



obligations. *Id.* Plaintiff relied on representations by Wolf Block and Defendants Kaufman and Glyn concerning their skill and expertise in the area of family law, specifically the preparation of a prenuptial agreement that would be subject to Florida law because as Defendants knew, the marriage was to take place in Florida and the couple planned to reside there. (Complaint, ¶ 70). Plaintiff and his wife signed the prenuptial agreement on September 27, 1983, and the couple was married on October 1, 1983. (Complaint, ¶ 1).

On October 12, 2007, Claudia Forman filed a Petition for Dissolution of Marriage in the Circuit Court of the 11<sup>th</sup> Judicial Circuit in and for Miami-Dade County, Florida. *Id.* She demanded equitable distribution of the entirety of Plaintiff's assets despite the terms of the prenuptial agreement. *Id.* By Order dated September 11, 2009, the Circuit Court of the 11<sup>th</sup> Judicial Circuit in and for Miami-Dade County, Florida ruled that the prenuptial agreement did not protect Plaintiff's property interests from claims by his wife, and thus the Court was permitted to grant Claudia Forman a greater distribution of Plaintiff's assets than provided for by the formula in the prenuptial agreement. *Id.*

Thereafter, Plaintiff filed his Complaint alleging legal malpractice and breach of contract by Wolf Block and the preparers of the invalidated prenuptial agreement. On July 19, 2011, this Court entered two Orders, the first granting Plaintiff's Motion to Determine Sufficiency of Objections and Compel Answers to Plaintiff's First Set of Interrogatories and Documents Responsive to Plaintiff's First Request for Production of Documents directed to David Glyn and ordering Defendant David Glyn to provide answers and any corresponding documents to Interrogatory Numbers 33, 34 and 35. (See Docket). The second Order granted Plaintiff's Motion to Determine Sufficiency of

Objections and Compel Answers to Plaintiff's First Set of Interrogatories and Documents Responsive to Plaintiff's First Request for Production of Documents directed to Wolf Block and ordering Defendant Wolf Block to provide answers and any corresponding documents to Interrogatory Numbers 33, 34, 35 and 37 and Document Request Numbers 19, 20, and 21. *Id.*

On July 29, 2011, both Wolf Block and David Glyn filed Motions for Reconsideration of the July 19, 2011 Orders. *Id.* On August 12, 2011, Plaintiff filed an Answer to each Motion for Reconsideration. *Id.* On August 18, 2011, Wolf Block and David Glyn both filed Replies in Support of the Motions for Reconsideration. *Id.* On September 28, 2011, Wolf Block thereafter filed a Brief in Support of their Motion for Reconsideration. *Id.* Plaintiff filed a Motion to Strike the Supplemental Reply Brief on October 5, 2011, and Defendant filed an Answer in Opposition of Motion to Strike on October 20, 2011. *Id.*

On August 16, 2011, Wolf Block and David Glyn both appealed to Superior Court. *Id.* On December 22, 2011, both Wolf Block and David Glyn filed their Statement of Matters Complained of on Appeal. The issues raised on appeal are as follows:

- 1) Whether this Court erred by requiring Wolf Block and David Glyn to produce other clients' redacted prenuptial agreements created in the last 30 years.
- 2) Whether this Court erred by requiring Wolf Block and David Glyn to produce information concerning other clients' family law matters handled by lawyers employed by Wolf Block over a five-year period.
- 3) Whether this Court erred by requiring Wolf Block to produce all correspondence to and from Wolf Block and its insurance carriers on the subject matter of this action.

### **LEGAL ANALYSIS**

Generally, the standard of review on appeal of a discovery order is abuse of discretion." *Lockley v. CSX Transp. Inc.*, 2010 Pa. Super. 167, 5 A.3d 383, 388 (2010),

quoting *Berkeyheiser v. A-Plus Investigations, Inc.*, 2007 Pa. Super. 336, 936 A.2d 1117, 1125 (2007). However, "the interpretation and application of a Pennsylvania Rule of Civil Procedure presents a question of law." *Boatin v. Miller*, 2008 Pa. Super. 188, 955 A.2d 424, 427 (2008) (citation omitted). Thus, the standard of review is *de novo*, and the scope of review is plenary. *Barrick v. Holy Spirit Hospital of the Sisters of Christian Charity*, 2011 Pa. Super. 251; 2011 Pa. Super. LEXIS 3756, P19 (2011).

Defendants first allege that this Court erred by ordering Wolf Block and David Glyn to produce the redacted prenuptial agreements of other clients created in the last 30 years in answer to Interrogatories 34-35. First, Defendants assert that complying with this Order will result in a breach of client confidentiality and the attorney-client privilege. However, the Order provides that any identifying information, not simply the names of the parties, is to be redacted from the prenuptial agreements; therefore, client confidentiality will not be compromised.

The attorney-client privilege applies in both civil and criminal matters and shields "confidential communications made by a client to his or her attorney in connection with legal services and by an attorney to the client when based upon confidential facts that the client has disclosed." *In re Condemnation of 16.2626 Acre Area*, 981 A.2d 391, 396, 2009 Pa. Commw. LEXIS 1356, P8-9 (2009) citing *Slusaw v. Hoffman*, 2004 Pa. Super. 354, 861 A.2d 269 (2004). In the instant matter, the Plaintiff is seeking only the finalized, redacted prenuptial agreements, not any communications in connection with the drafting of those agreements. Defendants fail to assert how any confidential communications could knowingly or inadvertently be revealed. Additionally, prenuptial

agreements are executed by the parties, neither of whom has an attorney-client or attorney work product privilege with the other's attorney.

Defendants further contend that the production of the prenuptial agreements will violate the attorney work-product privilege. The purpose of the work-product privilege is to shield "the mental processes of an attorney, providing a privileged area within which he can analyze and prepare his client's case." *Lepley v. Lycoming County Court of Common Pleas*, 481 Pa. 565, 393 A.2d 306, 310 (1978). "However, the work-product privilege is not absolute and items may be deemed discoverable if the 'product' sought becomes a relevant issue in the action." *Gocial v. Independence Blue Cross*, 2003 Pa. Super. 242, 827 A.2d 1216 (2003).

First, the work product privilege is not at issue in the instant action because Plaintiff is seeking the finalized prenuptial agreements, not any preliminary drafts or notes that could potentially reveal attorney mental processes involved in creating the documents. Second, the request is relevant to the standard of care exercised by the attorneys who prepared the Plaintiff's prenuptial agreement with the knowledge that the parties would be married and residing in Florida and that such agreement would likely be subject to Florida law. Production is also relevant to the issue of whether Wolf Block was aware or should reasonably have been aware of the likelihood of injury to Plaintiff should the agreement be later invalidated under Florida law. Further, this production is critical for the Plaintiff to determine what level of expertise existed in the firm at the time of preparation of the agreement and whether adequate resources were employed in such preparation.

Defendants also claim that Administrative Regulation 97-1 precludes the production of prenuptial agreements prepared for other clients of Wolf Block. However, 97-1 states, “Family Court records ... are impounded and are not subject to inspection except by a party to the action or counsel of record for the party whose records are to be inspected.” However, Plaintiff does not seek the production of court records or dockets, but only the finalized prenuptial agreements contained in Wolf Block’s files. Therefore, 97-1 is inapplicable.

Defendants’ second contention is that this Court erred by requiring Wolf Block and David Glyn to produce information concerning other clients’ family law matters handled by lawyers employed by Wolf Block over a five-year period. First, Defendants assert that complying with this Order will result in a breach of client confidentiality and the attorney-client privilege. However, the Order provides that any identifying information, not simply the names of the parties, is to be redacted from the documents; therefore, client confidentiality will not be compromised.

In the instant matter, the attorney-client privilege is not implicated because the Plaintiff is seeking information concerning the number and type of cases each lawyer handled in the area of family law, the subject matter of the representation, the caption for each divorce case, and the number and identity of each case involving Florida law. Defendants do not describe how any communications between attorney and client or confidential information could be divulged, particularly as the Order provides that any identifying information must be redacted. The information sought by Plaintiff is an inventory of the cases and statistical information rather than protected, confidential communications.

Defendants further contend that the production of documents prepared in the course of any family law matters handled by Wolf Block within a five-year period will violate the attorney work-product privilege. However, Plaintiff does not seek any information regarding the preliminary preparation of family law matters or any document that would reflect the mental processes or strategy of the attorneys involved. Defendants do not demonstrate how any privileged information would potentially be compromised in complying with Plaintiff's requests.

Furthermore, the request is relevant to the standard of care exercised by the attorneys who prepared the Plaintiff's prenuptial agreement and notice to Wolf Block of likelihood of injury to Plaintiff. The documents are relevant to whether or not other lawyers in the firm had more extensive experience in family law matters, specifically those involving Florida law, and notice of likelihood of injury to Wolf Block.

Defendants also allege that the request violates Pennsylvania law restricting public access to a client's identity, the existence of a client's case, and court records concerning a client's case in adoption, juvenile, and custody cases. However, Plaintiff only asks for the identity of the case in divorce matters handled by Wolf Block attorneys and in matters involving Florida law. Although Pennsylvania law restricts access to court records in adoption and child custody cases and in law enforcement matters involving juveniles, Defendants do not cite any Pennsylvania law that restricts the provision of the identity of the aforementioned family law cases to Plaintiff. *See* 42 Pa. C.S. §6308 (2011); 23 Pa. C.S. §2915-2916 (2011); 23 Pa. C.S. § 5336 (2011).

Defendants also argue that requests for information and documents relating to prenuptial agreements and family law matters handled by Wolf Block attorneys will cause unreasonable annoyance, oppression, burden and expense.

However, the "most extreme showing of burdensomeness" is required to avoid compliance with record requests on this ground. "Courts have held that an unwieldy record-keeping system, which requires heavy expenditures in money and time to produce relevant records, is simply not an adequate excuse to frustrate discovery." *Rhone-Poulenc Rorer, Inc. v. Home Indemnity Co.*, 1991 U.S. Dist. LEXIS 8304, P5 (E.D. Pa. 1991)

Defendants chose the document storage system based upon its business benefits despite the inefficiencies in litigation and therefore cannot use this as a basis to avoid document requests. In addition, Defendants' agents were able to use LegalKey's search and request function to locate the files containing prenuptial agreements and family law matters, but they claim that it will be too costly to retrieve these files. As the Court in *Rhone* concluded, this is not an adequate excuse to avoid compliance with discovery requests; therefore, the most extreme showing of burdensomeness has not been made.

Finally, Defendant Wolf Block contends that this Court erred by requiring Wolf Block to produce all correspondence to and from its insurance carrier on the subject matter of this action.

Initially, it is understood that Defendant raises no argument that the information sought is not relevant. Defendant does argue that the information sought is protected from disclosure for a number of reasons. The first of these posits that any communication from itself (as an insured) to its insurance carrier (insurer) is protected as a communication within the attorney-client privilege.

The communication by its very nature was made to a third party outside of the attorney-client relationship and any claim of protection must necessarily be considered to have been waived. The communication to the insurer by the insured carries no protection from being used by the insurer against the insured and as a result the confidentiality necessary to protect the communication is absent. *See Serago v. East Suburban Hospital*, 30 Pa. D. & C. 3d 221 (1983).

To avoid the application of the above rule of law it must be shown that the documents sought were supplied by counsel provided by the insurer to the insured and that such counsel represents to the court that the relationship which counsel has with the insurer and insured requires that counsel protect the interest of the insured against the insurer. *Serago Id.* None of this has been provided to this Court.

Defendant also asserts that the correspondence between Wolf Block and its insurer is protected by the attorney work product privilege or Pennsylvania Rule of Civil Procedure 4003.3, which provides that, “with respect to the representative of a party other than the party’s attorney, discovery shall not include disclosure of his mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.” Only statements concerning the value or merit of a claim or defense or a strategy or tactic, are protected under the rule, unless the statements have evidentiary value. *Mueller v. Nationwide Mutual Ins. Co.*, 31 Pa. D. & C.4th 23, 28 (1996).

Defendant also asserts that communications between Wolf Block and its insurer are protected by the joint defense or common interest privilege.

In order to establish the existence of a joint defense privilege, the party asserting the privilege must show that: (1) the communications were made in the course of a joint defense effort; (2) the statements were designed to further that effort; and (3) the privilege has not been waived. *In re Bevill, Bresler and Schulman Asset Management Corporation*, 805 F.2d 120, 126 (3d Cir. 1986).

“[T]he privilege extends only to counsel and parties who have entered into a joint defense agreement and share a common interest in legal strategy. A shared common business interest is insufficient to afford protection.” *Executive Risk Indemnity, Inc. v. Cigna Corp.*, 81 Pa. D. & C.4th 410, 424 (2006).

Here, Defendant Wolf Block has not demonstrated that there was a joint defense agreement, nor that the correspondence was designed to further that effort, nor that the correspondence related to the development of a joint legal strategy; therefore, the joint defense or common interest privilege is not applicable.

### **CONCLUSION**

For the foregoing reasons, this Court respectfully requests that its decision to grant Plaintiff, Alan Potamkin’s Motions to Determine Sufficiency of Objections and Compel Answers to Plaintiff’s First Set of Interrogatories and Documents Responsive to Plaintiff’s First Request for Production of Documents be **AFFIRMED**.

**BY THE COURT:**

**1-31-2012**

\_\_\_\_\_  
**DATE**

\_\_\_\_\_  
**ALLAN L. TERESHKO, J.**

cc:

**All counsel**

Nicholas M. Centrella, Esq./Aya Salem, Esq. for Appellants David R. Glyn and Wolf, Block, Schorr, and Solis-Cohen

Joseph R. Podraza, Esq./Theodore John P. Chylack, Esq., for Appellee Alan H. Potamkin