

## United States District Court, Northern District of Illinois

<b>Name of Assigned Judge or Magistrate Judge</b>	Virginia M. Kendall	<b>Sitting Judge if Other than Assigned Judge</b>	
<b>CASE NUMBER</b>	06 C 5486	<b>DATE</b>	10/28/2008
<b>CASE TITLE</b>	GROCHOCINSKI vs. MAYER BROWN ROWE & MAW et al		

### DOCKET ENTRY TEXT

Defendants are given to November 12, 2008 to file objections to the alternative ruling. In addition, Defendants' Unopposed Motion to Reset the Discovery Deadline is granted so that discovery may be completed pending the resolution of these privilege issues. Discovery is ordered closed January 31, 2009.

■ [ For further details see text below.]

Notices mailed by Judicial staff.

### STATEMENT

Plaintiff David Grochocinski ("Grochocinski"), in his capacity as Chapter 7 Trustee for the bankruptcy estate of CMGT, Inc., brought suit against Defendants Mayer Brown Rowe & Maw LLP, Ronald B. Given and Charles v. Trautner (collectively "Defendants"), alleging legal malpractice. Defendants brought a Motion to Dismiss, arguing in part that Grochocinski's case should be dismissed because it amounted to a fraud on the Court, or, as this Court has framed it, because he filed the suit with "unclean hands." This Court denied the Motion to Dismiss and the Motion to Reconsider that followed; however, it found Defendants' "unclean hands" argument very persuasive. As such, this Court bifurcated the case and ordered the parties to conduct discovery solely on the issue of "unclean hands" so that this Court, with all the relevant facts in front of it, could decide whether the case should be dismissed on that basis. Grochocinski then brought a Motion for a Protective Order, and following discussion of some of the relevant privilege issues, this Court ordered Grochocinski to prepare a privilege log listing any document to which he wanted to assert privilege and submit it to Magistrate Judge Denlow for his review. In addition, this Court referred all issues regarding the discovery of privilege matters to Judge Denlow.

Grochocinski argued in Judge Denlow's Court that documents related to his pre-lawsuit investigation and mental impressions of his case were privileged and thus not discoverable. Defendants argued that such documents were not privileged because the pre-lawsuit investigation had been put at issue and because Grochocinski waived the attorney-client and work product privileges. Judge Denlow issued a Memorandum Opinion and Order on June 9, 2008 granting in part and denying in part Grochocinski's Motion for a Protective Order. Specifically, he granted the protective order regarding communications that took place after the filing of the lawsuit but denied the protective order regarding communications that preceded the filing of the lawsuit. In so ruling, Judge Denlow held that this Court's orders placed the communications preceding the filing of the instant lawsuit "at issue" and thus waived any privilege that would otherwise apply. Specifically, Judge Denlow stated that the pre-filing communications were "exactly the type of information Judge Kendall intended the

## STATEMENT

parties to discover, in order to resolve the issue of whether Plaintiff filed this lawsuit in good faith.” Judge Denlow also issued an alternative ruling addressing “at issue” waiver by a party, attorney-client privilege, and work product doctrine and granting the Motion for a Protective Order in full. Such alternative ruling comes into play only if this Court sets aside the original Order. Grochocinski objected to Judge Denlow’s order, arguing that this Court did not and in fact could not order the production of privileged documents.

Here, Judge Denlow misinterpreted this Court’s referral. This Court did not intend to inherently put all privileged communications regarding Grochocinski’s motivation for filing the instant lawsuit at issue by opening discovery on the “unclean hands” issue. The Court merely opened discovery regarding Grochocinski’s motivation for filing this lawsuit, and he must now make his own decisions as to what potentially privileged communications to reveal in order to support his case. As such, this Court intended, by its referral, for Judge Denlow to address the privilege issues that would and did arise as a result of this Court opening discovery on the “unclean hands” issue. Therefore, this Court rejects Judge Denlow’s primary ruling.

This Court intends to adopt Judge Denlow’s alternative ruling. Defendants are given two weeks from the date of this order to file objections to the alternative ruling. In addition, Defendants’ Unopposed Motion to Reset the Discovery Deadline is granted so that discovery may be completed pending the resolution of these privilege issues. Discovery is ordered closed January 31, 2009.

So ordered.