

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

x

IN RE: NEW YORK CITY
ASBESTOS LITIGATION

This Document Refers To:

Index Nos.: 107211/08, 190078/08,
190070/11

BERNARD, KONOPKA-SAUER, FEINBERG

RECOMMENDATION OF THE
SPECIAL MASTER

FACTUAL BACKGROUND

This is an application by counsel for plaintiffs requesting a ruling as to whether certain conversations between counsel for Colgate and the deponent Dr. Richard Turse (“Turse”), a former Colgate employee who has been identified by Colgate as a fact witness, are protected by the attorney-client privilege.

Turse was recently deposed by plaintiffs. Turse appeared at the deposition represented by Nicole Gueron, who was retained by and paid by Colgate. At several points in the deposition, attorneys for Colgate, not Ms. Gueron, directed Turse not to answer questions regarding communications with any attorneys from Quinn Emanuel (Colgate’s current counsel), McGivney & Kluger (Colgate’s former counsel) or Colgate’s in-house counsel, Kevin Clunis.

Colgate correctly asserts that the attorney-client privilege applies to corporations and to both inside and outside counsel, citing *Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 73 N.Y.2d 588, 592 (1989). There is no question as well that post-employment communications between a corporation and its former employees may be privileged. *See, e.g., Radovic v. City of New York*, 168 Misc. 2d 58, 60 (N.Y. Sup. Ct. 1996). The balance of the case law upon which Colgate relies, largely from the federal courts, is not on point. Under the somewhat unusual facts of this case, I do not believe that the privilege applies for the reasons set forth below.

ANALYSIS

The law of New York regarding privilege does not distinguish between corporations and individuals. 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) 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.

There is no authority for the proposition that Colgate implicitly espouses here -- that the privilege is automatic merely because Turse was a former employee. The privilege is not a default position – to rule as such would wholly inconsistent with a “narrow construction” of the privilege. The attorney-client relationship must be established so that the parties have the expectation that their communications are confidential. In other words, it takes some affirmative conduct – either word or deed – or at a minimum an understanding – to invoke the privilege. According to Turse’s own testimony, Colgate did nothing that would have led Turse to believe that any communications he had with counsel for Colgate were privileged or that an attorney-client privilege existed. They are simply relying on his status as a former employee to invoke the privilege.

Moreover, under the principles of *Priest*, there is no basis for privilege. Turse did not in any way contact Colgate’s counsel for legal advice or services. Indeed, Colgate contacted him. Turse testified has no possibility of liability in these cases, nor does he believe he would be held liable. Turse was merely enlisted by Colgate’s counsel to provide information and to be a fact witness for its defense in these cases. There was never any attorney-client relationship established.

Critical here is the fact that Colgate decided to represent two other fact witnesses, also former employees – Briscese and Simko -- in this litigation and asserted the attorney-client privilege in connection with those three former employee fact witnesses. In other words, counsel for Colgate knows how to establish an attorney-client relationship with a former employee.

They did not do so here. Instead, they hired Ms Gueron, which is at a minimum a tacit admission that they are not Turse's counsel, never intended to establish an attorney-client relationship with Turse and had no attorney-client relationship with him. Otherwise, there would be no need for Colgate to retain separate counsel for Turse. Following Colgate's position to its logical conclusion, Turse's conversations are shielded from disclosure just because he is a former employee and he spoke with counsel for his former employer. This is inconsistent with a narrow construction of the privilege.

Since there was no attorney-client relationship established with Turse, plaintiffs are entitled to inquire into the substance of the conversations between Turse and Colgate. Turse is no different from any other non-party witness.

Respectfully submitted:

_____/s/_____
Laraine Pacheco
Special Master, NYCAL
November 6, 2011