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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BETTY ANN BIRD,

Plaintiff,
v.
PSC HOLDINGS I, LLC, et al,

Defendants.

Civil No. 12-CV-1528 W (NLS)
**ORDER RESOLVING JOINT
MOTION FOR
DETERMINATION OF
DISCOVERY DISPUTE AND
DENYING DEFENDANTS'
MOTION TO COMPEL**
(Dkt. No. 64.)

Plaintiff Betty Ann Bird (“Plaintiff”) commenced this action in California Superior Court, alleging several causes of action arising from Defendants’ termination of her employment. The case was removed to federal court by Defendants. (Dkt. No. 1.)

Currently pending before the Court is the parties’ joint motion for determination of discovery dispute. (Dkt. No. 64.) The parties seek to resolve the issue of whether certain communications between Plaintiff and her domestic partner, Julie Hussey, are entitled to the protections afforded the attorney-client relationship. *Id.* After discovery was conducted on the issue, the parties filed the pending joint motion. *Id.* After reviewing the submissions, the Court ordered Plaintiff and Ms. Hussey to file declarations to supplement the record, and they were timely provided. (Dkt. Nos. 67-69.)

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1 Defendants filed a response to the supplemental declarations.¹ (Dkt. No. 70.) The matter
2 is now fully briefed and ripe for determination.

3 **I. BACKGROUND**

4 Plaintiff and Julie Hussey are domestic partners. (Dkt. No. 64-5 ¶ 2.) Ms. Hussey
5 is a civil litigator and is employed at DLA Piper. (Dkt. No. 66-1 at 6.²) Plaintiff is
6 represented in this action by Edelson & Rezzo (“trial counsel”). (Dkt. No. 64-6 ¶ 1.)

7 Earlier in these proceedings, it came to this Court’s attention that Plaintiff invoked
8 attorney-client privilege and work product protection regarding certain communications
9 with Ms. Hussey. (Dkt. Nos. 15 at 7-10, 15-2 at 26-33.) This Court deferred ruling on
10 the propriety of these claims until after Plaintiff and Ms. Hussey were deposed, to allow
11 Defendants the opportunity to investigate whether an attorney-client relationship existed.
12 (Dkt. No. 22 at 8.) If there was an attorney-client relationship between Plaintiff and Ms.
13 Hussey at the time of the communications, Plaintiff is entitled to designate them as
14 privileged and therefore withhold them from disclosure. Complicating the issue is the
15 fact that Plaintiff also forwarded communications from her trial counsel to Ms. Hussey.
16 (Dkt. No. 64-5 ¶ 4.) If Plaintiff and Ms. Hussey did not have an attorney-client
17 relationship, this forwarding of information could constitute waiver of the privilege that
18 existed between Plaintiff and her trial counsel. *See* Cal. Evid. Code § 912.

19 **A. Plaintiff’s Argument**

20 Plaintiff essentially argues that she had an implied attorney-client relationship with
21 Ms. Hussey. Although Ms. Hussey was not officially retained as counsel, Plaintiff asked
22 Ms. Hussey for “legal guidance and legal opinion” regarding her dispute with her
23 employer, and sought input on her “legal rights and options.” (Dkt. No. 64-5 ¶ 4.)
24 According to Plaintiff’s trial counsel, a meeting took place between them, Plaintiff, and
25 Ms. Hussey, where it was agreed that Ms. Hussey would be part of the “attorney team”

26 ¹Plaintiff objected to this response. (Dkt. No. 71.) Defendants obtained permission
27 from this Court before filing the response.

28 ²Citations to page numbers in the parties’ submissions refer to those assigned by
the ECF system.

1 and that she would be included in confidential communications. (Dkt. Nos. 64-4 ¶¶ 3-4,
2 64-6 ¶ 2.) In supplemental briefing ordered by the Court, Plaintiff states she was
3 informed by her trial counsel that the attorney-client privilege would not be in jeopardy
4 because Ms. Hussey was an attorney, and Plaintiff also states that she understood that Ms.
5 Hussey would give her “guidance from a legal perspective.” (Dkt. No. 68 ¶¶ 4-5.)
6 Plaintiff states she shared information related to this lawsuit with Ms. Hussey solely
7 because she is an attorney, and not because she was her partner. *Id.* ¶ 9. Ms. Hussey
8 confirmed that she agreed to “help [Plaintiff] understand the litigation process.” (Dkt.
9 No. 69 ¶ 4.) She also unequivocally states that she has never been retained as Plaintiff’s
10 counsel. *Id.* at 6.

11 **B. Defendants’ Argument**

12 Defendants assert that the communications withheld by Plaintiff should not be
13 protected by the attorney-client privilege. They note that Ms. Hussey never actually
14 represented Plaintiff, and argue that she could not have represented her due to a potential
15 conflict of interest. (Dkt. No. 70 at 4-7.) Plaintiff admits that she understood Ms. Hussey
16 would not directly represent her in this action. (Dkt. No. 68 ¶ 8.) Defendants also argue
17 that Plaintiff is not entitled to rely on trial counsel’s advice that her communications with
18 her partner would be privileged. (Dkt. No. 70 at 2.)

19 **II. ANALYSIS**

20 **A. Governing Law**

21 In an action in federal court that is based on diversity of citizenship, state law
22 governs questions of attorney-client privilege. Fed. R. Evid. 501; *Star Editorial, Inc. v.*
23 *United States District Court for the Central District of California (Dangerfield)*, 7 F.3d
24 856, 859 (9th Cir. 1993) (California law governs questions of privilege in a diversity
25 action where state law provides the rule of decision). In California, privileges such as the
26 one between attorney and client are created and governed by statute. *HLC Properties,*
27 *Ltd. v. Superior Court*, 35 Cal.4th 54, 59 (2005).

28 The attorney-client privilege under California law is outlined in § 954 of the

1 California Evidence Code. It provides that “the client...has a privilege to refuse to
2 disclose, and to prevent another from disclosing, a confidential communication between
3 client and lawyer[.]” The Code also defines both “lawyer” and “client.” Section 950 of
4 the Code defines a “lawyer” as “a person authorized, or reasonably believed by the client
5 to be authorized, to practice law in any state or nation.” “Client” is defined as “a person
6 who, directly or through an authorized representative, consults a lawyer for the purpose
7 of retaining the lawyer *or securing legal service or advice from him in his professional*
8 *capacity[.]*” Cal. Evid. Code § 951, emphasis added.

9 The purpose behind such a privilege is to protect the confidential relationship
10 between attorneys and their clients, in order to “promote full and open discussion of the
11 facts and tactics surrounding individual legal matters.” *Mitchell v. Superior Court (Shell*
12 *Oil Co.)*, 37 Cal.3d 591, 599 (1984). “[T]he public policy fostered by the privilege seeks
13 to insure ‘the right of every person to freely and fully confer and confide in one having
14 knowledge of the law, and skilled in its practice, in order that the former may have
15 adequate advice and a proper defense.’” *Id.*; citing *Baird v. Koerner*, 279 F.2d 623, 629
16 (9th Cir. 1960). Courts of this state have confirmed that preservation of the
17 confidentiality of the attorney-client relationship outweighs the possibility of an unjust
18 decision. *Mitchell*, 37 Cal.3d at 600; *Costco Wholesale Corp. v. Superior Court*
19 *(Randall)*, 47 Cal.4th 725, 732 (2009); *Kandel v. Brother Intern. Corp.*, 683 F. Supp. 2d
20 1076, 1081 n. 4 (C.D. Cal. 2010).

21 The party claiming the privilege has the initial burden of “establishing the
22 preliminary facts necessary to support its exercise, i.e., a communication made in the
23 course of the attorney-client relationship.” *Costco*, 47 Cal.4th at 733. Once that is
24 established, “the communication is presumed to have been made in confidence and the
25 opponent of the claim of privilege has the burden of proof to establish the communication
26 was not confidential or that the privilege does not for other reasons apply.” *Id.*

27 The primary inquiry in determining the existence of an attorney-client relationship
28 is “whether the client would have a reasonable expectation that an express or implied

1 agreement existed.” *Legacy Villas at La Quinta HOA v. Centex Homes*, No. EDCV 11-
2 845 VAP (OPx), 2012 WL 1536036 at *5 (C.D. Cal. Apr. 30, 2012); citing *Responsible*
3 *Citizens v. Superior Court*, 16 Cal.App.4th 1717, 1733 (1993). When undertaking this
4 evaluation, it is incumbent on this Court to “[take] into account all kinds of indirect
5 evidence and contextual considerations that appear relevant to determining whether it
6 would have been reasonable for the person to have inferred that she was the client of the
7 lawyer.” *Sky Valley Ltd. P’ship v. ATX Sky Valley, Ltd.*, 150 F.R.D. 648, 652 (N.D. Cal.
8 1993).

9 **B. Application**

10 It is evident from the record that Plaintiff reasonably believed she had an implied
11 attorney-client relationship with Ms. Hussey. Ms. Hussey is an attorney, and the parties
12 do not appear to dispute this fact. The key element in this analysis is the fact that
13 Plaintiff fits well within the boundaries of “client” fashioned by the California Evidence
14 Code because she sought advice from Ms. Hussey in her professional capacity. She
15 asked Ms. Hussey for legal guidance regarding her dispute with her employer, and sought
16 input on her “legal rights and options.” (Dkt. No. 64-5 ¶ 4.) She emphatically states that
17 she would not have sought legal guidance from or shared legal documents with Ms.
18 Hussey if she had not been an attorney. (Dkt. Nos. 64-5 ¶ 4, 68 ¶ 9.)

19 Defendants’ arguments on this issue are well-taken. It is true that Plaintiff was
20 aware that Ms. Hussey was not going to actually represent her in this action. (Dkt. No.
21 68 ¶ 8.) However, the majority of Defendants’ argument stems from Ms. Hussey’s
22 position and viewpoint in this situation. They cite to the fact that Ms. Hussey states she
23 and her firm did not represent Plaintiff, she did not give Plaintiff legal advice, and she did
24 not agree to be Plaintiff’s attorney. (Dkt. No. 70 at 4-5.) However, Defendants
25 themselves note that this issue “must be considered from the perspective of a *reasonable*
26 person in the position of the party disclosing confidential information.” (Dkt. No. 66-1 at
27 11, emphasis in original.) This requires the Court to evaluate Plaintiff’s perspective as
28 the purported client, not Ms. Hussey’s. Defendants also argue that Ms. Hussey may have

1 had a conflict in representing Plaintiff in this action due to her firm’s involvement in
2 previously representing Defendants. (Dkt. No. 70 at 6-7.) However, in this analysis,
3 whether or not a conflict of interest existed is irrelevant. It may be true that Ms. Hussey
4 would be prevented from actually representing Plaintiff due to a conflict; however,
5 Plaintiff was not aware of the potential conflict. (Dkt. No. 64-5 ¶ 5.)

6 An additional wrinkle in this situation is the fact that Plaintiff was assured by her
7 trial counsel that Ms. Hussey would be part of the “privileged group.” (Dkt. No. 68 ¶ 4,
8 *see also* Dkt. Nos. 64-4 ¶¶ 3-4, 64-6 ¶ 2.) Defendants correctly point out that merely
9 agreeing that information should be confidential and subject to privilege does not make it
10 so. *Oracle America, Inc. v. Google, Inc.*, No. C-10-3561 WHA (DMR), 2011 WL
11 3794892 at *4 (N.D. Cal. Aug. 26, 2011); Dkt. No. 70 at 2-4. However, a person
12 unschooled in the law may be unaware of the nuances underlying the question of whether
13 an attorney-client relationship exists, nuances which are aptly pointed out by Defendants.
14 This lack of awareness can be precarious for the layperson, particularly when she is being
15 guided by and puts her trust into several individuals who are, in fact, schooled in the law.
16 If this layperson is assured by lawyers that she has a confidential attorney-client
17 relationship with her attorney partner, belief and reliance on that information is
18 reasonable. This is particularly so when no one disabuses her of this notion. *See People*
19 *v. Gionis*, 9 Cal.4th 1196, 1210 (1995) (no privilege applied when attorney informs
20 individual he wanted “no part in the legal proceedings”).

21 To be sure, Plaintiff has a relationship with Ms. Hussey that extends beyond legal
22 guidance. *See* Dkt. No. 68 ¶ 5 (“I made it clear that I wanted Julie Hussey to be kept
23 informed and part of our communications *because she was my partner and an attorney*
24 *whom I trusted completely.*”) (emphasis added). It is admittedly difficult for this Court to
25 attempt to unravel when Plaintiff may have relied on Ms. Hussey for legal guidance, and
26 when she may have relied on her for personal support. In these circumstances, the Court
27 finds that the different facets of the relationship cannot be unwoven in this action without
28 undue harm and severe prejudice to Plaintiff. Ultimately, the Court is guided by the

1 public policy principles that favor “the right of every person to freely and fully confer
2 and confide in one having knowledge of the law,” *Baird*, 279 F.2d at 629, and the
3 knowledge that the attorney-client privilege is fundamental is the proper functioning of
4 the judicial system. *Mitchell*, 37 Cal.3d at 611.

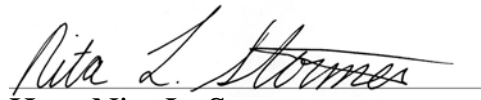
5 The undersigned does not find that “any discussion with a close friend or family
6 member who is a lawyer must be cloaked by privilege,” as is feared by Defendants. (Dkt.
7 No. 66-1 at 6.) This Court only finds that Plaintiff has met her burden to demonstrate
8 that she reasonably believed an attorney-client relationship existed between her and her
9 partner, taking into account the “indirect evidence and contextual considerations that
10 appear relevant[.]” *Sky Valley Ltd. P’ship*, 150 F.R.D. at 652. Therefore, the
11 communications in question are protected by privilege. However, although Plaintiff’s
12 belief was reasonable at the time the communications were made, it is now quite apparent
13 to all that there is no actual attorney-client relationship between Plaintiff and Ms. Hussey.
14 The Court advises the parties to bear this in mind, and proceed accordingly.

15 **IV. CONCLUSION**

16 After careful consideration of the parties’ joint motion and supplemental
17 submissions, Defendants’ motion to compel disclosure is **DENIED**. By Order dated
18 December 13, 2013, the remaining scheduling order deadlines in this action were vacated.
19 (Dkt. No. 60.) An amended scheduling order resetting pre-trial dates shall issue in due
20 course.

21 **IT IS SO ORDERED.**

22 DATED: April 8, 2014

23 
24 Hon. Nita L. Stormes
25 U.S. Magistrate Judge
26 United States District Court
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