

COMMONWEALTH OF PENNSYLVANIA

: IN THE COURT OF COMMON PLEAS
: DAUPHIN COUNTY, PENNSYLVANIA

v.

TIMOTHY MARK CURLEY

: No. 5165 CR 2011; 3614 CR 2013

: CHARGE(S): Endangering the
: Welfare of Children (2 Counts);
: Obstructing the Administration of
: Law or Other Governmental
: Function; Criminal Conspiracy (To
: Commit Obstructing the
: Administration of Law or Other
: Governmental Function); Criminal
: Conspiracy (To Commit Perjury);
: Criminal Conspiracy (To Commit
: Endangering the Welfare of Children)

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Defendant Timothy Curley's Motion in Limine

AND NOW, comes the Defendant, Timothy Mark Curley, by and through counsel, Caroline Roberto Esq., and hereby submits this Motion in Limine to protect Timothy Curley's right to attorney client privilege. In support of this motion, Defendant avers as follows:

1. A hearing is scheduled in the above- captioned matter regarding Defendant Timothy Mark Curley's motion to quash and other pre-trial motions for December 17, 2013.
2. As part of this hearing, the court will explore the scope of Cynthia Baldwin's representation of Mr. Curley during the Grand Jury inquiry into Gerald Sandusky.
3. Cynthia Baldwin has been subpoenaed to testify at said hearing.

4. In order to establish that an attorney-client relationship existed between Ms. Baldwin and Mr. Curley, it may be necessary to reveal some communications that occurred between Mr. Curley and Ms. Baldwin that would otherwise be subject to the attorney-client privilege or work product doctrine.

5. Mr. Curley hereby requests the Court to allow for the disclosure of some privileged information which is relevant to the question before the court without finding that such disclosure represents a waiver of the privileged.

6. Mr. Curley further requests that this Court bar the use by the Commonwealth of any privileged information or protected work product that is disclosed at this hearing in any subsequent proceedings in this case or any future litigation.

7. In support thereof, Mr. Curley therefore Timothy Curley adopts and incorporates by reference his Brief in Support of this Motion in Limine as though the same were set forth fully at length.

Memorandum of Law

I. Attorney Client Privilege

As an initial matter, the attorney client privilege emphatically protects against the compelled disclosure of privileged information. **42 Pa.C.S.A. § 5916**. Further, the determination of whether or not a statement is within the privilege should not require disclosure of the substance of the communication in question. 1 West's Pa. Prac., Evidence § 521-1 (4th ed.). Therefore, compelling disclosure of privileged materials during litigation to determine the existence of that privilege would be inappropriate. If any review of the materials is necessary, the court should conduct an *in camera*

examination of the subject information.

This makes logical sense considering the shifting burden analysis that courts use in determining whether to compel disclosure of potentially privileged materials. In asserting the privilege, a defendant has "the initial burden to prove that the privilege had been properly invoked." *Joe v. Prison Health Servs., Inc.*, 782 A.2d 24, 32 (Pa. Commw. 2001). Once Defendant makes that showing, there can be no compelled disclosure of the information absent the Commonwealth making a prima facie showing that an exception to applies. *Com. v. Maguigan*, 470 A.2d 611, 623 (Pa. Super. 1983) rev'd, 511 A.2d 1327 (Pa. 1986). Here, the privilege has been properly invoked. Therefore, this Court could only compel disclosure if an exception existed, and there is none. There is no exception allowing for compulsory disclosure of privileged materials merely because a defendant is litigating the existence of the privilege. Compelling disclosure because a party asserts the privilege would not only be a legal absurdity that befouls the privilege in its entirety, it would be in contravention of well-established rule against the compulsory disclosure of privileged information without a viable exception.

This sentiment is reflected in Pennsylvania in *Estate of Kofsky*. In that case, the Supreme Court of Pennsylvania ruled that the material protected under attorney client privilege should not be disclosed even as a preliminary matter. 409 A.2d 1358, 1362-63 (Pa.1979). In that case, the parties were litigating the issue of whether or not certain materials were privileged. The trial court required disclosure of the privileged information and delayed ruling on whether a privilege existed. *Id.* The trial court later prohibited the admission of the privileged material into evidence. *Id.* The Supreme Court held that "the damage to the administrative of justice occurs when the sanctity of the

confidence is improvidently violated, not when the evidence is given substantive consideration.” *Id.* This case clearly indicates the Supreme Court’s unwillingness to allow disclosure of privileged information, even during litigation concerning the existence of that privilege.

On occasion, circumstances arise where the only method to determine the existence of the privilege is for the court to review the material in question. Under those circumstances, the appropriate method is for the presiding judge to review the material *in camera*. See e.g. **Nationwide Mut. Ins. Co. v. Fleming**, 924 A.2d 1259, 1262-63(Pa. Super. 2007). This would protect the information from being disclosed to an opponent while still allowing the court to make any necessary examination. While this would be an imposition on the attorney client privilege, it would at least limit the perversion of the privilege to the least invasive alternative to the full protection that the law normally requires.

Even where a disclosure in open court is necessary, that disclosure should be limited to ensure the least amount of intrusion upon the rights of the Defendant. Further, any privileged information that Timothy Curley discloses in order to establish that he has a right to assert attorney client privilege with regard to communications with Ms. Baldwin may not be used by the Commonwealth outside of the context of the December 17, 2013, hearing. See **Commonwealth v. Chmiel**, 738 A.2d 406, 415 (Pa.1999). In **Chmiel**, the Pennsylvania Supreme Court found that, where a defendant waives attorney client privilege for the purposes of pursuing an ineffective assistance of counsel claim, that waiver is limited. *Id.* The privileged information may not be used against the defendant in a subsequent trial. *Id.*

In *Chmiel*, the Pennsylvania Supreme Court followed a California Court of Appeals case discussing the same issue. In *State v. Dennis*, the Court of Appeals for the Third District of California held that where a defendant waives any privilege for the purposes of litigating an ineffective assistance claim, that waiver must be limited. 177 Cal.App.3d 863 (1986). To hold otherwise would penalize a defendant for pursuing his rights. *Id.* Therefore, the court held that a defendant "must be granted use immunity for disclosures he may make in support of a motion for a new trial on the grounds of ineffective assistance of counsel." *Id.* at 874. The same must be true here. Mr. Curley is asserting the attorney client privilege and questioning whether counsel was improperly representing him while suffering from a conflict. If it is necessary for Mr. Curley to disclose certain privileged information in order to show that the privilege exists or to show that counsel was conflicted, the court must bar the use of that privileged information in subsequent proceedings. To do otherwise would amount to "a compulsive sanction against the exercise of [privilege]." *Id.* at 874.

II. Work Product Doctrine

Attorney work product is protected by Pennsylvania Rule of Criminal Procedure 573. According to that Rule:

Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the attorney for the Commonwealth or the attorney for the defense, or members of their legal staffs.

Pa. R. Crim. P 573. "[T]he doctrine 'promotes the adversary system by enabling attorneys to prepare cases without fear that their work product will be used against their clients.'" *Commonwealth v. Kennedy*, 876 A.2d 939, 948 (Pa. 2005)(quoting *Westinghouse Electric Corporation v. Republic of the Philippines*, 951 F.2d 1414,

1428 (3rd Cir.1991)). This doctrine “provides even broader protections than the attorney-client privilege.” **Commonwealth v. Noll**, 662 A.2d 1123, 1126 (Pa. Super. 1995). The doctrine even extends beyond just the work of attorneys and protects the work of investigators and other agents. *Id.*

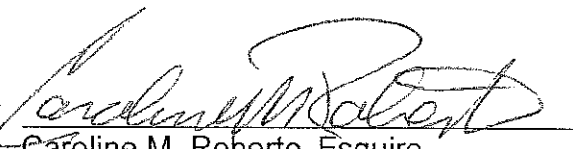
Compelling disclosure of attorney work product during litigation to determine whether the material qualifies as work product would overwhelm the rule entirely. Pragmatically speaking, if the court were to order that the material be disclosed during such litigation, the underlying principles of the rule would be violated. See **Kennedy**, 876 A.2d at 948. The entire basis of the law, “to guard ‘the mental processes of an attorney, providing a privileged area within which he can analyze and prepare his client’s case’” would be corrupted by such an action. **Commonwealth v. Hetzel**, 822 A.2d 747, 757 (Pa. Super. 2003). Therefore, disclosure of such materials must be prohibited, even for the purposes of litigating whether the work product doctrine applies.

In situations where there must be a review of the material to determine whether or not the material falls within the protections of the work product doctrine, an *in camera* review is appropriate. See **Pa.R.C.P. 4003.3**, Explanatory Comment at ¶ 4–5. This would protect the sanctity of the rule, while still allowing the court to make a determination as to what aspects of the material fall within the parameters of the rule. See **Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity**, 32 A.3d 800, 812 (Pa. Super. 2011) *appeal granted in part*, 52 A.3d 221 (Pa. 2012). There is no circumstance where potentially protected work product should be disclosed to an opponent merely because there is pending litigation as to whether the materials fall within the work product doctrine. An *in camera* review would protect the rights of the

opposing party while still maintain the protections of the work product doctrine. See *id*;
Nationwide Mut. Ins., 924 A.2d at 1262-63.

WHEREFORE, Mr. Curley respectfully requests that this Court allow Defendant to introduce testimony that would otherwise be protected by attorney-client privilege or the work product doctrine without waiving the same privilege or protections.

Respectfully submitted,

By: 
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Defendant
Curley's Motion in Limine was hand-delivered, this 16 day of December, 2013, to
the following:

The Honorable Todd A. Hoover
President Judge
Dauphin County Courthouse
101 Market Street
Harrisburg, PA 17101

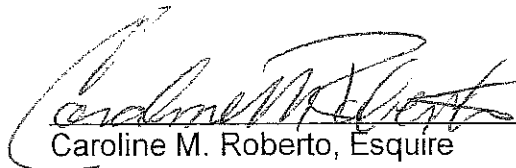
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A handwritten signature in cursive script, appearing to read "Caroline M. Roberto", written over a horizontal line.

Caroline M. Roberto, Esquire
Attorney for Defendant, Timothy Mark Curley