

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
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: 09/20/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JAMES C. SELL, Trustee of the) No. 1 CA-SA 12-0183
Participating Trust established)
under Debtors' First Amended)
Joint Plan of Reorganization) DEPARTMENT C
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 on September 19, 2011. The court, Presiding Judge Philip Hall, Judge Patricia A. Orozco, and Chief Judge Lawrence F. Winthrop participating, has considered the special action petition of 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 filed July 25, 2012, compelling Trustee to produce to defense counsel for Real Parties in Interest all signed joint representation agreements entered by Trustee; his attorneys, Sherman & Howard, L.L.C. ("Sherman & Howard"); and individuals who are investors in and beneficiaries of the Trust.

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, 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).

Further, we grant relief. The unsolicited mailing of the letters and proposed joint representation agreement by Sherman & Howard to investors was not a privileged communication protected by

the attorney-client privilege. However, any communications between the investors and Sherman & Howard made after the investors took active steps to form an attorney-client relationship between themselves and Sherman & Howard are privileged communications and are protected, absent a waiver. Trustee did not waive any existing attorney-client privilege in defending against the motion to disqualify, and no waiver has otherwise occurred. See *State Farm Mut. Auto. Ins. Co. v. Lee*, 199 Ariz. 52, 56, ¶ 10, 13 P.3d 1169, 1173 (2000). Consequently, as previously ordered, Real Parties in Interest are only entitled to a copy of the solicitation letter and the unsigned, proposed joint representation agreement sent to each participating investor. Accordingly,

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

IT IS FURTHER ORDERED granting Petitioners' request for relief.

IT IS FURTHER ORDERED denying the request for costs and attorneys' fees filed by Real Parties in Interest.

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