

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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IN RE: NEW YORK CITY  
ASBESTOS LITIGATION

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This Document Refers To:

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WALTER SKY

RECOMMENDATION OF THE  
SPECIAL MASTER

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### **FACTUAL BACKGROUND**

Depositions of non-party fact-witnesses on behalf of deceased plaintiffs are a common occurrence in the New York asbestos litigation. Often times these non-party fact-witnesses are former co-workers of the decedents with whom they worked at common job sites, in common trades, during similar time frames. Other times, the non-party fact witness does not even know the decedent, but worked at the same sites as the decedent during the same time frame. Many of these fact-witnesses also have their own asbestos-related personal injury lawsuits and are frequently represented by the same law firm as the decedents' estates.

These former co-workers are frequently called to testify as a non-party fact-witness in a decedent's case for the purpose of establishing product identification and exposure to asbestos – the central issue in all asbestos cases. When these non-party fact-witnesses are produced for deposition, it is common for controversy to arise among the parties when counsel for the decedent instructs the non-party fact-witness not to answer various deposition questions on the grounds that the questions invade the attorney-client privilege. Almost always, the questions objected to focus on counsel's preparation of the fact-witness concerning the testimony that is to

be proffered on behalf of decedent's case. Counsel's assertion of attorney-client privilege is usually invoked as a blanket or absolute privilege that protects from disclosure all communications between counsel and the non-party witness, regardless of the nature, purpose, or context of the communications sought to be discovered. In support of this position, counsel argues that 1) the co-worker is the firm's client, rendering all communications privileged and; 2) the matter the co-worker fact-witness is produced to testify about is so inextricably intertwined with the fact-witness's own case that they cannot reasonably be separated, and thus the attorney-client privilege extends to cover all of their communications.

I have often been called upon to determine whether the assertion of the attorney-client privilege is appropriate under such circumstances and whether the privilege itself is applicable in the context set forth above. This particular dispute arose during the discovery deposition of non-party fact-witness Christopher A. Keenan ("Keenan") who was produced as a co-worker fact witness in the case of decedent Walter Sky ("Sky") [NYCAL July 2010 Trial Cluster] on April 21, 2010. This recommendation is intended to further clarify my ruling on the applicability of the attorney-client privilege in these circumstances.

## **ANALYSIS**

CPLR 3101 [a] directs that there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action. One exception to this rule is the attorney-client privilege, codified by statute in New York under CPLR 4503, which protects certain communications between an attorney and client under particular circumstances. Not all communications between attorney and client are privileged. *Matter of Priest v. Hennessey*, 51

N.Y.2d 62, 68 (1980). Because the attorney-client privilege has been recognized as an “obstacle to the truth-finding process” (*id.* at 68), New York courts scrutinize such claims carefully to ensure that “its application is consistent with its purpose.” *People v. Deutsch*, 164 Misc. 2d 182, 183 (Sup. Ct. N.Y. Cty. 1994), *citing Matter of Jacqueline F.*, 47 N.Y.2d 215, 219 (1979). The privilege is to be narrowly construed. *People v. Deutsch*, 164 Misc. 2d at 184.

It warrants repetition that not every communication between an attorney and his client is privileged. *See, e.g., Matter of Priest* at 69; *see also People v. Mitchell*, 58 N.Y. 2d 368, 373 (1983). Rather, the attorney-client privilege is only applicable where an attorney-client relationship exists with respect to the communication at issue. That relationship arises “when one contacts an attorney . . . for the purpose of obtaining legal advice or services.” *Priest* at 68-69. It is the “*client’s intent and purpose*” that governs whether there is an attorney-client relationship. *Deutsch* at 184 (*emphasis in original*), *citing Nachman v. Nachman*, NYLJ, 1/22/1993 at 2 col. 1 (Sup. Ct. N.Y. Cty). Similarly, an attorney’s communications to his or her client are privileged only where they are made in the course of dispensation of legal advice in the client’s case. *See Rossi v. Blue Cross & Blue Shield of Greater New York*, 73 N.Y.2d 588 (1989).

With these principles in mind, the threshold inquiries as to whether an attorney-client relationship has been established and thus whether the communication is privileged are 1) did the client contact the attorney for legal advice or services? 2) was the communication made for the purpose of seeking legal advice? and 3) what was the client’s intent and purpose?

The burden of showing that discovery should be curtailed because material sought to be discovered is protected by the attorney-client privilege is on the party seeking to invoke the

protection. *Matter of Priest*, 51 N.Y.2d at 69. Moreover, each element of privilege must be proved. *Id.* As I will demonstrate below, these threshold requirements are not met in this and other cases like it.

*1) Did the client contact the attorney for legal advice or services?*

An attorney-client relationship arises “only when one contacts an attorney in his capacity as such for the purpose of obtaining legal advice or services.” *Matter of Priest* at 68-69. In other words, the privilege is triggered only by the client’s request for legal advice. That trigger is non-existent in this and other similar situations. The words when “one contacts an attorney” are key. Here, Keenan did not contact counsel to get legal advice with respect to Sky’s case. To the contrary, counsel needed Keenan’s testimony to prosecute Sky’s case and contacted Keenan to secure his assistance. Keenan derives no benefit from testifying in Sky’s case and receives no legal advice or services whatsoever. Indeed, it could be argued that Keenan might be putting his own case at risk since his sworn testimony might be used at a later date to impeach him or otherwise discredit him. The failure to meet this criterion, without more, is sufficient to vitiate any claim of privilege. If counsel is contacting the client for assistance as opposed to the other way around there is no attorney-client relationship and there can be no claim of privilege with respect to those communications.

*2) Was the communication made for the purpose of seeking legal advice?*

For the attorney-client relationship to exist, “it must be shown that the information sought to be protected from disclosure was a ‘confidential communication’ made to the attorney for the purpose of obtaining legal advice or services.” *Matter of Priest* at 69 (*emphasis supplied*).

Counsel for plaintiff cannot credibly assert that Keenan was seeking legal advice or services with

respect to Sky's case. Keenan has no interest in Sky's case other than the very broad no-specific interest that the law firm he has retained be successful prosecuting the thousands of cases of plaintiffs it represents. One could argue, in fact, that counsel was seeking Keenan's services with respect to Sky's case. This threshold inquiry also is not met.

3) *What was the client's intent and purpose?*

Keenan's only discernible purpose in this scenario would be to assist his counsel in prosecuting another's case, or to assist his former co-worker or to please his counsel. The intent and purpose of counsel, on the other hand, is quite clear: to utilize the testimony of Keenan to bolster Sky's case. That intent and purpose does not comport with the fundamental principle underlying the attorney-client privilege.

Plaintiff suggests that the communications at issue would be protected by the so-called "common interest doctrine," an extension of the attorney-client privilege that is largely applied in criminal cases to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been undertaken. *See, e.g., US v. Schwimmer*, 892 F.2d 237 (2d Cir. 1989). Plaintiff's reliance on this doctrine is misplaced for two reasons. First, for the common interest doctrine to apply there must be some benefit to both defendants. *See, e.g., Schwimmer, supra*. There is no benefit to Keenan here. Second, even where the common interest privilege applies, it only applies if the elements of the underlying attorney-client privilege are met. *US Bank Nat'l Ass'n v. APP Int'l Fin. Co.*, 33 AD 2d 430, 431 (1<sup>st</sup> Dep't 2006). In other words, the communications must be privileged in the first

place. They are not. Neither of the fundamental requirements for the common interest doctrine to apply is met.

These threshold requirements set forth above are fundamental to the invocation of the attorney-client privilege and none of the requirements has been met here. Keenan did not contact his counsel, did not seek legal advice or services and his intent and purpose cannot be interpreted to support the invocation of the attorney-client privilege. The communications made in connection with the preparation of giving non-party testimony are thus discoverable.

Respectfully submitted:

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Laraine Pacheco

Special Master, NYCAL

May 15, 2010