

J. WILLIAM LUNDY : CV-23-00074  
 :  
 vs. :  
 :  
 VALERIE N. LUNDY, : Motion to Compel

**OPINION AND ORDER**

This matter came before the Court for oral argument on Plaintiff’s Motion to Compel Deposition Testimony (hereinafter the “Motion”) filed October 27, 2023. During oral argument, it became clear that Defendant agreed to attend the requested deposition, but that Defendant might refuse to answer questions on one specific issue. For the purpose of clarification, the Court directed the parties to schedule Defendant’s deposition, in order to narrow the precise scope of their dispute. At that deposition, the Defendant answered many questions by Plaintiff’s counsel, but refused to answer some others. The questions presented are whether Defendant is required to answer those questions.

**I. BACKGROUND**

J. William Lundy (hereinafter “Plaintiff”) commenced this action by Complaint filed January 17, 2023, against Valerie N. Lundy (hereinafter “Defendant). On October 27, 2023, Plaintiff filed a Motion to Compel Deposition Testimony (hereinafter the “Motion”). Simply stated, Plaintiff’s Motion alleges that the parties executed a Property Settlement Agreement on September 23, 2022, that the parties undertook to clarify an issue regarding personal property through a series of emails over October 27 and October 28, 2022, that Defendant sent an email to her former counsel stating “Yes, I agree with that” (hereinafter “Defendant’s Email”), that Defendant’s former counsel forwarded Defendant’s Email for the purpose of confirming Defendant’s agreement to a proposed distribution of personal property, that a dispute has now arisen on that subject, and that Plaintiff seeks to take the follow-up deposition of the Defendant on the subject of her intention in sending Defendant’s Email.

Defendant contends that Defendant’s Email is a privileged communication under 42 Pa.C.S.A. § 5928, that Defendant’s former counsel was not authorized to waive that privilege, and that Defendant cannot be compelled to answer what she intended by Defendant’s Email. Plaintiff contends that Defendant’s Email is not protected, or that any such protection has been waived by the disclosure by Defendant’s former counsel.

## II. QUESTIONS INVOLVED

- A. Whether Defendant's former counsel waived attorney-client privilege by the act of forwarding Defendant's Email to counsel for the Plaintiff.
- B. Whether Defendant's Email is subject to protection under 42 Pa.C.S.A. § 5928.

## III. ANSWERS TO QUESTIONS INVOLVED

- A. Defendant's former counsel was not authorized to waive attorney-client privilege with regard to any communication subject to 42 Pa.C.S.A. § 5928.
- B. Defendant's Email is not subject to protection under 42 Pa.C.S.A. § 5928.

## IV. DISCUSSION

42 Pa.C.S.A. § 5928 provides that “[i]n a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.” In order to invoke the privilege, a party must establish that:

“(1) [t]he asserted holder of the privilege is or sought to become a client[;] (2) [t]he person to whom the communication was made is a member of the bar of a court, or his subordinate[;] (3) [t]he communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purposes 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[; and] (4) [t]he privilege has been claimed and is not waived by the client.” *In re Flonase Antitrust Litigation*, 723 F.Supp.2d 761, 764 (E.D. Pa. 2010) (applying Pennsylvania law). The party asserting the privilege has the burden of showing that the doctrine applies. *Conoco Inc. v. U.S. Dep't of Justice*, 687 F.2d 724, 730 (3d Cir. 1982).

The attorney-client privilege “exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.” *In re Processed Egg Prod. Antitrust Litig.*, 278 F.R.D. at 117. However, “[b]ecause the attorney-client privilege obstructs the truth-finding process, it is construed narrowly. The privilege protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege.”

*Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1423–24 (3d Cir. 1991) (internal citations omitted).

*Hydrojet Services, Inc. v. Sentry Insurance Company*, 2022 WL 2168655, 5 (E.D. Pa. 2022).

Despite the very broad language of Section 5928, the vast majority of discussions between an attorney and their client are not subject to the privilege. The privilege protects those disclosures of confidential information made by a client to an attorney, for the purpose of seeking legal advice. Because the privilege is not without limits, the Court must, in the exercise of its discretion, determine on a case by case basis when the privilege should be applied. *Lane v. Hartford Accident and Indemnity Company*, 1990 WL 255906 (Dauphin Cnty. 1990). The purpose of the privilege is to enable the client to make disclosures that might not have been made absent the privilege, where the client’s ultimate goal is to obtain legal advice. The party asserting the privilege has the burden of proving that the privilege has been properly invoked. *Joe v. Prison Health Services, Inc.*, 782 A.2d 24, 31-32 (Pa. Commw. Ct. 2001).

The showing necessary to establish the privilege is settled:

(1) (When) legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his insistence permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

*In re Grand Jury*, 603 F.2d 469, 474 (3d Cir.1979) (citing J. Wigmore, EVIDENCE § 2292 at 554 (1961)); *see also In re Impounded*, 241 F.3d 308, 316 n. 6 (3d Cir.2001). “The burden of proving that the (attorney-client) privilege applies is placed upon the party asserting the privilege.” *In re Grand Jury*, 603 F.2d at 474 (citing among other cases *United States v. Landof*, 591 F.2d 36, 38 (9th Cir.1978)).

....

In this regard “[t]he protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, ‘What did you say or write to the attorney?’ but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.” *Upjohn Co. v. United States*,

449 U.S. 383, 395–96, 101 S.Ct. 677, 66 L.Ed.2d 584, (1981) (quoting *Philadelphia v. Westinghouse Electric Corp.*, 205 F.Supp. 830, 831 (E.D.Pa.1962)).

In other words, communications made by Patterson's employees to Attorney Shu for the purposes of gaining legal advice or formulating legal strategy are protected from disclosure. Plaintiff cannot compel disclosure of such communications. Nevertheless, plaintiff is free to gather the factual information from Patterson and the other defendants through myriad discovery devices and neither Patterson nor any other defendant can shelter the actual factual information known or imparted to them. But it is plaintiff's burden to employ those devices and frame the inquires in a manner that nets the factual information without intruding into the actual privileged documents and communications.

*Serrano v. Chesapeake Appalachia, LLC*, 298 FRD 271, 281-282 (W.D. Pa. 2014).

Where a litigant discloses confidential information to the opposing party, the privilege may be regarded as waived:

The Court finds most persuasive the argument that when one party intentionally discloses privileged material with the aim, in whole or in part, of furthering that party's case, the party waives its attorney-client privilege with respect to the subject-matter of the disclosed communications. *See In re Leslie Fay Cos., Inc. Sec. Litig.*, 161 F.R.D. 274, 282 (S.D.N.Y.1995) (“Based principally on notions of fairness, courts have imposed such a ‘subject matter waiver’ most often when the privilege-holder has attempted to use the privilege as both ‘a sword’ and ‘a shield’ or when the party attacking the privilege will be prejudiced at trial.”); *Edwards*, 868 F.Supp. at 229; *Hundley*, supra, § 9, and cases cited therein.

*Murray v. Gemplus Intern., S.A.*, 217 F.R.D. 362, 367 (E.D. Pa. 2003) (noting that when the defendant intended to convey information to the plaintiff in order to “cast [the defendant] in a positive light,” the defendant “should be deemed to have waived” attorney-client privilege).

*A. Defendant’s former counsel was not authorized to waive attorney client privilege with regard to any communication subject to 42 Pa.C.S.A. § 5928.*

There is no merit to the contention that an attorney may waive attorney-client privilege. The privilege belongs to the client, and only the client may waive it. In assessing a claim of privilege, it is the intent of the client which controls the Court’s analysis. *EMC Insurance Company v. Zicolello*, 2014 WL 123687 (M.D. Pa. 2014) (citing

*Martin Marietta Materials, Inc. v. Bedford Reinforced Plastic, Inc.*, 227 F.R.D. 382, 390 (W.D. Pa. 2005).

*B. Defendant's Email is not subject to protection under 42 Pa.C.S.A. § 5928.*

Taken in context, it is clear that Defendant's Email was not a communication of confidential information for the purpose of securing legal advice. Defendant was about to vacate a residence, and take some personal property. Plaintiff was about to deliver a check to Defendant, to provide part of the funds needed by her to close on the purchase of another home. Counsel for both parties were exchanging emails, in order to confirm those arrangements. Counsel for Plaintiff listed the particular personal property which Plaintiff believed the Defendant was removing, and the personal property which would remain. Defendant's counsel forwarded that email to her in order to confirm her intentions. Defendant provided that confirmation, which her attorney forwarded to opposing counsel. The Court does not regard her written confirmation of that email exchange between counsel as her "communication of confidential information for the purpose of securing legal advice." First, Defendant did not establish that her email statement "Yes, I agree with that" was ever intended to be confidential. In fact, since she was confirming her agreement with an email statement from opposing counsel, she had every reason to believe that her agreement would be communicated by her attorney. Second, she was certainly not seeking legal advice. The only reasonable inference which can be drawn from her statement is that she concurred in the arrangement outlined in the email from opposing counsel, to her attorney. While her statement may have been the product of a misunderstanding, it cannot be regarded as a confidential communication made to her attorney, for the purpose of securing legal advice.

**V. ORDER**

And now, this 26<sup>th</sup> day of March, 2024, for the reasons more fully set forth above, Plaintiff's Motion to Compel Deposition Testimony filed October 27, 2023, is granted. The Defendant is directed to answer questions on the subject of her understanding of the emails contained within the email stream between counsel between October 27 and October 28, 2022, and her understanding and intention in sending her email to her former counsel stating "Yes, I agree with that."

Nothing set forth herein is intended to require Defendant to testify to any confidential communication to her former or present counsel seeking legal advice, beyond the email exchanged discussed herein.

IT IS SO ORDERED,

BY THE COURT,

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Hon. William P. Carlucci, Judge

WPC/aml

cc: Court Administrator

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