicholas Pastore In Support of Defendants' Opposition to Plaintiff's Motion to Compel." (Docket No. 50). The court OVERRULES objections 1,3, and 5, and SUSTAINS objections 2,4, and 6. The second was titled "Objections to the Declaration of Kelly M. Laughrin." (Docket No. 65). The court OVERRULES all of these objections. Kelly Laughrin was ordered to submit this second declaration to aid the court in determining who the various people listed in the privilege log were. The declaration sets forth Laughrin's subjective understanding to the best of her knowledge. That is what the order required. Finally, NAF made numerous objections to the revised privilege log defendants submitted. Rather than address these objections individually, the court will address them in the context of plaintiff's motions to compel documents, below.

DISCUSSION

A. Defendants' Attorney-Client Privilege and Work Product Objections

As previously noted, the defendants objected overwhelmingly to plaintiff's discovery requests with claims of privilege and attorney work-product protection. The court having overruled defendants' "third party privacy" objections, defendants only asserted attorney-client privilege and work product objections in the revised privilege log. The court addresses these objections as an initial matter, then applies these rulings to the remaining issues.

1. The Crime-Fraud Exception.

Both in its papers and at the hearing, counsel for NAF implored the court to apply the crime-fraud exception to extinguish the attorney-client privileges held by Margaret Laughrin and Hartford Holding Corporation. The attorney-client privilege is one of the "most fundamental" privileges recognized under the Federal Rules of Evidence. *Nowell v. Superior Court*, 223 Cal.App.2d 652, 657, 36 Cal.Rptr. 21, (Cal. Superior Ct., 1964); *In re Napster, Inc. Copyright Litigation*, 479 F.3d 1078, 1090 (9th Cir.2007). It is not, however, absolute.

*3 The party seeking to vitiate a claim of attorney-client privilege with the crime-fraud exception must show: (1) that the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme; *Id.* (citing *In re Grand Jury* Proceedings, 87 F.3d 377, 381 (9th Cir.1997) (internal quotations omitted); and (2) that the communication "reasonably relates" to the crime or fraud. BP Alaska Exploration, Inc. v. Nahama & Weagant Energy Company, 199 Cal.App.3d 1240, 1268, 245 Cal.Rptr. 682 (1988). "The attorney does not have to be aware of the fraud for the crime-fraud exception to apply." State Farm Fire & Casualty Co. v. Superior Court 54 Cal.App.4th 625, 645, 62 Cal.Rptr.2d 834 (1997). If the exception applies, the client's communications with the attorney are no longer protected. The plaintiff must still prove any case it has (on whatever theories it has alleged) against the attorney.

Initially, at the hearing and in its papers, NAF urged the court to extinguish the attorney-client privilege on a theory of collateral estoppel. NAF asserted that the default judgment it received from the Central District of California established that Margaret Laughrin, Clinton Holland and Hartford Holding Corporation were engaged in illegal acts during July 2001, and that defendants could not assert any attorney-client privileges on these clients' behalf. The court was not persuaded because, while the ruling established that these client's were engaged in illegal acts, the ruling did not address how the communications at issue in this case were reasonably related to the illegality. The Central District ruling was made specifically in relation to Laughrin's communications with Meyer and Connolly (the law firm that assisted Laughrin, Holland and Mangere in covering up the theft). The communications plaintiff seeks in these motions were between Margaret Laughrin, Clinton Holland, Hartford Holding Corporation, and C.T. Ventures and the attorneys at Campbell Warburton.

The court is aware that the party challenging the privilege often lacks sufficient evidence to establish the exception because this evidence is likely to be in the hands of whoever is invoking the privilege. Where a plaintiff has made some showing of the client's criminal or fraudulent scheme, and its possible relation to the privileged communications sought, courts have engaged in *in camera* review of the privileged materials. This is precisely what occurred here.

Plaintiff has provided sufficient evidence to meet its burden to establish that Campbell Warburton clients Margaret Laughrin, Clinton Holland and Hartford Holding Corporation were likely engaged in illegal activity in July of 2001, around the time that they sought Campbell Warburton's legal services. Having reviewed the documents defendants submitted, the court also finds that some of the attorney-client communications NAF seeks are sufficiently related to the illegal activity to trump the attorney-client privilege. For example, it appears that Laughrin and Holland may have planned to use, or used, estate-planning devices to conceal monies that originated from NAF. The attorney-client privilege held by Margaret Laughrin, Clinton Holland, Hartford Holding Corporation and C.T. Ventures will be extinguished in each communication that is reasonably related to transfers of monies from accounts that may have housed NAF's money. The in camera review also revealed consultations with Campbell Warburton attorneys on matters that were not sufficiently related to such transfers. Since the crime-fraud exception is triggered by the nexus between the illegality and the particular privileged communication, some communications retain their attorney-client privilege.

*4 The court emphasizes that it only finds that plaintiff has established to a preponderant likelihood that Campbell Warburton's clients were engaged in criminal or fraudulent acts, and that these acts were reasonably related to some of the privileged communications defendants are currently withholding. This ruling does not address whether defendants had knowledge of their clients' wrongful activities. Additional responses and production of individual documents will be addressed in the context of plaintiff's motions to compel, below.

2. Work-Product Protection.

Defendants objected to producing a large number of documents and to answering interrogatories on work-product grounds. An objection based on work-product protects trial preparation materials that reveal an attorney's strategy, intended lines of proof, evaluation of strengths and weaknesses, and inferences drawn from interviews. Fed.R.Civ.P. 26(b)(3); *Hickman v. Taylor*, 329 U.S. 495, 511, 67 S.Ct. 385, 91 L.Ed. 451 (1947). "To be protected, the communication must have been prepared in anticipation of litigation. Although commencement of a lawsuit is not required, there must be some *possibility* of litigation." SCHWARZER, WALLACE,

Not Reported in F.Supp.2d, 2009 WL 102816 (N.D.Cal.) (Cite as: 2009 WL 102816 (N.D.Cal.))

AND TASHIMA, <u>FEDERAL CIVIL PROCEDURE</u> <u>BEFORE TRIAL, 11</u>-102 (hereinafter, "Schwarzer").

Nobody argues that Margaret Laughrin, Clinton Holland, Hartford Holding Corporation or C.T. Ventures originally retained Campbell Warburton and its attorneys in anticipation of litigation. Campbell Warburton says that the original purpose of the representation was to assist Margaret Laughrin and Clinton Holland in estate planning, and to provide advice about the corporations. After NAF filed its 2003 lawsuit, Campbell Warburton attorneys drafted proposed settlement agreements, and seem to have advised Margaret Laughrin about the litigation, although they never made an appearance on her behalf. Therefore, some of the communications currently withheld can qualify for work-product protection, however, many of them cannot. Only those documents that were prepared in relation to the 2003 lawsuit can be rightly classified as work-product. The court OVERRULES the objection as to all other communications. As with the ruling on defendants' attorney-client privilege objections, the production of individual responses and documents will be addressed in the context of plaintiff's motions to compel.

B. NAF's Motions to Compel Further Responses from Kelly Laughrin.

NAF sought to compel additional responses to its First Set of Requests for Admission ("RFAs") from Kelly Laughrin in "Discovery Motion 2." NAF specifically takes issue with the answers Kelly gave to RFAs 2-4 and 9-11. When responding to RFAs, a party must admit, deny, or state that she has made a reasonable inquiry and cannot admit or deny. *See* <u>Fed.R.Civ.P. 36(a)</u>. Kelly unambiguously denies RFAs 4, 9 and 10, and admits RFA 11. The motion, as to those four RFAs, is DENIED as MOOT.

RFA 2 states "[t]he money transferred into the ... bank account of Kelly Laughrin on or about August 1, 2001, originated from [NAF]" RFA 3 states that "Margaret Laughrin caused [NAF's money] to be wire transferred to Kelly Laughrin." In response to both, Kelly stated that after reasonable inquiry, she could neither admit or deny either RFA. NAF claims that she may not give lack of information or knowledge as a reason for failing to admit or deny unless she also makes a reasonable inquiry. NAF contends that Kelly has documents in her possession that show the money belonged to it, and that Kelly also must ask her mother to tell her whom the money she received belonged to. According to NAF, failure to do so is a failure to make a reasonable inquiry.

*5 The documents that NAF contends show that this was its money are inconclusive. The wire transfer documents in Exhibit 54 show that its money went into a U.S. Bank Account, and that Kelly received \$200,000 from that same account. It is not clear, however, that only NAF's money, or that only stolen money, went into that account. NAF's counsel appears to have leapt to this conclusion. While Kelly has an obligation to review whatever documents she has before responding, she is not obliged to make the leap that NAF's counsel has made, or use that conclusion to answer. She also has no obligation to accept a third party's testimony as her own (as NAF suggested, Margaret's answers). See Schwarzer at 11-285. Requests for Admission ask for personal knowledge. Kelly has plainly stated she has no personal knowledge of the ownership of the \$200,000. The motion, as to RFAs 2 and 3, is DENIED.

NAF sought to compel Kelly Laughrin to provide additional responses to its interrogatories in "Discovery Motion 3." NAF specifically complains about Kelly's answers to interrogatories 1-4, 6 and 9. Interrogatory 1 asked Kelly what she did with the \$200,000. She responded that she put \$80,000 toward her house, paid off some credit cards, applied \$103,000 toward law school loans, and spent the rest on miscellaneous things. NAF wants more information. Kelly claims she does not remember and has no obligation to find out. The court disagrees. She certainly has the obligation to search all available records and consult sources of information to provide whatever level of detail she can, i.e., the names of the credit card(s), account numbers, the lender of the school loan, the loan number, etc. NAF's motion to compel additional response to Interrogatory 1 is, therefore, GRANTED.

Interrogatory 2 asked for Margaret Laughrin's addresses since January 2001. Kelly objected on the grounds of Margaret's privacy rights, and attorney-client privilege. In its interim order, this court overruled all objections based on third party privacy rights. This leaves only the objection based on attorney client privilege. Generally, the identity of an attorney's client is not privileged unless "disclosure would convey the substance of a confidential professional communication between the attorney and the client." *In re Grand Jury Subpoenas*, 803 F.2d 493, 496-98 (9th Cir.1986). The motion to compel further response to Interrogatory 2 is GRANTED.

NAF's motion to compel additional responses to interrogatories 3, 4, and 6-9 is DENIED. Many of these interrogatories contain discrete sub-parts in violation of Rule 33(a)(1). (For example, interrogatory 3 asks for the facts upon which each of the seventeen affirmative defenses were based; interrogatory 6 asks for the facts upon which each response to the RFAs were based.) Although she objected to the interrogatories for these subparts, Kelly answered them, and provided supplemental responses in some cases. Her responses were adequate.

C. NAF's Motion to Compel Further Responses from Campbell Warburton.

*6 NAF sought to compel further responses to interrogatories from defendant Campbell Warburton in "Discovery Motion 4." NAF takes specific issue with Campbell Warburton's answers to interrogatories 1, 2, 4, and 8-12. Interrogatory 1 asks Campbell Warburton to "state all facts" that it based each of its affirmative defenses on. This interrogatory contains subparts, in excess of the 25-interrogatory limit. Moreover, although Campbell Warburton objected to the interrogatory for this reason, it also responded adequately, and provided a supplemental response. Similarly, Interrogatories 2, 4, 11, and 12 have been adequately answered. No further response is required. NAF's motion, as to interrogatories 1, 2, 4, 11 and 12 is DENIED.

Interrogatory 10 asked defendant to "describe in detail each meeting [it] ever had with Margaret Laughrin." Campbell Warburton objected on the grounds of privacy rights, attorney-client privilege and the work product doctrine. The court previously overruled the privacy rights objection. Plaintiff's motion to compel further response to Interrogatory 10 is GRANTED IN PART. Defendant must disclose the dates and times of all meetings with Margaret Laughrin. As for the "details" of the discussion, the crime-fraud exception extinguishes any privilege in the details defendant has about meetings where estate planning or transfers of monies were discussed, and no work-product protection applies. Defendant may withhold (on attorney-client privilege or work-product protection grounds) protected details from meetings where litigation or settlement matters were discussed..

Interrogatory 8 requested that Campbell Warburton "identify each communication between [it] and Margaret Laughrin whereby Margaret Laughrin offered or was asked to contribute to or pay for the defense of the within action." Campbell Warburton objected on the grounds of attorney-client privilege and work-product protection. The court overrules Campbell Warburton's objections, and GRANTS the motion as to Interrogatory 8. Similarly, Interrogatory 9 asked Campbell Warburton to "identify each communication between [it] and Margaret Laughrin whereby Margaret Laughrin offered or was asked to contribute to or pay for a settlement of the within action." Campbell Warburton objected on the grounds of attorney-client privilege and work product protection, in addition to third party privacy rights. The court already overruled the privacy objection, and now overrules the attorney-client privilege and work product objections. Plaintiff's motion, as to Interrogatory 8, is GRANTED.

D. Plaintiff's Motions to Compel Production of Documents.

NAF sought to compel additional production of documents from Kelly Laughrin in "Discovery Motion 1," and from Campbell Warburton in "Discovery Motion 5." The motions were nearly identical. As originally briefed, the motions presented some 73 requests for production.

In response to the court's third interim order, Defendants submitted for *in camera* review both (1) the documents that were responsive to the order, and (2) all remaining documents that they had withheld. In determining the applicability of the crime-fraud exception, the court also performed a *de facto in camera* review of all remaining withheld documents. Therefore, IT IS ORDERED that the defendants produce documents that: (1) do not contain any privileged or work-product protected communications; and (2) do not contain any work-product, where the attorney-client privilege has been nullified by the crime-fraud exception.

*7 Much to the court's surprise, and despite defendants' counsel's representations to the contrary, the *in camera* review revealed that defendants continued to withhold a number of fax cover sheets, phone message slips, and other documents that did not contain any information that was ever protected by attorney-client privilege or work-product exemption. Defendants' *in camera* materials also included nearly 30 pages of billing records. The amount of fees paid to an attorney are not privileged, so billing records are generally discoverable. *Real v. Continental Group, Inc.,* 116 F.R.D. 211, 213-14 (N.D.Cal.1986). These documents should have been produced, and are ordered to be produced in the first section below.

Some of the documents defendants withheld were not attorney work-product, but would have been protected by the attorney-client privilege. Because the court found that these documents were reasonably related to transfers of monies or estate planning, the privilege these documents would have otherwise retained has been extinguished. These documents are ordered to be produced in the second section below.

CAM00001-2
CAM00008
CAM00029
CAM00061-63
CAM00065
CAM00070
CAM00142
CAM00148
CAM00208
CAM00216
CAM00288
CAM00296-97
CAM00299
CAM00311
CAM00313-315
CAM00317-18
CAM01111-12
CAM01127
CAM01135
CAM01146-47

CAM00005

CAM00014

CAM00022

CAM00009-12

CAM00019-20

CAM00026-28

CAM00030-32

CAM00034-37

CAM00040-42

CAM00044-55

CAM00057-60 CAM00067-69

2. Documents that do not contain any work-product, and where the attorney-client privilege

1. Documents that do not contain any privileged or work-product protected communications, specifically:

CAM00321 CAM00324-25 CAM00328 CAM00361 CAM00410 CAM00610 CAM00683 CAM00723-26 CAM00989-992 CAM01006 CAM01009-10 CAM01021 CAM01070 CAM01086 CAM01093 CAM01097 CAM01155 CAM02000-2027

has been nullified by the crime-fraud exception, specifically:

CAM00130 CAM00136 CAM00146 CAM00612-682 CAM00684-722 CAM00737-775 CAM00976-988 CAM00993-1008 CAM01011-1063 Not Reported in F.Supp.2d, 2009 WL 102816 (N.D.Cal.) (Cite as: 2009 WL 102816 (N.D.Cal.))

All discovery responses and productions are due **not** later than January 30, 2009.

IT IS SO ORDERED.

N.D.Cal.,2009. New Amsterdam Project Management Humanitarian Foundation v. Laughrin Not Reported in F.Supp.2d, 2009 WL 102816 (N.D.Cal.)

END OF DOCUMENT

	.1	
	1	
	2	
	3	
	4	
	5	
	6	
	7	
	8	
	9	
	10	
¥ ¢	11	
CHARLTON WEEKS LLP 1007 West Avenue M-14, Suite A Palmdale, CA 93551	12	
EEKS M-14, 935	13	
N W enue l	14	
RLTOI t Ave ndale	15	
CHAR Wes Pair	16	
001	17	
	18	
	19	
	20 21	
	21	
	23	
	24	
	25	
	26	
	27	
	28	
		4
		4



United States Court of Appeals, Ninth Circuit. Robert L. CLARKE, Comptroller of the Currency, Plaintiff-Appellee,

v. AMERICAN COMMERCE NATIONAL BANK, Anaheim, California, Defendant-Appellant.

> No. 91-56327. Argued and Submitted April 7, 1992. Decided Sept. 8, 1992.

Office of Comptroller of Currency sued to enforce administrative subpoena issued to regulated bank for production of attorney billing statements from outside counsel. The United States District Court for the Central District of California, <u>Irving Hill</u>, J., granted in part and denied in part motion to enforce subpoena, and appeal was taken. The Court of Appeals, <u>Pregerson</u>, Circuit Judge, held that attorney billing statements which merely contained information on identity of client, case name for which payment was made, amount of fee and general nature of services performed were not protected by privilege.

Affirmed.

West Headnotes

[1] Banks and Banking 52 235

52 Banks and Banking
52IV National Banks
52k235 k. Regulation and supervision in general. Most Cited Cases

Complaint filed by Office of Comptroller of Currency to compel turn over of bank records was not facially defective, for failing to anticipate and address bank's defense of attorney-client privilege.

[2] Federal Courts 170B 🕬 416

<u>170B</u> Federal Courts <u>170BVI</u> State Laws as Rules of Decision <u>170BVI(C)</u> Application to Particular Matters <u>170Bk416</u> k. Evidence law. <u>Most Cited</u> Cases

Issues concerning application of attorney-client privilege in adjudication of federal law are governed by federal common law.

[3] Privileged Communications and Confidentiality 311H 2000

<u>311H</u> Privileged Communications and Confidentiality <u>311HIII</u> Attorney-Client Privilege <u>311Hk100</u> k. In general. <u>Most Cited Cases</u> (Formerly 311Hk106, 410k198(1))

Because attorney-client privilege has effect of withholding relevant information from fact finder, it is applied only when necessary to achieve its limited purpose of encouraging full and frank disclosure by client to his or her attorney.

[4] Privileged Communications and Confidentiality 311H Im 146

<u>311H</u> Privileged Communications and Confidentiality <u>311HIII</u> Attorney-Client Privilege <u>311Hk144</u> Subject Matter; Particular Cases <u>311Hk146</u> k. Client information; retainer and authority. <u>Most Cited Cases</u> (Formerly 410k198(2))

Not all communications between attorney and client are privileged; communications regarding identity of client, amount of fee, identification of payment by case file name, and general purpose of work performed are usually not protected from disclosure.

[5] Privileged Communications and Confidentiality 311H III

<u>311H</u> Privileged Communications and Confidentiality <u>311HIII</u> Attorney-Client Privilege <u>311Hk135</u> Mode or Form of Communications <u>311Hk137</u> k. Documents and records in general. <u>Most Cited Cases</u>

(Formerly 410k204(2))

Privileged Communications and Confidentiality 311H 🕬 139

<u>311H</u> Privileged Communications and Confidentiality **<u>311HIII</u>** Attorney-Client Privilege 311Hk135 Mode or Form of Communications 311Hk139 k. Letters and correspondence. Most Cited Cases (Formerly 410k204(2))

Correspondence, bills, ledgers, statements and time records of attorney will be protected by privilege, where such records also reveal motive of client in seeking representation, litigation strategy, or specific nature of services provided, such as researching particular areas of law.

[6] Privileged Communications and Confidentiality 311H 🖘 173

311H Privileged Communications and Confidentiality **<u>311HIII</u>** Attorney-Client Privilege 311Hk171 Evidence 311Hk173 k. Presumptions and burden of proof. Most Cited Cases (Formerly 410k222)

Burden of establishing that attorney-client privilege applies to documents in question rests with party asserting privilege.

[7] Privileged Communications and Confidentiality 311H 🕬 178

311H Privileged Communications and Confidentiality **<u>311HIII</u>** Attorney-Client Privilege 311Hk175 Determination 311Hk178 k. In camera review. Most Cited

Cases

(Formerly 410k223)

District court may conduct in camera inspection of alleged confidential communications to determine whether attorney-client privilege applies.

[8] Privileged Communications and Confidentiality 311H 🖘 169

311H Privileged Communications and Confidentiality 311HIII Attorney-Client Privilege

311Hk169 k. Objections; claim of privilege. Most Cited Cases

(Formerly 410k198(1))

Blanket assertions of attorney-client privilege are extremely disfavored; rather, privilege must ordinarily be raised as to each record sought to allow court to rule with specificity.

[9] Federal Courts 170B 776

170B Federal Courts

170BVIII Courts of Appeals 170BVIII(K) Scope, Standards, and Extent 170BVIII(K)1 In General 170Bk776 k. Trial de novo. Most Cited Cases

Court of Appeals reviews de novo district court's rulings on scope of attorney-client privilege, as they involve mixed questions of law and fact.

[10] Privileged Communications and Confidentiality 311H 🕬 146

311H Privileged Communications and Confidentiality **<u>311HIII</u>** Attorney-Client Privilege 311Hk144 Subject Matter; Particular Cases 311Hk146 k. Client information; retainer and authority. Most Cited Cases (Formerly 410k204(2))

Attorney billing statements from outside counsel to regulated bank were not protected from disclosure to Office of Comptroller of Currency by attorney-client privilege, where statements merely contained information on identity of client, case name for which payment was made, amount of fee, and general nature of services performed and did not reveal specific research or litigation strategy.

*128 Barbara A. Reeves, Morrison & Foerster, Los Angeles, Cal., for defendant-appellant.

Larry J. Stein, Office of the Comptroller of the Currency, Washington, D.C., for plaintiff-appellee.

Appeal from the United States District Court for the Central District of California.

Before: <u>PREGERSON</u>, <u>D.W. NELSON</u>, and THOMPSON, Circuit Judges.

PREGERSON, Circuit Judge:

This case arises out of the efforts of the Office of the Comptroller of the Currency ("OCC") to investigate the banking practices of American Commerce National Bank ("ACNB" or "Bank"). ACNB appeals the order of the district court requiring it to turn over certain unredacted attorney billing statements to the OCC. The district court concluded that the information fell within the crime/fraud exception to the attorney-client privilege. We affirm, but on the ground that the attorney-client privilege does not protect the attorney billing statements from disclosure.

I. BACKGROUND

The OCC is responsible for the periodic examination of all national banks to assure that they are operated in a safe and sound manner and in accordance with all applicable laws, rules, and regulations. Under <u>12 U.S.C. § 481 (1988)</u>, national bank examiners, as designees of the Comptroller, are authorized to conduct thorough examinations of the affairs of national banking associations. ACNB is a federally-chartered national banking association.

In August 1990, the OCC issued an administrative subpoena requesting, among other things, the production of all billing statements from outside legal counsel to ACNB since January 1, 1989. The OCC believed that the Bank may have improperly paid the personal legal expenses of its chairman, Gerald Garner. ACNB refused portions of this request, asserting the attorney-client privilege. It provided copies of billing statements, but redacted all descriptive information other than dates and fees.

The OCC brought an action in district court for an order to enforce its subpoena. After an in camera inspection of all unredacted attorney billing statements submitted to ACNB between January 1, 1989, and August 30, 1990, together with ACNB's line-by-line justification for asserting the attorney-client privilege, the district court granted in part and denied in part the OCC's motion to enforce its subpoena. The district court determined that the OCC made a prima facie showing that the bills of certain law firms fell within the crime/fraud exception to the attorney-client privilege. With respect to the bills of other law firms, the district court sustained ACNB's assertion of the attorney-client privilege, finding no basis to believe that the statements contained evidence of criminal or fraudulent conduct. This ruling was without prejudice to a later motion to renew should a basis for disclosure be uncovered.

To accommodate ACNB's anticipated appeal, the district court circled in red those portions of the bills ordered turned over which, when viewed in light of other material, led the district court to conclude that a sufficient prima facie case had been made. The bills remained sealed and were furnished to this court in camera. We stayed the district court's order pending the outcome of this appeal. We have jurisdiction under 28 U.S.C. § 1291 (1988).

ACNB contends that the district court erred in four respects: (1) by denying its motion to dismiss for failure to state a claim; (2) by ordering in camera inspection of its attorney billing statements; (3) by requiring a line-by-line justification for asserting the attorney-client privilege for each redacted item on the billing statements; and (4) by ordering production of the billing statements to the OCC.

II. DENIAL OF MOTION TO DISMISS

[1] ACNB first argues that the district court should have dismissed the OCC's complaint for failure to state a claim. ACNB contends that the complaint is facially defective because it does not address ***129** the issue of attorney-client privilege. We agree with the district court that the OCC was not required to anticipate and address ACNB's defense of attorney-client privilege in its complaint. The district court did not err in denying ACNB's motion to dismiss.

III. ATTORNEY-CLIENT PRIVILEGE

[2][3] Issues concerning application of the attorney-client privilege in the adjudication of federal law are governed by federal common law. *See <u>United</u> States v. Zolin,* 491 U.S. 554, 562, 109 S.Ct. 2619, 2625, 105 L.Ed.2d 469 (1989); *United States v. Hodge and Zweig,* 548 F.2d 1347, 1353 (9th Cir.1977); Fed.R.Evid. 501. Under the attorney-client privilege, confidential communications made by a client to an attorney to obtain legal services are protected from disclosure. *Fisher v. United States,* 425 U.S. 391, 403,

96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976); *United States v. Hirsch*, 803 F.2d 493, 496 (9th Cir.1986). Because the attorney-client privilege has the effect of withholding relevant information from the factfinder, it is applied only when necessary to achieve its limited purpose of encouraging full and frank disclosure by the client to his or her attorney. *Fisher*, 425 U.S. at 403, 96 S.Ct. at 1569; *Tornay v. United States*, 840 F.2d 1424, 1426 (9th Cir.1988).

[4][5][6] Not all communications between attorney and client are privileged. Our decisions have recognized that the identity of the client, the amount of the fee, the identification of payment by case file name, and the general purpose of the work performed are usually not protected from disclosure by the attorney-client privilege. See, e.g., Tornay, 840 F.2d at 1426; In re Grand Jury Witness (Salas and Waxman), 695 F.2d 359, 361-62 (9th Cir.1982); Hodge and Zweig, 548 F.2d at 1353; United States v. Cromer, 483 F.2d 99, 101-02 (9th Cir.1973). However, correspondence, bills, ledgers, statements, and time records which also reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of law, fall within the privilege. Salas, 695 F.2d at 362. The burden of establishing that the attorney-client privilege applies to the documents in question rests with the party asserting the privilege. Tornay, 840 F.2d at 1426.

[7] ACNB contends that the district court erred by conducting an in camera inspection of the attorney billing statements and by ordering a line-by-line justification for assertion of the attorney-client privilege. A district court may conduct an in camera inspection of alleged confidential communications to determine whether the attorney-client privilege applies. *See Kerr v. United States Dist. Ct. for N. Dist. of Cal.*, 426 U.S. 394, 404-405, 96 S.Ct. 2119, 2124-2125, 48 L.Ed.2d 725 (1976); *Salas*, 695 F.2d at 362.

[8] ACNB relies on our decision in <u>Salas</u>, 695 <u>F.2d at 362</u>, in arguing that the district court had no basis for ordering it to provide a line-by-line justification for each requested redaction. In *Salas*, we stated that the parties seeking to invoke the attorney-client privilege should have provided the court with "an explanation of how the information [contained in the documents subject to the grand jury subpoena] fits within the privilege." *Id.* Nothing in *Salas* indicates that a court is prohibited from requiring individual explanations justifying the assertion of privilege. To the contrary, we have noted that blanket assertions of the privilege are "extremely disfavored." *See id.* The privilege must ordinarily be raised as to each record sought to allow the court to rule with specificity. *United States v. Hodgson,* 492 F.2d 1175, 1177 (10th Cir.1974). *See also United States v. El Paso Co.,* 682 F.2d 530, 541-42 (5th Cir.1982) (attempt to invoke privilege rejected, due in part to the failure to "particularize its assertion of the privilege" with respect to each specific document), *cert. denied,* 466 U.S. 944, 104 S.Ct. 1927, 80 L.Ed.2d 473 (1984).

[9] After in camera inspection of the attorney billing statements, the district court determined that they fell within the ***130** attorney-client privilege.^{FN1} We review de novo a district court's rulings on the scope of the attorney-client privilege as they involve mixed questions of law and fact. *Tornay*, 840 F.2d at 1426 (citing *United States v. McConney*, 728 F.2d 1195, 1202 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984)).

<u>FN1.</u> Although the ruling was not explicit, the district court's conclusion regarding the crime/fraud exception indicates that it must have found the attorney-client privilege applicable.

[10] We have examined the attorney billing statements ordered disclosed by the district court. We conclude that they do not contain privileged communications between attorney and client. The statements contain information on the identity of the client, the case name for which payment was made, the amount of the fee, and the general nature of the services performed. Our previous decisions have held that this type of information is not privileged. See, e.g., Salas, 695 F.2d at 361; Cromer, 483 F.2d at 101-02. We find nothing in the statements that reveals specific research or litigation strategy which would be entitled to protection from disclosure. Accordingly, we hold that the district court erred in concluding that the attorney-client privilege applies to the attorney billing statements subpoenaed by the OCC.^{FN2} The district court, however, ordered disclosure based on the crime/fraud exception to the attorney-client privilege. Thus, we affirm the judgment of the district court but on different grounds. Because we have determined that the attorney billing statements are not protected

by the attorney-client privilege, and were therefore properly ordered disclosed, we do not reach the issue of the scope of the crime/fraud exception.

<u>FN2.</u> Because the district court denied in part the OCC's motion for enforcement of its subpoena, the billing statements that were not ordered disclosed are not before us on appeal. We render no opinion as to those documents.

AFFIRMED.

C.A.9 (Cal.),1992. Clarke v. American Commerce Nat. Bank 974 F.2d 127, 61 USLW 2202, 36 Fed. R. Evid. Serv. 739

END OF DOCUMENT

	1	PROOF OF SERVICE
	2	
	3	I am employed in the aforesaid county, State of California; I am over eighteen years of age and not a party to the within action; my business address is:
	4 5	1007 West Avenue M14, Suite A, Palmdale, California 93551.
	6	On March 7, 2011 at my place of business at Palmdale, California, a copy of the following document(s):
	7 8	NON-CALIFORNIA AUTHORITY
	9	By posting the documents listed above to the Santa Clara Superior Court website in regard to the Antelope Valley Groundwater Matter:
	10	
LLP Suite A 51	11 12	I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
KS Ll 14, St 3551	13	
VEE Le M- CA 9	14	Executed on March 7, 2011
CHARLTON WEEKS LL West Avenue M-14, Su Paimdale, CA 93551	15	Brill
HARL Nest / Palmo	16	Bradley T. Weeks
1007 / CF	17	
-	18	
	19	
	20	
	21	
	22	
	23 24	
	24	
	26	
	27	
	28	
		PROOF OF SERVICE