UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TIMOTHY BAUMGARDNER,
Plaintiff,

vs.

LOUSIANA BINDING SERVICE, INC.,
Defendant.

Case No. 1:11-cv-794

Beckwith, J.
Litkovitz, M.J.

ORDER

Plaintiff, Timothy Baumgardner, brings this action against his former employer, defendant Louisiana Binding Service, Inc. (LBS), alleging breach of employment contract. (Doc. 2).[1] This matter is currently before the Court on LBS's motion to quash plaintiff's subpoena for certain documents and to depose Christopher Carrigg, Esq., and for a protective order (Doc. 54), plaintiff's response in opposition (Doc. 57), and LBS's reply memorandum. (Doc. 59).

I. Factual and Procedural Background

Plaintiff alleges that he was employed as a salesman by Tenacity Manufacturing Company (Tenacity) from 1974 until approximately January 2010, when he entered into an employment contract with LBS. (Doc. 2, ¶ 3). Pursuant to the contract, plaintiff was to receive a severance package in the event he was terminated by LBS without cause or if LBS were sold. *Id.*, ¶¶ 13-16. Tenacity later sued plaintiff and LBS in the Court of Common Pleas for Hamilton County, Ohio alleging misappropriation of trade secrets. *Id.*, ¶ 18. Plaintiff alleges that during the course of the state court litigation, the owners of Tenacity negotiated with LBS owners

[1]Plaintiff's complaint includes various other tort claims against other individuals and entities. *See* Doc. 1. However, these claims were dismissed August 22, 2012, by order of the District Judge. (Doc. 46).

Patrick Williams and Scott Williams to purchase LBS. *Id.*, ¶ 19. Plaintiff further alleges he was terminated without cause by LBS at approximately the same time that Tenacity purchased LBS, after which Tenacity dismissed its lawsuit against LBS. *Id.*, ¶¶ 20-24.

Plaintiff's sole claim is that LBS violated his employment contract by terminating him without cause and failing to provide him payments he is contractually due. *Id.*, ¶¶ 29-34. Under the employment contract, LBS is required to pay plaintiff certain severance payments in the event he was terminated without cause. Conversely, if plaintiff was terminated with cause, he is due nothing. *See* Doc. 2 at 14-16 (Employment Contract). Plaintiff's claim therefore turns on whether or not LBS discharged him with cause.

In the course of discovery, plaintiff issued a subpoena to Christopher Carrigg, Esq. (Carrigg), commanding him to appear for a deposition on November 16, 2012. *See* Doc. 57, Ex. 1. The parties agree that Carrigg was acting counsel for both LBS and plaintiff in the state court Tenacity lawsuit. *See* Doc. 54 at 5; Doc. 57 at 1. The subpoena further commands Carrigg to produce "[t]he complete file and all documents relating to Tenacity Manufacturing Company v. Baumgardner, et al., Court of Common Pleas, Hamilton County, Ohio, Case No. A 1003621."[2] *Id.* LBS asserts the subpoena must be quashed as the information sought is not relevant to plaintiff's breach of contract claims and, further, is protected by the attorney-client privilege as Carrigg was acting counsel for LBS in the state court matter.

II. Standard of Review

Rule 45 of the Federal Rules of Civil Procedure governs motions to quash subpoenas. Fed. R. Civ. P. 45. Courts must quash subpoenas requiring "disclosure of privileged or other protected matter, if no exception or waiver applies . . . ." Fed. R. Civ. P. 45(c)(3)(A)(iii). "[T]he

[2] Plaintiff initially named Tenacity Manufacturing Company (Tenacity) as a defendant in the instant action (Doc. 2); however, plaintiff's claims against Tenacity were dismissed pursuant to the District Judge's grant of Tenacity's summary judgment motion. (Doc. 46).

burden of persuasion in a motion to quash a subpoena . . . is borne by the movant." *U.S. v. Int'l Bus. Mach. Corp.*, 83 F.R.D. 97, 104 (S.D.N.Y. 1979). *See also In re Smirman*, 267 F.R.D. 221, 223 (E.D. Mich. 2010); *Recycled Paper Greetings, Inc. v. Davis*, No. 1:08-mc-13, 2008 WL 440458, at *3 (N.D. Ohio Feb.13, 2008). In reviewing a motion to quash, the court may consider "whether (i) the subpoena was issued primarily for the purposes of harassment, (ii) there are other viable means to obtain the same evidence, and (iii) to what extent the information sought is relevant, nonprivileged, and crucial to the moving party's case." *Bogosian v. Woloohojian Realty Corp.*, 323 F.3d 55, 66 (1st Cir. 2003) (citing cases). "If the documents sought by the subpoena are relevant and are sought for good cause, then the subpoena should be enforced unless the documents are privileged or the subpoenas are unreasonable, oppressive, annoying, or embarrassing." *Recycled Paper Greetings*, No. 1:08-mc-13, 2008 WL 440458, at *3 (internal quotations and citations omitted).

III. Analysis

LBS seeks to quash the instant subpoena asserting that: (1) the deposition testimony and documents plaintiff seeks are not relevant to his breach of contract claims; and (2) the information sought is protected by the attorney-client privilege. LBS asks this Court to quash the subpoena and enter an order that Carrigg is not required to produce the purportedly privileged documents or appear for a deposition in this case. (Doc. 54 at 2-3).

In response, plaintiff contends the subpoenaed documents and testimony are relevant to his breach of contract claims as they relate to LBS's stated reason for terminating his employment. Plaintiff further argues that the documents and testimony are not protected by the attorney-client privilege as Carrigg was acting as counsel for both plaintiff and LBS and no attorney-client privilege attaches between jointly represented clients. Plaintiff also asserts that

even if the documents and testimony are protected, the privilege was waived when Patrick Williams, owner of LBS, voluntarily testified about conversations he had with Carrigg during the course of the joint representation about why plaintiff was going to be terminated.

For the following reasons, LBS's motion to quash the subpoena is denied.

A. The discovery sought in the subpoena is relevant to plaintiff's claim.

LBS asserts that the subpoenaed information is not relevant to plaintiff's breach of contract claim as the only pertinent issue is whether plaintiff was fired with or without cause and, thus, is or is not due severance pay under his employment contract. LBS argues that any conversations Patrick Williams (Williams) had with Carrigg regarding plaintiff's pending discharge or the reasons for the discharge are not relevant to this inquiry. LBS contends that "[t]he sole issue is whether or not the contract was breached. The intent of a party to a contract, expressed or not expressed, is irrelevant to the issue of whether the contract was breached." (Doc. 54 at 4).

"The scope of discovery is . . . within the broad discretion of the trial court." *Lewis v. ACB Business Servs., Inc.*, 135 F.3d 389, 402 (6th Cir. 1998). The Federal Rules of Civil Procedure provide that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . ." Fed. R. Civ. P. 26(b)(1). "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. "The scope of examination permitted under Rule 26(b) is broader than that permitted at trial. The test is whether the line of interrogation is reasonably calculated to lead to the discovery of admissible evidence." *Mellon v. Cooper-Jarrett, Inc.*, 424 F.2d 499, 501 (6th Cir. 1970); *see also* Fed. R. Civ. P. 26(b)(1). In other words, the Court construes discovery under Rule 26 "broadly to

encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). Pretrial discovery serves the purpose of making "a trial less a game of blind man's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *U.S. v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958). However, where strong public policy weighs against disclosure, the Court should balance a party's "right to discovery with the need to prevent 'fishing expeditions.'" *Conti v. Am. Axle and Mfg., Inc.*, 326 F. App'x 900, 907 (6th Cir. 2009) (quoting *Bush v. Dictaphone Corp.*, 161 F.3d 363, 367 (6th Cir. 1998)).

LBS's argument is, essentially, that because LBS produced a discharge letter in the course of discovery which sets forth several bases for plaintiff's termination, any "expressed additional reasons for the discharge are of no consequence" and are not relevant to plaintiff's claim. (Doc. 54 at 4-5). The discharge letter produced by LBS provides that plaintiff was terminated for: (1) engaging in conversations with Tenacity employees that are damaging to LBS; (2) releasing derogatory comments about customers to the customers; (3) releasing LBS customer service lists in e-mails; and (4) performing below expectations. (Doc. 59, Ex. 1). However, Williams testified at his deposition that plaintiff was fired for allegedly bringing documents to LBS from Tenacity; attempting to destroy them during the Tenacity lawsuit; and planning on committing perjury. *See* Doc. 56 at 41-42 (Deposition of Patrick Williams). This substantive change in the stated basis for plaintiff's discharge brings into question: (1) the credibility of both LBS and Williams; and (2) whether the reasons given for firing plaintiff were mere pretext to avoid paying him a substantial severance package.[3] Thus, insofar as LBS

[3] The employment agreement provides that in the event LBS terminates plaintiff without cause, plaintiff is entitled to 36 months of salary, including a five percent cost of living increase, and continued health insurance for one year. (Doc. 2 at 15).

contends that "additional reasons for [plaintiff's] discharge are of no consequence" to plaintiff's breach of contract claim, this argument fails. (Doc. 54 at 5).

The crux of plaintiff's claim is that LBS violated his employment contract by not providing him a contracted for benefit after firing him without cause. Accordingly, any and all reasons stated by LBS, Williams, or any other LBS employee are highly relevant because they serve to either support or detract from plaintiff's claim that he was fired without cause. *See Powell v. Time Warner Cable, Inc.*, No. 2:09-cv-600, 2010 WL 5464895, at *4 (S.D. Ohio Dec. 30, 2010) (in wrongful discharge action, parties are entitled to discovery of documents reflecting reasons for plaintiff's termination). LBS appears to argue that the discharge letter produced in discovery is indisputable evidence that plaintiff was terminated for cause – that it is *res ipsa loquitur* evidence. However, Williams testified that plaintiff was terminated for reasons not stated in the letter. The subpoenaed documents and testimony regarding Williams' statements to Carrigg about plaintiff's termination could lend support to or detract from Williams' testimony, the rationale provided by LBS in their discharge letter, and/or plaintiff's credibility. As the subpoenaed discovery has a "tendency to make [the fact of whether plaintiff was terminated with or without cause] more or less probable than it would be without the evidence," it is relevant. Fed. R. Evid. 401.

LBS further argues against enforcing the subpoena on the ground that any information obtained from Carrigg would be hearsay. The Court disagrees. First, there is no evidence before the Court from which the undersigned can determine that the subpoenaed evidence is hearsay. Second, LBS's assertion fails to acknowledge that the evidence could be introduced not for the truth of the matter asserted, but to impeach a witness and, thus, would not be hearsay evidence. *See* Fed. R. Evid. 801(c) (Hearsay is defined as "a statement that . . . a party offers in evidence to

prove the truth of the matter asserted in the statement."). In this same vein, LBS's argument ignores the possibility that even if the evidence is hearsay evidence it may be admissible under an exception to the hearsay rule. *See* Fed. R. Civ. P. 803 (listing exceptions to exclusionary hearsay rule). Lastly, whether or not the discovery is hearsay has no bearing on whether it is discoverable – "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

As the undersigned finds the subpoenaed information is relevant, the Court must now determine whether it is protected from disclosure pursuant to the attorney-client privilege.

B. The subpoenaed discovery is not protected from disclosure by the attorney-client privilege.

LBS contends the subpoenaed documents and testimony are not subject to disclosure as they are protected by the attorney-client privilege. Plaintiff does not dispute that the subpoena seeks discovery related to statements made by Williams to his attorney, Carrigg, but argues the attorney-client privilege does not protect the statements for two reasons. First, because plaintiff was Carrigg's co-client, the privilege cannot be invoked when an attorney jointly represents two parties. Second, even if the discovery is protected by the privilege, Williams waived the privilege by voluntarily testifying at his deposition about statements he made to Carrigg about plaintiff's termination.

Unless waived, the attorney-client privilege protects communications made by a client in confidence to his attorney in order to secure legal services or assistance in legal proceedings. *Reed v. Baxter*, 134 F.3d 351, 355-56 (6th Cir. 1998). The privilege is intended to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981). The privilege may be asserted by corporate entities as well as individuals,

Commodity Futures Trading Com. v. Weintraub, 471 U.S. 343, 348 (1985), but it is to be narrowly construed to prevent frustrating the fact-finding process. *See In re Grand Jury Investigation No. 83–2–35*, 723 F.2d 447, 451 (6th Cir. 1983). Thus, "[t]he burden of establishing the existence of the privilege rests with the person asserting it." *Id.* at 450.

"Ohio's attorney-client privilege is governed by both common law and statute." *In re Professionals Direct Ins. Co.*, 578 F.3d 432, 440 (6th Cir. 2009).[4] Plaintiff argues that under Ohio common law, Williams' statements to Carrigg about why plaintiff was fired were made during Carrigg's joint representation of LBS and plaintiff and, consequently, are not protected because "a client of an attorney cannot invoke the [attorney-client] privilege in litigation against a co-client." (Doc. 57 at 4) (quoting *Squires Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 937 N.E.2d 533, 540 (Ohio 2010). Plaintiff's argument raises the Ohio common-law joint-representation exception to the attorney-client privilege. This exception applies:

> when the same attorney acts for two parties having a common interest, and each party communicates with him. Here the communications are clearly privileged from disclosure at the instance of a third person. Yet they are not privileged in a controversy between the two original parties, inasmuch as the common interest and employment forbade concealment by either from the other.

8 Wigmore on Evidence (3d Ed. 1940), § 2312. As noted by plaintiff, the Ohio Rules of Professional Conduct further provide that the attorney-client privilege does not attach between commonly represented clients and "it must be assumed that if litigation does later occur between the clients, *the privilege will not protect communications made on the subject of the joint representation*, while it is in effect, and the clients should be so advised." Ohio Prof. Cond. Rule 1.7 cmt 26 (2007) (emphasis added).

LBS claims the exception is limited to communications made on the subject of the joint representation and Williams' statements to Carrigg - that plaintiff was improperly in possession

[4] The Court applies Ohio privilege law to this diversity action pursuant to Federal Rule of Evidence 501.

of Tenacity's client information and planning on perjuring himself - related to plaintiff's ongoing employment at LBS and not to Carrigg's representation of the parties in the Tenacity litigation. LBS argues that "the absence of privilege pertains only to those issues relative to the common interests of the representation." (Doc. 59 at 2-3) (citing *Emley v. Selepchak*, 63 N.E.2d 919, 922 (Ohio App. Ct. 1945) (exception to attorney-client privilege exists when attorney acts for two parties with a common interest); *Netzley v. Nationwide Ins. Co.*, 296 N.E.2d 550, 561 (Ohio Ct. App. 1971) (finding exception to privilege where co-clients have mutuality of interest and holding that letter from trial counsel to insurance company was not protected from disclosure to plaintiff, who was joint defendant with insurance company in previous auto accident lawsuit); *Sarbey v. National City Bank, Akron*, 583 N.E.2d 392, 398 (Ohio Ct. App. 1990) (attorney-client privilege does not attach to "matters comprehended by that joint representation."). LBS asserts that because the common interest shared by LBS and plaintiff in the Tenacity litigation was the alleged misappropriation of trade secrets and not plaintiff's ongoing employment, the statements made by Williams to Carrigg about why plaintiff was fired are privileged.

To determine whether the statements made by Williams to Carrigg related to the joint representation, the Court examines Williams' deposition testimony. At the deposition, Williams was asked about whether or not plaintiff had given confidential information to LBS that he obtained from Tenacity. (Doc. 56 at 40). Williams testified as follows:

> A. [Williams]. So at the - - At the time [Carrigg] was calling to make arrangements to depose myself and [plaintiff], [plaintiff] called me after work one day and asked me to destroy evidence that he gave – not evidence – destroy just documents that he had taken out of Tenacity.
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> . . .
>
> A. There – We were scheduling depositions and I called [Carrigg] and told him you couldn't take [plaintiff]'s depositions because he was perjuring himself and that I had to go and look for these documents he was asking me to destroy, see if they existed and if they were in the building.

Q. Okay. But –

A. So I went around and –

Q. You mean the attorney told you to do that or –

A. No. I told [Carrigg] that he can't do the depositions because [plaintiff]'s perjuring himself. I found out that [plaintiff] was perjuring himself and lying and that he asked me to destroy these documents. So I went and looked for the documents. And I hired [another] attorney, got his opinion on whether I could keep [plaintiff] as an employee or not; and he said, no, I had to fire him. And I had to let [Carrigg] know.

...

Q. And what did you tell [Carrigg]?

A. That [plaintiff] was going to perjure himself and he can't depose him. I was going to seek legal advice on what to do.

Id. at 41, 65, 74.

Given this testimony, the undersigned cannot conclude that Williams' testimony was related solely to plaintiff's employment situation with LBS. LBS and plaintiff were co-defendants and jointly represented by Carrigg in the Tenacity litigation on claims that both had misappropriated Tenacity's trade secrets. Williams' statements to Carrigg regard facts that were highly pertinent to Tenacity's claims, specifically that plaintiff had allegedly misappropriated Tenacity's trade secrets. Williams' statements also related directly to Carrigg's joint defense of LBS and plaintiff inasmuch as Williams directed the litigation strategy by telling Carrigg to not proceed with plaintiff's deposition. Consequently, LBS's argument that the statements are privileged because they are not related to the joint representation is not well-taken.

Even if Williams' statements are protected by the attorney-client privilege, the undersigned finds that the statements are nevertheless discoverable as Williams waived the privilege by voluntarily testifying about the communication with Carrigg. Ohio law provides that an attorney may not testify about privileged communications made by a client to the attorney

unless the client waives the privilege by voluntarily testifying, under which circumstances "the attorney may be compelled to testify on the same subject." Ohio Rev. Code § 2317.02(A)(1). *See also Rubel v. Lowe's Home Centers, Inc.*, 580 F. Supp.2d 626, 628 (N.D. Ohio 2008) (citing *Spitzer v. Stillings*, 142 N.E. 365 (Ohio 1924)) ("Courts . . . can compel attorneys to testify to the same general subject matter as the client's prior testimony."). Plaintiff contends that Williams waived his attorney-client privilege when he testified at his deposition about statements he made to Carrigg regarding plaintiff's alleged wrongdoing and termination. Plaintiff thus asserts the subpoena should be enforced. LBS argues that Williams did not voluntarily testify about his conversations with Carrigg, noting that "[p]laintiff's counsel sought to probe into attorney-client privileged communications over 40 times in the course of the deposition." (Doc. 59 at 4). It is undisputed that the testimony at issue was provided during the course of a deposition and that no objections were levied on the basis of attorney-client privilege. Thus, the only issue is whether such testimony is "voluntary."

LBS cites to *Harpman v. Devine*, 10 N.E.2d 776 (Ohio 1937) and *Tandon v. Tandon*, No. 99 JE 36, 1999 WL 1279162 (Ohio Ct. App. Dec. 27, 1999), in support of its contention that Williams' testimony was not voluntary. In *Harpman*, the Ohio Supreme Court determined that a plaintiff-patient did not waive his patient-physician privilege by testifying at trial about treatment received under cross-examination because the testimony was not voluntary. *Harpman*, 10 N.E.2d at 778. The court based its decision on the facts that: (1) the plaintiff "was obliged to answer the questions whether he desired to or not[;]" (2) defense counsel directed the questioning; and (3) plaintiff faced contempt of court if he elected to not answer. *Id.*[5] In

[5]Ohio courts recognize that the principles enunciated in *Harpman* extend to issues involving waiver of attorney-client privilege. *See Foley v. Poschke*, 32 N.E.2d 858, 860 (Ohio Ct. App. 1940); *Meyers Roman Friedberg & Lewis v. Malm*, 916 N.E.2d 832, 835-36 (Ohio Ct. App. 2009).

Tandon, the appellate court applied the *Harpman* rationale in the attorney-client context and held that testimony given during cross-examination was not voluntary as "the client and his counsel do not have control of the questions or the information which is to be elicited." *Tandon*, 1999 WL 1279162, at *3. Relying on these cases, LBS argues that Williams' testimony regarding his statements to Carrigg were not voluntary such that the attorney-client privilege was waived as the testimony was given only in response to questions posed by plaintiff's counsel. LBS's interpretation is not supported by the relevant case law.

Ohio courts have expressly "declined to adopt a bright-line rule that testimony in a deposition that is solicited by an opponent can never be voluntary." *Malm*, 916 N.E.2d at 836 (citing *Amer Cunningham Co., L.P.A. v. Cardiothoracic & Vascular Surgery of Akron*, No. 20899, 2002 WL 1800323 (Ohio Ct. App. Aug. 7, 2002). Even the *Tandon* decision, cited by LBS, recognized that its holding "should not be read so as to create a blanket rule that a client may make any statement regarding counsel during cross-examination without the fear of waiving the privilege. If this court is presented with the proper circumstances, we will not hesitate to find a waiver of the attorney-client privilege despite the fact that the statements made by a client were on cross-examination." *Id.* at *4. Rather, a court analyzing whether deposition testimony is voluntary "must consider the facts of the case before it, specifically the questions and answers from the deposition, and then decide if the testimony concerning the relevant information was voluntary." *Amer Cunningham*, 2002 WL 1800323, at *3. A court should consider whether any objections based on the attorney-client privilege were interposed during the relevant questioning or whether the deponent refused to answer any questions about the communications in question. *Id.*

Though plaintiff's counsel asked several questions regarding Williams' statements to Carrigg, *see, e.g.*, Doc. 56 at 39, 43, the testimony at issue involves Williams' responses to questions about his *actions* after plaintiff allegedly told him to destroy documents. Specifically, in response to a question about when plaintiff allegedly told Williams to destroy documents, Williams, on his own and through no leading question or prompting by plaintiff's counsel, volunteered the conversation he had with Carrigg:

> Q [plaintiff's counsel]. What is it that jogged – What makes you think it was February 2011, that [plaintiff] asked you to destroy documents?
>
> A [Williams]. That's what I recall.
>
> Q. Okay. I mean, is there anything that makes you recall it was February?
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> A. There – We were scheduling depositions and I called [Carrigg] and told him you couldn't take [plaintiff]'s depositions because he was perjuring himself and that I had to go and look for these documents he was asking me to destroy, see if they existed and if they were in the building.
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> Q. Okay. But –
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> A. So I went around and –
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> Q. You mean the attorney told you to do that or –
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> A. No. I told [Carrigg] that he can't do the depositions because [plaintiff]'s perjuring himself. I found out that [plaintiff] was perjuring himself and lying and that he asked me to destroy these documents. So I went and looked for the documents. And I hired [another] attorney, got his opinion on whether I could keep [plaintiff] as an employee or not; and he said, no, I had to fire him. And I had to let [Carrigg] know.

(Doc. 56 at 64-65). Notably, Williams' counsel raised no objections based on attorney-client privilege to any of plaintiff's counsel's questions. Further, Williams' testimony regarding his communications with Carrigg was not given in response to questions directed at the attorney-client communication but to Williams' actions following plaintiff's purported unlawful conduct. *See* Doc. 56 at 41, 65, 74. Accordingly, the testimony was voluntary. *See Malm*, 916 N.E.2d at

838; *Amer Cunningham*, 2002 WL 1800323, at *3 (deposition testimony was voluntary and amounted to waiver of attorney-client privilege where no attorney-client privilege objections raised and deponent fully answered all questions). The undersigned therefore finds that Williams' waived his attorney-client privilege by providing voluntary deposition testimony regarding his communications with Carrigg about plaintiff's purported misconduct. As such, plaintiff is entitled to depose Carrigg and view documents in Carrigg's possession relating to this testimony.

Lastly, the Court addresses plaintiff's request for sanctions. Plaintiff seeks reasonable attorney fees involved in responding to the instant motion, contending that the motion is frivolous as Ohio law clearly holds that no attorney-client privilege attached to Williams' statements to Carrigg. The Federal Rules of Civil Procedure provide that a non-moving party may seek reasonable attorney's fees incurred responding to a frivolous motion. *See* Fed. R. Civ. P. 11(b)(2), (c)(2). However, "[a] motion for sanctions *must* be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b)." Fed. R. Civ. P. 11(c)(2) (emphasis added). Plaintiff's one-sentence request for attorney's fees contained in his response to LBS's motion to quash fails to comply with the procedural requirements for seeking sanctions under the Rule and, thus, must be denied. *See Ridder v. City of Springfield*, 109 F.3d 288, 294 (6th Cir. 1997) ("[A] party seeking sanctions must follow a two-step process: first, serve the Rule 11 motion on the opposing party for a designated period (at least twenty-one days); and then file the motion with the court.") Further, the undersigned finds that LBS's motion, although denied, was not frivolous such that it is sanctionable. LBS supported its claim of attorney-client privilege with citations to authority which could reasonably be interpreted as standing for LBS's proposition. Plaintiff's request for sanctions is therefore denied.

IV. Conclusion

For the above reasons, LBS's motion to quash the subpoena (Doc. 54) is **DENIED**.

IT IS SO ORDERED.

Date: 2/28/13

Karen L. Litkovitz
United States Magistrate Judge