

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

FILED
'APR 20 2011
CLERK OF CIRCUIT COURT #77
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

HOLIDAY SHORES, ET AL,)
Plaintiffs,)
)
-vs-)
)
)
SYNGENTA, ET AL,)
Defendants.)

No. 04-L-710

ORDER

The matter before the Court concerns hundreds documents or communications received on March 30, 2011 for *in camera* review to determine whether the documents submitted are privileged or subject to disclosure to the Plaintiffs. Through counsel, the University of Chicago, Dr. Don Coursey and Defendant Syngenta Crop Protection, Inc. ("Syngenta") all produced materials for *in camera* review. The documents are being withheld on the basis that they are either consulting expert or attorney-client privileged materials, or both.

Supreme Court Rules 201(b)(2) and (3) provide an exception to the general rule that any relevant material is discoverable. It provides:

"All matters that are privileged against disclosure on the trial, including privileged communications between a party or his agent and the attorney for the party, are privileged against disclosure through any discovery procedure. Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney....A consultant is a person who has been retained in anticipation of litigation or preparation for trial but who is not to be called at trial. The identity, opinions, and work product of a consultant are discoverable only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject matter by other means."

The Court, being fully advised in the premises, at this time finds and rules as to each party's submission as follows:

The Coursey documents

The Court is in possession of a substantial amount of material produced by attorney Ray Bell. No privilege log has been produced to the Court regarding the submission other than general consulting expert privilege assertions in response to the first three requests contained in plaintiff's subpoena duces tecum as follows:

DOCUMENTS RESPONSIVE TO SUBPOENA REQUEST 1

All payments made by Syngenta, or on Syngenta's behalf, to C. Raymond Bell and/or Foley & Mansfield since June 2010.

OBJECTION: This Request is irrelevant and harassing. Moreover, said documents are protected by the consulting expert privilege, as Dr. Don Coursey is a consultant to Syngenta. Thus, communications between those parties and their attorneys is privileged.

DOCUMENTS RESPONSIVE TO SUBPOENA REQUEST 2

All communications between Kurtis Reeg and Reeg Lawyers, L.L.C. and C. Raymond Bell and Foley & Mansfield.

OBJECTION: This Request is irrelevant and overbroad. Moreover, said documents are protected by the consulting expert privilege, as Dr. Don Coursey is a consultant to Syngenta, which extends to attorneys for those parties.

DOCUMENTS RESPONSIVE TO SUBPOENA REQUEST 3

All communications between attorneys of record for Syngenta Crop Protection, Inc.; attorneys of record for Don Coursey; attorneys of record for the University of Chicago; and, Don Coursey; regarding Don Coursey's retention date.

OBJECTION: Said documents are privileged by the consulting expert privilege, as Dr. Don Coursey is a consultant to Syngenta, which extends to attorneys for those parties. Thus, communications between attorneys for those parties, including University of Chicago (which is only involved because Dr. Coursey's work, communications, etc. are contained on the computer system utilized by Dr. Coursey for his work), are protected by consulting expert privilege.

Coursey's counsel objects to Requests 4 and 5 asserting both the consulting expert privilege and the attorney-client privilege as follows:

DOCUMENTS RESPONSIVE TO SUBPOENA REQUEST 4

All communications regarding Don Coursey's retention date.

OBJECTION: Said documents are protected by the consulting expert privilege, as Dr. Don Coursey is a consultant to Syngenta, which extends to attorneys for those parties. Thus, communications between attorneys for those parties, including University of Chicago (which is only involved because Dr. Coursey's work, communications, etc. are contained on the computer system utilized by Dr. Coursey for his work), are protected by consulting expert privilege. Moreover, communications between Dr. Coursey and his attorneys are further protected by the attorney/client privilege.

DOCUMENTS RESPONSIVE TO SUBPOENA REQUEST 5

All communications concerning the subpoena duces tecum served upon either Don Coursey or the University of Chicago and documents requests therein.

OBJECTION: Said documents are protected by the consulting expert privilege, as Dr. Don Coursey is a consultant to Syngenta, which extends to attorneys for those parties. Thus, communications between attorneys for those parties, including University of Chicago (which is only involved because Dr. Coursey's work, communications, etc. are contained on the computer system utilized by Dr. Coursey for his work), are protected by consulting expert privilege. Moreover, communications between Dr. Coursey and his attorneys are further protected by the attorney/client privilege.

NOTE: Documents attached hereto are solely communications between counsel for Dr. Coursey and persons other than Dr. Coursey.

DOCUMENTS RESPONSIVE TO SUBPOENA REQUEST 5

All communications concerning the subpoena duces tecum served upon either Don Coursey or the University of Chicago and documents requests therein.

OBJECTION: Said documents are protected by the consulting expert privilege, as Dr. Don Coursey is a consultant to Syngenta, which extends to attorneys for those parties. Thus, communications between attorneys for those parties, including University of Chicago (which is only involved because Dr. Coursey's work, communications, etc. are contained on the computer system utilized by Dr. Coursey for his work), are protected by consulting expert privilege. Moreover, communications between Dr. Coursey and his attorneys are further protected by the attorney/client privilege.

NOTE: Documents attached hereto are solely communications between Dr. Coursey and his counsel.

The Court estimates that approximately 750 combined pages of documents are attached to these objections, and for the most part they consist of email exchanges, and many are redundant. Many of the emails concern making arrangements for teleconferences, meetings and so forth. Some may include strategic decisions that may reveal mental impressions, opinions or trial strategy, but it is difficult for the Court to cull out from the voluminous documentation the communications that may fall within the attorney-client privilege.

Based on the multiple representations to this Court that Dr. Don Coursey was not retained as a consulting expert pursuant to Rule 201 until January 9, 2009, the Court Orders the production of all documents and communications requested by Plaintiffs in Requests 1, 2, and 3 up to that date, as the only objection being asserted by Mr. Bell is that Coursey's documents are protected by the consulting expert privilege.

In other words, any documents or communications dated prior to January 9, 2009 that have been withheld from Plaintiffs based upon the consulting expert privilege as asserted in response to the first three requests shall be disclosed within 14 days of the date of this Order.

Any documents or communications that are being sought by Plaintiffs in Requests 4 and 5 that are being withheld based upon the consulting expert privilege shall be disclosed within 14 days. Any documents or communications that are being sought by Plaintiffs in

Requests 4 and 5 that are being withheld based upon any other privilege, including the attorney-client privilege, must be properly identified pursuant to Rule 201(n) in the form of a privilege log, with an express claim of privilege and supported by a description of the nature of each such document or communication or things not produced or disclosed and the exact privilege which is being claimed. [To the extent that some of these documents may have already been produced by Syngenta, such documents should not be included in said privilege log.]

The University of Chicago documents

The Court also has approximately 744 documents for *in camera* review from the University of Chicago on a compact disc. The documents are in PDF and Excel formats and are identified as "ICR000001, ICR000002," and so forth. It appears some of these documents are emails, studies, communications and other writings to, from or authored by Dr. Don Coursey, presumably obtained from his university computer hard drive. In its motion to file these documents under seal, the University's attorneys advise that they do not have personal knowledge of the documents upon which Dr. Coursey relied in his role as a consultant-expert for Syngenta, and that counsel for Dr. Coursey has provided Plaintiffs with a privilege log regarding these documents concerning any claimed privileges asserted by Dr. Coursey and his attorney. Likewise it is difficult for the Court to cull out from this production the communications that may fall within the attorney-client privilege. Any documents or communications dated prior to January 9, 2009 that have been withheld from Plaintiffs based upon a "consulting expert privilege" shall be disclosed within 14 days of the date of this Order.

Any documents that are being sought by Plaintiffs that are being withheld based upon any other privilege, such as the attorney-client privilege, must be properly identified pursuant to Rule 201(n) in the form of a privilege log, with an express claim of privilege and supported by a description of the nature of each such document or communication or things not produced or disclosed and the exact privilege which is being claimed. [To the extent that some of these documents may have already been produced by Syngenta, such documents should not be included in said privilege log.]

Syngenta's Jayne Thompson & Associates, Ltd., ("JTA") public relations document

The Court also reviewed *in camera* the JTA public relations document withheld by Defendant Syngenta on the basis of a litigation consultant privilege. This document likewise shall be produced to Plaintiffs within 14 days of the date of this Order. The Court finds the argument and authorities cited by the Plaintiffs persuasive on this issue. See *Burke v. Lakin Law Firm, PC*, 2008 WL 117838 (S.D.Ill.) and *Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53 (2000).

The document at issue is a 13 page proposal dated October 3, 2005 addressed to a senior communications manager at Syngenta and outlines a publicity effort proposed to be undertaken by a public relations firm, Jayne Thompson & Associates, Ltd., for Syngenta. It followed a September 27, 2005 confidentiality agreement that states that the sole purpose of making certain disclosures to JTA was "to assist Syngenta in developing a public relations proposal relating to the lawsuit." Syngenta and JTA also entered into a

“Consulting Services Agreement” at or near such time. The confidentiality and the consulting services agreements have previously been produced to Plaintiffs.

In a nutshell a major element of the October 2005 JTA proposal outlines a plan to tie the defense of this action into a negative public relations campaign that castigates the Madison County judicial system as a “judicial hellhole” and a source of “jackpot justice,” and, in part, to undertake efforts to enhance the public’s perception of Syngenta and the herbicide it manufactures at the expense of the Madison County judicial system. It encourages Syngenta to “selectively contact ... pro-business columnists ... in consultation with the company” who have coined those terms and make the case that it’s now “Syngenta’s turn in the Madison County Barrel.”

Although the document utilizes the term “litigation support” on a couple of occasions, the proposal actually outlines an aggressive public relations strategy to build upon or create a hostile attitude toward the Madison County judicial system. While the proposal says “we are not suggesting that the company author any or all of these themes,” several are, in fact, suggested in the document including, “Another Madison County class action case going amuck,” and “Now Madison County is going after the family farmers,” and so forth.

Included is a recommendation to recruit “supporters, including... the Illinois Civil Justice League, Illinois Chamber of Commerce, the Heartland Institute, Illinois Policy Institute and the *Madison-St. Claire [sic] Record*” in this effort. It has nothing to do with trial strategy or the preparation of this case for trial as contemplated by Rule 201(b) (3), but much to do with fostering a negative public perception of our judicial system.

In *Burke*, the district court ordered the production of documents regarding the public relations strategies for communicating with employees, clients and the media in an effort to try to divert negative publicity from litigation brought against a current and former partner of a law firm – rejecting the argument that the documents were made in anticipation of litigation and were protected work product. The reviewing court found that the documents did not involve preparation or legal strategies for conducting litigation itself, nor do they discuss how the defendants planned to defend the action. *Burke* at page 3. “Though the work product doctrine may protect documents that were prepared for one’s defense in the court of law, it does not protect documents that were merely prepared for one’s defense in the court of public opinion.” *Burke* at page 3.

Likewise in *Calvin Klein*, the district court found that such communications are not protected, advising that the purpose of such privileges is to provide a zone of privacy for strategizing about the conduct of litigation itself, and not for strategizing about the effects of the litigation on the party’s customers, the media, or on the public generally.” *Calvin Klein* at page 4.

This document does not contemplate legal strategy. They pertain to business decisions, not litigation decisions. Rule 201(b)(2) provides, “Material prepared by or for a party in

preparation for trial is subject to discovery only if it does not contain or disclose legal theories, mental impressions, or litigation plans of the party's attorney."

Rule 201(b)(3) defines a consultant as "a person who has been retained in anticipation of litigation or preparation for trial."

The Court finds that this public relations document does not disclose "legal theories, mental impressions, or litigation plans of the party's attorney" and was not "retained in anticipation of litigation or preparation for trial" within the meaning of the rule.

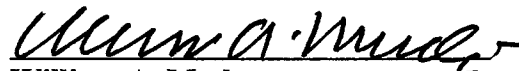
Syngenta has not cited any legal precedent that public relations proposals such as the one at issue qualify as either Rule 201 (b)(2) or (3) material. This document must be produced by Syngenta.

In light of the disclosures and privilege logs required by this Order, **the evidentiary hearing scheduled for May 6, 2011 is continued** and will be reset after such time as the Court has had an opportunity to review the anticipated privilege logs and documents relating thereto that remain undisclosed.

Once again, the Court admonishes the parties to continue to facilitate discovery and make reasonable attempts to resolve their differences over discovery pursuant to Supreme Court Rule 201(k) and consistent with this and previous rulings by this Court pertaining to discovery.

Clerk to send copies of this Order to the parties of record.

Enter: APR 20 2011


William A. Mudge
Circuit Judge