

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

BRIAN M. CAVANAUGH

Plaintiff,

MEMORANDUM
DECISION

vs.

Index No. 4495/07

CANISIUS COLLEGE

Defendant

BEFORE: **HON. JOHN M. CURRAN, J.S.C.**

APPEARANCES: **BARRY L. RADLIN, ESQ.**
Attorney for Plaintiff

WARD, NORRIS, HELLER & REIDY, LLP
Thomas S. D'Antonio, Esq., of Counsel
Attorneys for Defendant

CURRAN, J.

Plaintiff has moved for an Order compelling the defendant to produce certain documents and to produce defendant's President for an examination before trial. At oral argument conducted on August 28, 2008, plaintiff withdrew his motion with respect to the examination before trial because that matter had been resolved between counsel. Moreover, by letter dated September 2, 2008, plaintiff limited his motion to compel the production of documents to the following numbered documents in defendant's Privilege Log: 25-31, 33, and 37-53. The Court has since conducted an *in camera* review of these documents (*Optic Plus*

Enters., Ltd. v Baucsh & Lomb, Inc., 37 AD3d 1185 [4th Dept 2007]; *Baliva v State Farm Mut. Auto. Ins. Co.*, 275 AD2d 1030 [4th Dept 2000]). The only other issue before the Court is plaintiff's motion to compel the documents described in paragraph 19 of the Affirmation of Barry L. Radlin, Esq., supporting the motion.

Defendant's Privilege Log identifies as the bases for the alleged privilege both the attorney-client privilege and the attorney work product privilege. However, defendant's Memorandum of Law and answering papers, as to the documents now sought by plaintiff, are limited solely to the attorney-client privilege. Accordingly, the Court has limited its analysis of the objections to production to this privilege alone.

The key basis upon which defendant alleges the attorney-client privilege as to the twenty-four (24) documents the Court has reviewed *in camera* is the involvement of John J. Hurley, Esq. ("Mr. Hurley"), with each document. According to Mr. Hurley's Affidavit, he currently serves as defendant's Executive Vice President for College Relations. He has held this position since January of 2007. He began his employment with the defendant in 1997, as General Counsel and Vice President for College Relations.

Mr. Hurley asserts that, at all relevant times while employed by the defendant, his job responsibilities and job functions have included the traditional "counsel" role, "which is to provide legal counsel to Canisius on a variety of issues" (Hurley Aff., ¶ 2). Mr. Hurley further asserts that he relinquished the title of "General Counsel" "in order to minimize the routine legal work that might be a distraction to a capital campaign undertaken by the defendant from 1997 through 2000" (Hurley Aff., ¶ 17). Nevertheless, Mr. Hurley maintains that he continues to be consulted on major legal issues involving the defendant.

The instant dispute arises from defendant's decision to terminate plaintiff's employment as the coach of the men's ice hockey team effective December 10, 2004. Following the decision to terminate plaintiff, the parties entered into a settlement agreement. In pertinent part, the settlement agreement provides: (1) plaintiff would continue to be paid under the terms of his contract through June 30, 2007; and (2) defendant would not make public statements regarding any specifics that gave rise to the decision to terminate plaintiff but for the exceptions described in Paragraph 9 of the settlement agreement. Plaintiff commenced this lawsuit alleging that defendant has failed to pay in full the compensation provided for in the settlement agreement and that defendant has breached its obligation to refrain from making public statements.

The primary context for the documents at issue is the defendant's decision to terminate the employment of Timothy Dillon as defendant's Athletic Director, apparently for reasons relating in part to plaintiff's termination from employment. The documents at issue are all dated between January 5, 2005 and February 10, 2005. The documents reflect, that during this time, defendant was contemplating its decision to terminate Mr. Dillon, the terms under which such termination would occur, and the public relations strategy to be pursued by the defendant in connection with Mr. Dillon's termination. Plaintiff's termination is only tangentially referred to in the subject documents.

The analysis of the subject documents is made more complex by Mr. Hurley's position as an attorney and as the former General Counsel to the defendant. Moreover, the documents indicate that Mr. Hurley was in contact with outside counsel to the defendant concerning the employment situation addressed by the documents and that Mr. Hurley was

being used by employees of the defendant for legal advice, business advice and advice as to public relations strategies.

In similar situations, the Court of Appeals has acknowledged that the attorney-client privilege raises “nettlesome questions” (*Rossi v Blue Cross and Blue Shield of Greater New York*, 73 NY2d 588, 592 [1989]), and that the analysis in which the trial courts must engage is highly fact specific (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 378 [1991]). According to the Court of Appeals: “the critical inquiry is whether, viewing the lawyer’s communication in its full content and context, it was made in order to render legal advice or services to the client” (*Spectrum Sys. Intl. Corp.*, 78 NY2d at 379). Likewise, the Court of Appeals has recognized that “a lawyer’s communication is not cloaked with privilege when the lawyer is hired for business or personal advice, or to do the work of a non-lawyer” (*Spectrum Sys. Intl. Corp.*, 78 NY2d at 379). The communication must be “for the purpose of obtaining legal as opposed to business advice” (*People v Belge*, 59 AD2d 307, 309 [4th Dept 1977]). In order to be encompassed by the attorney-client privilege, the communication between the lawyer and the client must be “primarily or predominantly of a legal character” (*Rossi*, 73 NY2d at 594; *see also Cooper-Rutter Assoc., Inc. v Anchor Natl. Life Ins. Co.*, 168 AD2d 663, 663 [2d Dept 1990]).

In accord with these principles, the following is the Court’s analysis of each document at issue:

No. 25 This document involves a discussion of, among other subjects, the wisdom or legal propriety of making statements to the media regarding Mr. Dillon's termination. It is therefore a communication primarily or predominantly of a legal character and is privileged.

No. 26 This document involves a discussion of, among other things, the legal requirements in the Administrator's Handbook and the contractual requirements governing Mr. Dillon's termination. The document further discusses the possibility of litigation with Mr. Dillon. Accordingly, the document is primarily or predominantly of a legal character and is privileged.

No. 27 & 28 These documents discuss the handling of a particular inquiry from the media. Neither the inquiry nor the response is primarily or predominantly of a legal character. Rather, the discussion in the documents is primarily or predominantly of a character involving public relations and involvement with the media. While the parties have not cited any New York authority as to whether such matters involve legal advice, it is apparent that the courts do not generally regard such advice as being of a legal character (*See, e.g., De Espana v Am. Bureau of Shipping*, 2005 US Dist LEXIS 33334 [SDNY 2005]; *Lauth Group, Inc. v Grasso*, 2008 US Dist LEXIS 28009 [SD Ind 2008]). Accordingly, these documents are not privileged and should be produced.

No. 29 This document addresses, among other things, the legal options available to the defendant with respect to the termination of Mr. Dillon and, accordingly, it is primarily or predominantly of a legal character and is privileged.

No. 30 & 31 Both of these documents reference conversations Mr. Hurley had with the defendant's outside counsel as to the handling of Mr. Dillon's termination. Accordingly, these documents are primarily or predominantly of a legal character and are privileged.

No. 33 This document discusses the defendant's public relations strategies and does not involve anything of a legal character. Accordingly, it is not privileged and should be produced.

No. 37 The first two paragraphs of this document involve primarily public relations strategies and are not subject to the attorney-client privilege. However, the third and final paragraph of the document is one which addresses legal strategies and is primarily or predominantly of a legal character and is privileged. Therefore, the document should be redacted to allow the appearance of only the first and second paragraphs of that document and should then be produced in that redacted form.

No. 38 This document involves advice as to the script to be followed with respect to the termination of Mr. Dillon which involves Mr. Hurley's legal advice. It is primarily or predominantly of a legal character and is therefore privileged.

No. 39 This document also involves Mr. Hurley's advice with respect to the options available to the defendant and Mr. Dillon with respect to his termination. It is primarily or predominantly of a legal character and is therefore subject to the privilege.

No. 40 This document involves discussions with respect to potential buyouts of Mr. Dillon's contract and other options available to the defendant. Mr. Hurley's advice contained therein is primarily or predominantly of a legal character and therefore is privileged.

No. 41 This document addresses concerns with respect to possible litigation to be brought against defendant and is therefore primarily or predominantly of a legal character. It is privileged and need not be produced.

No. 42 In this document Mr. Hurley seeks information concerning Mr. Dillon's pension which was sought in connection with the options available to the defendant from a legal perspective in connection with Mr. Dillon's termination. It is therefore primarily or predominantly of a legal character and is privileged.

No. 43 This document involves a discussion of, among other subjects, the wisdom or legal propriety of making statements to the media regarding Mr. Dillon's termination. It is therefore a communication primarily or predominantly of a legal character and is privileged.

No. 44 & 45 Both of these documents relate to the defendant's public relations strategies and potential press releases. They do not involve questions requiring legal advice and therefore are not subject to the privilege and should be produced.

No. 46 This document refers to advice rendered by outside counsel in connection with Mr. Dillon's termination and is therefore primarily or predominantly of a legal character. It is subject to the privilege and need not be produced.

No. 47 _____ This document is between Mr. Hurley and William Collins from the public relations firm employed by the defendant. It is not primarily or predominantly of a legal character and therefore should be produced.

No. 48 _____ This document involves legal advice by Mr. Hurley to the defendant's President as to the possible legal ramifications of public comments. It is therefore primarily or predominantly of a legal character and is subject to the privilege.

No. 49 _____ This document refers to legal advice rendered by outside counsel and is therefore primarily or predominantly of a legal character and should not be produced.

No. 50 _____ This document includes an e-mail received from Mr. Dillon and comments made by Mr. Hurley to the defendant's President. There is nothing of a legal character contained in the document, but rather is business advice. It is not subject to the privilege and should be produced.

No. 51 _____ This document pertains to the press release to be issued by the defendant pertaining to Mr. Dillon's termination. It is not primarily or predominantly of a legal character and therefore should be produced.

No. 52 & 53 _____ These are e-mails from Mr. Hurley to the defendant's outside counsel. They are related to legal advice sought and received by the defendant. They are therefore primarily or predominantly of a legal character and are subject to the privilege.

As to the other documents sought in paragraph 19 of the Affidavit from Mr. Radlin, defendant has proffered its position in the Affidavit of Mr. D'Antonio at paragraphs 15 and 16 that such documents did not exist. Accordingly, because the defendant is not required to

produce documents which do not exist, the demand to compel production of such information must be denied.

Based on the foregoing, plaintiff's motion to compel is granted in part and denied in part as described herein. Plaintiff's counsel should settle the Order with defendant's counsel.

DATED: December 1, 2008

HON. JOHN M. CURRAN, J.S.C.