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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 03/22/2012
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JAMES C. SELL, Trustee of the) No. 1 CA-SA 12-0046
Participating Trust established)
under Debtors' First Amended)
Joint Plan of Reorganization) DEPARTMENT B
dated 7-7-06 in U.S. Bankruptcy)
Case No. 05-27993-PHX-GBN, on)
behalf of the Trust's) Maricopa County
Participating Investors,) Superior Court
) No. CV2007-005734
)
Petitioners,)
)
v.) DECISION ORDER
)
)
THE HONORABLE J. RICHARD GAMA,)
Judge of the SUPERIOR COURT OF)
THE STATE OF ARIZONA, in and for)
the County of MARICOPA,)
)
Respondent Judge,)
)
DOUGLAS E. TOWLER and STACIE)
TOWLER, husband and wife; TOWLER)
& ASSOCIATES, LLC, an Arizona)
limited liability company; JAMES)
S. CUNDIFF and JANE DOE CUNDIFF,)
husband and wife; CTAC GROUP LLC,)
an Arizona limited liability)
company; JAMES GLAUSER and CATHY)
GLAUSER, husband and wife,)
SQUIRE & COMPANY, PC, a Utah)
professional corporation; LYNN)
G. HILLSTEAD and JANE DOE)
HILLSTEAD, husband and wife;)
DWAYNE ASAY and JANE DOE ASAY,)
husband and wife; LEWIS AND ROCA,)
LLP, an Arizona limited)

liability partnership; KEITH)
BEAUCHAMP and JULIET LIM,)
husband and wife,)
)
Real Parties in Interest.)

)

This special action came on regularly for conference and oral argument on March 20, 2011. The court, Acting Presiding Judge Donn Kessler, Judge Patricia A. Orozco, and Chief Judge Lawrence F. Winthrop participating, has considered the special action petition of Plaintiff, James C. Sell ("Trustee"), who has filed this petition on behalf of himself and the participating investors of a Trust (collectively, "Petitioners"). Trustee seeks relief from an order of the trial court compelling Trustee to disclose to defense counsel solicitation letters and a joint representation agreement entered by Trustee; his attorneys, Sherman & Howard, L.L.C. ("Sherman & Howard"); and individuals who are investors in and beneficiaries of the Trust. For the following reasons, we accept jurisdiction and deny relief.

In the underlying action, Trustee seeks to recover losses allegedly suffered by unsecured creditors of certain bankrupt debtors. The creditors purportedly lost their money in a fraud scheme, and some of them ("the participating investors" or "beneficiaries") apparently elected to assign their claims in bankruptcy to a Trust formed to pursue the claims. Trustee was authorized by the bankruptcy court's bankruptcy plan to pursue

claims assigned to the Trust. Toward that end, Trustee filed a complaint against various professionals, including the Real Parties in Interest ("Defendants"), alleging negligence in providing advice and professional services related to the sales of securities sold in the fraud scheme.

Trustee ultimately retained Sherman & Howard as counsel. Defendants sought to depose the participating investors, and Sherman & Howard e-mailed a solicitation letter, with a proposed joint representation agreement attached, to each investor for the purpose of creating a limited retention agreement that would allow Sherman & Howard to assist the investors in preparing for and testifying at their depositions. All of the solicited participating investors signed the joint representation agreement, and counsel from Sherman & Howard met with them in advance of their depositions, represented them at their depositions, and blocked Defendants' efforts to question them about communications leading to the retention and the nature of their relationships with their new counsel.

Defendants moved to disqualify Sherman & Howard, contending that Trustee and the participating investors' interests were adverse, such that a conflict of interest existed between them, and Sherman & Howard could not represent both. The trial court granted the motion. Trustee and Sherman & Howard petitioned for special action relief. In an order filed February 8, 2011, this court

accepted jurisdiction and granted relief. Based on the avowals of the petitioners, we held that the representation was "limited" and did not constitute a conflict of interest:

The trial court abused its discretion when it granted the Squire defendants' motion to disqualify law firm Sherman & Howard, L.L.C. Trustee Sell is not adverse to the participating investors represented by Sherman & Howard, L.L.C. for the limited purpose of assisting them in preparing for and defending their depositions. The trial court's determination that there was a concurrent conflict of interest under Ethical Rule 1.7 was erroneous. Accordingly, we vacate the order of disqualification and reverse the trial court's order excluding the depositions from evidence.

On May 25, 2011, the Arizona Supreme Court denied review, thereby establishing the conflict of interest issue as law of the case.

On remand, Defendants sought to learn what the participating investors were told in the solicitation letters and proposed joint representation agreement. Defendants moved to compel production of each of those documents, arguing that no attorney-client privilege could attach to unsolicited communications sent before any prospective client meeting or retention. Alternatively, they argued that even assuming such a privilege had attached, Sherman & Howard had waived the privilege by voluntarily disclosing the general content of those communications in defending against the disqualification motion.

In response, Trustee and Sherman & Howard argued that the communications and agreement were protected by the attorney-client privilege, even though the participating investors had not agreed

to representation at the time of contact and did not initiate the contact, because any communication between counsel and a prospective client, no matter who initiates it, should be privileged. They further argued that only the clients, not the lawyers, could waive the privilege, and any disclosure of the general content of the letters and the agreement was "defensive" and only in response to the disqualification motion. The trial court granted the motion to compel, adopting both arguments raised by Defendants. The court concluded the attorney-client privilege did not attach to the solicitation letters and agreement "when or as they were submitted" to the prospective clients, and alternatively, even if the privilege did attach, Sherman & Howard had waived the privilege by describing the content of the letters and agreement and placing their content at issue in defending against the motion for disqualification.¹ This petition for special action relief followed.

We accept jurisdiction of Petitioners' special action petition because the trial court's order compels discovery over the objection of a party asserting a privilege; accordingly,

¹ The trial court's findings are silent as to the relevance and/or discoverability of these documents. Although the parties to this special action have presented arguments concerning the claimed relevance or lack thereof of the documents, neither the solicitation letters nor the joint retention agreement have been provided for our review. Accordingly, we do not address this issue, and our decision does not preclude the trial court, if asked, from addressing the issue on remand.

Petitioners have no equally plain, speedy, or adequate remedy by appeal. See Ariz. R.P. Spec. Act. 1(a); *Twin City Fire Ins. Co. v. Burke*, 204 Ariz. 251, 252, ¶ 3, 63 P.3d 282, 283 (2003).

At the same time, however, we deny relief. We acknowledge that a preliminary conversation between a prospective client and an attorney may be privileged "when the party divulging confidences and secrets to an attorney believes that he is approaching the attorney in a professional capacity with the intent to secure legal advice." *Alexander v. Superior Court*, 141 Ariz. 157, 162, 685 P.2d 1309, 1314 (1984) (citations omitted). Nonetheless, absent an agreement, a trust beneficiary is not a client of the trustee's attorney, see *In re Estate of Fogleman*, 197 Ariz. 252, 257, ¶¶ 10-12, 3 P.3d 1172, 1177 (App. 2000), and communications with someone else's attorney are not privileged. See *Granger v. Wisner*, 134 Ariz. 377, 379, 656 P.2d 1238, 1240 (1982). It is undisputed that, in this case, the participating investors did not initiate the solicitation communications or request any written materials. At the time those documents were sent, the participating investors were not yet clients of Sherman & Howard, as conceded by counsel at oral argument and evidenced by Sherman & Howard's offer to represent them, and further, they were not seeking legal counsel or advice, and had taken no other action to create or in furtherance of an attorney-client relationship. The e-mails and proposed joint representation agreement constitute no more than a solicitation,

not unlike carefully targeted advertising. The participating investors (and for that matter, Sherman & Howard itself) could not have had any legitimate expectation of confidentiality when Sherman & Howard sent these solicitations to non-clients who had neither contacted the law firm nor requested legal advice. Accordingly, under these circumstances, the unsolicited mailing of the letters and proposed joint representation agreement by counsel to the investors was not a privileged communication protected by the attorney-client privilege.² Consequently, we deny relief as it relates to the trial court's order that Trustee's counsel produce to Defendants' counsel the letter and proposed joint representation agreement sent to each participating investor.³

We also note, however, that before the depositions, the investors took active steps to form an attorney-client relationship between themselves and Sherman & Howard, and such a relationship was created. On remand, defense counsel is not entitled to inquire, on deposition examination or otherwise, into discussions between the participating investors and Sherman & Howard that

² This, of course, does not mean that Defendants are entitled to any earlier or additional "drafts" of the letters and proposed joint representation agreement that may exist in the possession of Sherman & Howard. They are only entitled to an unsigned copy of the letters and proposed joint representation agreement, as sent to each participating investor.

³ Because we deny relief on the aforementioned basis, we do not address Petitioners' further argument that Trustee did not waive

occurred after those active steps, or as to any advice provided in the course of representation. Accordingly,

IT IS ORDERED accepting jurisdiction of Petitioners' special action petition.

IT IS FURTHER ORDERED denying Petitioners' request for relief, with the caveat that defense counsel may not inquire into communications between the investors and Sherman & Howard made after the investors took active steps to form an attorney-client relationship.

IT IS FURTHER ORDERED that the clerk of this court provide a copy of this Decision Order to each party appearing herein and to the Honorable J. Richard Gama, a Judge of the Superior Court.

_____/S/_____
LAWRENCE F. WINTHROP, Chief Judge

any existing attorney-client privilege in defending against the motion to disqualify.