

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :
 : **CR-1056-2012**
 v. :
 :
 CHAD MARSHALL WILCOX, : **CRIMINAL DIVISION**
 Defendant :

OPINION AND ORDER

On December 30, 2015, the Defendant filed a motion to dismiss the charges. Hearing and argument on the motion was held on January 14, 2016.

I. Background

During the hearing, the Defendant’s wife, Amanda Wilcox (Mrs. Wilcox), testified that in 2013 she gave documents to Sergeant James Taylor of the South Williamsport Police Department. Mrs. Wilcox testified that the documents, which were handwritten by the Defendant, contain “everything” the Defendant wanted to tell his lawyer and “things” that the Defendant wanted Mrs. Wilcox to tell his lawyer. During the hearing, the Defendant testified that the documents were notes written for his lawyer. He also testified that he reviewed the notes with his lawyer on multiple occasions.

The Defendant introduced Defense Exhibit #1, which includes the handwritten documents. Each page has a typed number at the bottom.¹ The Court will use the typed numbers when referencing the specific pages of the documents. The documents start on page 001268; they end on 001317.

The Defendant argues that the “[i]nformation received by the Commonwealth is a violation of the Work-Product Doctrine.” In addition, he argues that the “information contained

¹ These numbers were added by the prosecution during another case against the Defendant in Montgomery County, Pennsylvania. The Montgomery County prosecution obtained the documents after obtaining a warrant for samples of the Defendant’s handwriting.

[in the documents] was attorney-client privilege material.” Last, he argues that the charges against him must be dismissed because the Commonwealth received the documents, and the toothpaste is out of the tube. The Commonwealth argues that the documents are not protected by the attorney-client privilege or the work product doctrine. It notes that the documents were addressed to Mrs. Wilcox, not the Defendant’s lawyer.

II. Discussion

A. Work Product Doctrine

“The work product doctrine . . . is an exemption from discovery for certain types of documents.” In re Thirty-Third Statewide Investigating Grand Jury, 86 A.3d 204, 207 n.2 (Pa. 2014). The work product doctrine “promotes the adversary system by enabling *attorneys* to prepare cases without fear that their work product will be used against their clients.” Commonwealth v. Noll, 662 A.2d 1123, 1126 (Pa. Super. 1995) (internal citation omitted) (emphasis added). “[T]he U.S. Supreme Court has referred to the work product doctrine as a qualified privilege for certain materials prepared *by an attorney* acting for his client in anticipation of litigation.” In re Thirty-Third Statewide Investigating Grand Jury, 86 A.3d at 207 n.2 (internal quotation marks omitted) (emphasis added). “[W]ork-product privilege only applies to records that are the work-product *of an attorney*, and may extend to the product of an attorney’s representative secured in anticipation of litigation.” Bagwell v. Pa. Dep’t of Educ., 103 A.3d 409, 415 (Pa. Commw. 2014) (emphasis added). Here, the Defendant’s attorney did not prepare the documents. Therefore, they are not protected by the work product doctrine.

B. Attorney-Client Privilege

“In Pennsylvania, the attorney-client privilege operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice. In describing the purpose of the privilege, [the Superior Court of Pennsylvania has] said: The attorney-client privilege exists to foster a confidence between attorney and client that will lead to a trusting and open dialogue.” Custom Designs & Mfg. Co. v. Sherwin-Williams Co., 39 A.3d 372, 376 (Pa. Super. 2012) (internal citations and quotation marks omitted). The generally recited requirements for assertion of the attorney-client privilege are:

- 1) The asserted holder of the privilege is or sought to become a client.
- 2) The person to whom the communication was made is a member of the bar of a court, or his subordinate.
- 3) The communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort.
- 4) The privilege has been claimed and is not waived by the client.

Commonwealth v. Mrozek, 657 A.2d 997, 998 (Pa. Super. 1995). “The client can waive the protection afforded by attorney-client privilege, for example by disclosing the communication at issue to a third party.” Nationwide Mut. Ins. Co. v. Fleming, 924 A.2d 1259, 1265 (Pa. Super. 2007). “[O]nce the attorney-client communications have been disclosed to a third party, the privilege is deemed waived.” Joe v. Prison Health Servs., 782 A.2d 24, 31 (Pa. Commw. 2001).

1. Letter #1

Page 001268 is a letter written by the Defendant. It starts with “Mom” and ends with “Always your son.” The Court finds that the Defendant did not create the letter exclusively for

his lawyer. Even if the Court assumes that the letter contains communication that the Defendant made to his lawyer and the communication relates to facts that he told his lawyer for the purpose of securing legal assistance, the letter is not protected by the attorney-client privilege. This is because the Defendant waived the privilege by not creating the letter exclusively for his lawyer.

2. Letter #2

Page 001269 is a letter written by the Defendant. It starts with “To my love” and ends with “‘Watermelon.’ Yours Always.” The Court finds that the Defendant did not create the letter exclusively for his lawyer. Even if the Court assumes that the letter contains communication that the Defendant made to his lawyer and the communication relates to facts that he told his lawyer for the purpose of securing legal assistance, the letter is not protected by the attorney-client privilege. This is because the Defendant waived the privilege by not creating the letter exclusively for his lawyer.

3. Letter #3

Pages 001270-72 contain a three-page letter written by the Defendant. It starts with “Ms. Wilcox!!! Good morning lady!” On page 001270, the following is written:

I still have work to do today though. Tomorrow too! I really would like to have everything out by tomorrow night mail call so you have it all for the weekend. Please spend Saturday and Sunday working on this. Oh?? You’ll see the spots I left for you . . . Feel free to change stuff too but make a note on a separate paper what it was so I remember.

On page 001271, the Defendant wrote the following:

Actually – Notes on the 2 page Supplemental Narrative I left for you! – Thanks . . . I’ll leave comments/concerns up to you.

The letter ends with “More notes and stuff to come!! I love you! Your Husband.” The Court finds that the Defendant did not create the letter exclusively for his lawyer. Even if the Court

assumes that the letter contains communication that the Defendant made to his lawyer and the communication relates to facts that he told his lawyer for the purpose of securing legal assistance, the letter is not protected by the attorney-client privilege. This is because the Defendant waived the privilege by not creating the letter exclusively for his lawyer.

4. Untitled Document

Page 001273 is blank. Pages 001274-75 contain an untitled two-page document written by the Defendant. The following is written at the top of page 001274:

And obviously anything you think is missing or could asked better, ect. go right ahead . . .
And write down answers from attorneys.

On page 001275, the Defendant wrote, “You should get this Thursday. (Day of my hearing). Ask Lawyers questions for Friday, For sure. Then you can plan for when to do this.” Also on page 001275, the Defendant wrote, “Please. This is a major part of defense for our life.” The Court finds that the Defendant did not create the document exclusively for his lawyer. The receiver was instructed to ask attorneys questions and write down the answers. Even if the Court assumes that the document contains communication that the Defendant made to his lawyer and the communication relates to facts that he told his lawyer for the purpose of securing legal assistance, the document is not protected by the attorney-client privilege. This is because the Defendant waived the privilege by not creating the document exclusively for his lawyer.

5. “Notes” Document

Pages 001276-83 contain an eight-page document with the title, “Notes.” The document contains the Defendant’s thoughts on the information in certain case documents, such as the affidavit of probable cause, synopsis of the investigation, the incident report, and the

supplemental narrative. On the first page of the document, page 001276, the Defendant wrote the following:

Erase this, and fill in how Dangle told you what [child] just said . . . I'll leave extra space . . . Thanks! Love you!! I wrote light so you can erase!! But I can say 'hi' right!? . . . So I guess is this is only one of 10 pieces I want to take notes on, I guess I'm only 1/10th . . . Love you!!

On page 001282, the Defendant wrote, "(Mandi – add examples here)." The Court finds that the Defendant did not create the "Notes" document exclusively for his lawyer. On pages 001271 and 1272, the Defendant wrote that he sent Mrs. Wilcox "notes" and was going to send her more. In the "Notes" document, he wrote, "love you" and asked "Mandi" to add examples. Even if the Court assumes that the document contains communication that the Defendant made to his lawyer and the communication relates to facts that he told his lawyer for the purpose of securing legal assistance, the document is not protected by the attorney-client privilege. This is because the Defendant waived the privilege by not creating the document exclusively for his lawyer.

6. Letter #4

Pages 001284-87 contain a four-page letter written by the Defendant. It starts with "Mrs. Wilcox!!" and ends with "Love you Lady!! Your Husband." The Court finds that the Defendant did not create this letter exclusively for his lawyer. Even if the Court assumes that the letter contains communication that the Defendant made to his lawyer and the communication relates to facts that he told his lawyer for the purpose of securing legal assistance, the letter is not protected by the attorney-client privilege. This is because the Defendant waived the privilege by not creating the letter exclusively for his lawyer.

7. Letter #5

Pages 001288-91 contain a four-page letter written by the Defendant. It starts with “Mrs. Wilcox, Good morning” and ends with “Love you! Your Husband.” The Court finds that the Defendant did not create this letter exclusively for his lawyer. Even if the Court assumes that the letter contains communication that the Defendant made to his lawyer and the communication relates to facts that he told his lawyer for the purpose of securing legal assistance, the letter is not protected by the attorney-client privilege. This is because the Defendant waived the privilege by not creating the letter exclusively for his lawyer.

8. The “Real Narrative” Document

Pages 001292-1317 contain a document with the title “The ‘Real Narrative.’” On page 001297, the Defendant wrote, “(I’ll let Amanda fill in what Dangle said and what [child] then told her).” On page 001298, the Defendant wrote the following:

Insert anymore notes related and put here. I’m out of time. Maybe what she said about her not coming home, about me.

On page 001303, the Defendant wrote, “(Mandi – Put which day you yelled at her. And why this makes NO SENSE).” On page 001307, the Defendant wrote, “Mandi Please comment on Paragraphs 2, 3, 4, 5, 6, 7 on page 1.” On page 001308, the Defendant wrote, “(Mandi Comment on rest of this long paragraph if necessary!).” On page 001311, the Defendant wrote, “Then tells Amanda: (You fill this in). And comment.” On page 001316, the Defendant wrote the following:

Mandi . . . I think there was mention of you saying stuff about me being bad father then me saying something about you being bad mother. Don’t comment about it yet unless you remember and its [sic] beneficial . . . I’m sorry. Please erase this and make a few comments.”

On page 001317, the Defendant wrote, “Mandi – You write this as well Love you. Gonna wrap it up for now. ‘My Narrative’ will be coming next – By Wed.”

The Court finds that the Defendant did not create the ““Real Narrative”” document exclusively for his lawyer. On pages 001270 and 1276, the Defendant wrote that he was leaving space for Mrs. Wilcox to fill. In the ““Real Narrative,”” the Defendant repeatedly told “Mandi” to insert information and comment. He ended the document with “love you.” Even if the Court assumes that the document contains communication that the Defendant made to his lawyer and the communication relates to facts that he told his lawyer for the purpose of securing legal assistance, the document is not protected by the attorney-client privilege. This is because the Defendant waived the privilege by not creating the document exclusively for his lawyer.

III. Conclusion

The documents are not protected by the work product doctrine because the Defendant's attorney did not prepare them. Because the Defendant did not create the documents exclusively for his lawyer, he waived any attorney-client privilege he may have had.

ORDER

AND NOW, this _____ day of January 2016, based upon the foregoing Opinion, it is ORDERED and DIRECTED that the Motion to Dismiss, which was filed on December 30, 2015, is hereby DENIED.

By the Court,

Nancy L. Butts, President Judge