

1 APPEARING, HEREBY GRANTS in part and DENIES in part Defendants'
2 Motion.

3 I

4 FACTUAL BACKGROUND

5 In 2003, Shell Oil Company (hereafter "Shell") entered into
6 settlement negotiations to resolve potential litigation with
7 Plaintiffs in which Plaintiffs would claim that Shell had liability
8 for the clean-up of contamination that Shell acknowledged emanated
9 from its operations. Shell was represented by Marc R. Greenberg
10 (hereafter "Greenberg").

11 During the settlement negotiations, Greenberg was employed by
12 the law firms Baker & Hostetler, and later, Keesal, Young & Logan.
13 The City was represented by Grace Lowenberg (hereafter "Lowenberg")
14 and Frank Devaney (now Judge Devaney)(hereafter "Devaney").

15 During the negotiations between the City and Shell regarding
16 Plaintiffs' potential claims against Shell, Greenberg offered to
17 represent the City in litigation against Defendants.

18 In order to determine whether the City would retain Greenberg
19 to pursue litigation against Defendants, the City sought from
20 Greenberg oral and written legal advice regarding potential claims
21 against Defendants for Defendants' alleged contamination of 166
22 acres under and surrounding Qualcomm Stadium (hereafter "the
23 Property"). On October 24, 2004, the City and Shell entered into a
24 Settlement Agreement regarding Shell's liability for contamination
25 at the Property.

26 Defendants seek production of nine documents that the City
27 has withheld from production based on the attorney-client privilege
28 and work product doctrine. These documents are communications

1 between Greenberg and Lowenberg and/or Devaney and/or other
2 employees of the City who were working with Lowenberg and/or
3 Devaney. The Court has reviewed the documents *in camera*.

4 II

5 ANALYSIS

6 A. California Law Applies to Plaintiffs' Assertion of the
7 Attorney-Client Privilege
8 Plaintiffs' First Amended Complaint contains causes of action
9 for Public Nuisance, pursuant to California Code of Civil Procedure
10 §731, and California Civil Code §§ 3479 and 3480; Private Nuisance
11 pursuant to California Civil Code §§ 3479, 3480 and 3481; Trespass,
12 Negligence, Violation of California Health & Safety Code §25249.5
13 (Drinking Water and Toxic Enforcement Act of 1986); Violation of
14 California Business & Professions Code § 17200, et seq.; and
15 Declaratory Relief.

16 Federal Rule of Evidence 501 states in pertinent part:

17 ... (I)n civil actions and proceedings, with respect to
18 an element of a claim or defense as to which State law
19 supplies the rule of decision, the privilege of a
20 witness, person, government, State, or political
21 subdivision thereof shall be determined in accordance
22 with State law.

23 Here, Plaintiffs' causes of action arise under California
24 law. Therefore, pursuant to Fed. R. Evid. 501, the City's assertion
25 of the attorney-client privilege is determined in accordance with
26 California law.

27 B. Attorney-Client Privilege

28 It well settled under California law that the attorney-client
privilege applies to confidential communications during preliminary
negotiations with an attorney even if employment of the attorney is
declined. Rosso, Johnson & Ebersold v. Superior Court, 191 Cal. App.

1 3d 1514, 1518 (1987)[citing Estate of Dupont, 60 Cal. App. 2d 276,
2 287-288 (1943)]. "The fiduciary relationship existing between lawyer
3 and client extends to preliminary consultations by a prospective
4 client with a view to retention of the lawyer, although actual
5 employment does not result." People ex. rel. Department of Corps.
6 v. Speedee Oil Changes Systems, 20 Cal. 4th 1135, 1147-1148
7 (1999)[citing Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d
8 1311, 1319 (7th Cir. 1978)]. This legal principle is further
9 supported by California Evidence Code § 951, which states in
10 pertinent part: "... (C)lient means a person who, directly or through
11 an authorized representative, consults a lawyer for the purpose of
12 *retaining the lawyer* or securing legal service or advice from him in
13 his professional capacity..." (emphasis added).

14 Here, Lowenberg states in her Declaration that in order to
15 determine whether she would recommend retaining Greenberg's legal
16 services, the City needed to evaluate its claims against Defendants,
17 as well as Greenberg's and his experts' qualifications. Therefore,
18 the City sought from Greenberg, and Greenberg provided, verbal and
19 written legal advice regarding the City's potential claims against
20 Defendants for Defendants' alleged contamination of the Property and
21 potential damages arising therefrom. The City also sought and
22 received from Greenberg legal advice regarding the potential for Dr.
23 Richard Jackson^{1/} to be the City's expert environmental consultant.
24 Further, Lowenberg states that the City expected and understood that
25 its communications to Greenberg, and Greenberg's communications to

27 ^{1/} Although not entirely clear from the papers submitted by counsel,
28 Dr. Jackson appeared to have been Judge Robert Altman's technical
advisor in a mediation Judge Altman conducted in the dispute between
Shell and Defendants.

1 it, regarding potential claims against Defendants, were made in
2 confidence and protected by the attorney client privilege.
3 Similarly, Greenberg states in his Declaration that at the time his
4 communications were made to Lowenberg and Devaney, the City was
5 evaluating who to retain to pursue its claims against Defendants.
6 Further, Greenberg states that he had several meetings with Devaney
7 in which Defendants' liability was discussed as well as various
8 possible fee arrangements that he could offer the City should the
9 City retain him for its suit against Defendants. Ultimately, the
10 City hired another attorney to represent it in its suit against
11 Defendants (this litigation). Additionally, Greenberg states that
12 many of the documents at issue in this Motion were communications
13 between him and the City when the City was evaluating its case
14 against Defendants and whether to retain him to pursue litigation
15 against Defendants. Finally, Greenberg states that some of the
16 documents at issue are his work product.

17 Defendants assert that the documents are not protected by the
18 attorney-client privilege, based upon the dates of the documents
19 provided on the City's privilege log, and upon statements made by
20 attorneys for the City. Further, Defendants contend that many of
21 the communications at issue occurred during the time that Greenberg
22 identified himself as attorney for Shell (prior to, during and after
23 the mediation before Judge Altman). Additionally, Greenberg and the
24 City entered into an agreement that released Shell from claims that
25 the City had against Shell arising from the contamination at the
26 Property. Therefore, Defendants contend that any such assertion of
27 the attorney-client privilege is implausible because if Plaintiffs'

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1 explanation is accepted, Greenberg committed ethical violations,
2 which appears to be unlikely.^{2/}

3 The Court agrees in part with the City regarding its
4 characterization of the documents at issue. It is clear that during
5 the negotiations between the City and Shell regarding the City's
6 potential claims against Shell, Greenberg offered to represent the
7 City in potential litigation against Defendants. The City's
8 attorneys sought and received oral and written legal advice from
9 Greenberg on several matters pertaining to potential claims against
10 Defendants in order to determine whether the City should retain
11 Greenberg. The City's attorneys considered the communications to be
12 confidential. Greenberg's characterization of the communications
13 reveal that the communications were intended to be confidential and
14 were made at a time when the City was evaluating whether to hire him
15 for litigation against Defendants. Therefore, the Court concludes,
16 after *in camera* review, that some, but not all, of the documents are
17 protected from disclosure by the attorney-client privilege.
18 Specifically, document numbers 116,^{3/} 191, 192, 193, 282 and PLF
19 Privilege Log Entry 121 are protected from disclosure.

20 C. Work Product

21 Plaintiffs argue that document numbers 104, 113 and 116 are
22 protected from disclosure by the work product doctrine. Plaintiffs
23 contend that these documents were prepared by Greenberg in anticipa-
24 tion of litigation against Defendants in connection with the City's
25

26 ^{2/} The Court does not express an opinion regarding whether Greenberg
committed ethical violations.

27 ^{3/} All references to document numbers are to the Working Group
28 Privilege Log, as noted at page 5 of Defendants' Points and
Authorities in Support of the Motion to Compel (Doc. # 101-1),
unless otherwise noted.

1 evaluation of whether to hire Greenberg to represent it in an action
2 against Defendants. Therefore, the City concludes that pursuant to
3 Fed. R. Civ. Pro. 26(b)(3), the documents are protected from
4 disclosure.

5 Defendants argue that Plaintiffs can not claim the documents
6 in issue are protected from disclosure by the work product doctrine
7 because they did not have an attorney-client relationship with
8 Greenberg.

9 Fed. R. Civ. Pro. 26(b)(3)(A) and (B) state in pertinent
10 part:

11 (A) Ordinarily, a party may not discover documents...
12 that are prepared in anticipation of litigation or for
13 trial by or for another party or its representative
(including the other party's attorney...)

14 (B) If the court orders discovery of those materials,
15 it must protect against disclosure of the mental
impressions, conclusions, opinions or legal theories
of a party's attorney or other representative concern-
ing the litigation.

16 The Court disagrees with Plaintiffs' assertion that document
17 numbers 104, 113 and 116 are protected from disclosure by the work
18 product doctrine. The documents were not prepared by Greenberg in
19 anticipation of the City's litigation against Defendants. Instead,
20 the documents are merely Greenberg's responses to the City's
21 inquiries in connection with the City's evaluation whether to hire
22 Greenberg for litigation against Defendants. Therefore, the Court
23 concludes, after *in camera* review, that document numbers 104, 113
24 and 116 are not protected from disclosure by the work product
25 doctrine.

26 D. Confidential Settlement Discussions

27 Neither Plaintiffs nor Defendants discuss whether the
28 documents in issue may be protected from disclosure because they

1 embody confidential communications made with respect to settlement
2 negotiations.

3 Communications made in furtherance of settlement negotiations
4 are protected from third party discovery because of the public
5 policy favoring confidentiality of such communications. Phoenix
6 Solutions v. Wells Fargo Bank, 254 F.R.D. 568, 583 (N.D. Cal.
7 2008)[citing Goodyear v. Chiles Power Supply, 332 F.3d 976, 980 (6th
8 Cir. 2003)]. There is a well-established privilege relating to
9 settlement discussions. Cook v. Yellow Freight, 132 F.R.D. 548, 554
10 (E.D. Cal. 1990) overruled on other grounds in Jaffee v. Redmond,
11 518 U.S. 1 (1996). A strong public policy exists that favors the
12 confidentiality of attempts to resolve disputes. U.S. v. Contra
13 Costa County Water Dist., 678 F.2d 90, 92 (9th Cir. 1982).

14 Here, some of the documents in issue are communications
15 between Greenberg and the City regarding Shell's potential liability
16 to the City for contamination of the Property. These documents
17 embody some of the settlement negotiations that occurred between
18 Greenberg, on behalf of Shell, and the City's attorneys. Therefore,
19 the Court concludes, after *in camera* review, that some of the
20 documents in issue are settlement communications that are confiden-
21 tial and protected from disclosure to third parties. Specifically,
22 document numbers 190, 191, 192 and 193 are protected from disclo-
23 sure.

24 As a result of the foregoing, the Court ORDERS:

25 1. With respect to Working Group Privilege Log, document
26 number 104, the document is not protected from disclosure and shall
27 be produced.

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1 2. With respect to Working Group Privilege Log document
2 number 113, the document is not protected from disclosure and shall
3 be produced.

4 3. With respect to Working Group Privilege Log document
5 number 116, the document is not protected from disclosure by virtue
6 of the work product doctrine but is protected from disclosure by the
7 attorney-client privilege and shall not be produced.

8 4. With respect to Working Group Privilege Log document
9 number 190, the document is protected from disclosure because it is
10 a confidential settlement communication, and shall not be produced.

11 5. With respect to Working Group Privilege Log document
12 number 191, the document is protected from disclosure, because it is
13 in part a confidential settlement communication, and in part, by the
14 attorney-client privilege, and shall not be produced.

15 6. With respect to Working Group Privilege Log document
16 number 192, the document is protected from disclosure because it is
17 in part a confidential settlement communication, and in part by the
18 attorney-client privilege, and shall not be produced.

19 7. With respect to Working Group Privilege Log document
20 number 193, the document is protected from disclosure because it is
21 in part a confidential settlement communication, and in part by the
22 attorney-client privilege, and shall not be produced.

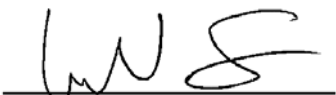
23 8. With respect to Working Group Privilege Log document
24 number 282, the document is protected from disclosure by the
25 attorney-client privilege, and shall not be produced.

26 9. With respect to PLF Privilege Log entry number 21, the
27 document is protected from disclosure by the attorney-client
28 privilege, and shall not be produced.

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On or before October 26, 2010, Plaintiffs shall produce to
Defendants Working Group Privilege Log document numbers 104 and 113.
IT IS SO ORDERED.

DATED: October 12, 2010



Hon. William V. Gallo
U.S. Magistrate Judge