

September 23, 2011

By ECF

The Honorable George H. Lowe
United States Magistrate Judge
U.S. District Court for the Northern District of New York
P.O. Box 7346
Syracuse, New York 13261-7346

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Re: *Yoder v. Town of Morristown*, Civil Case No.: 09-cv-00007 (NPM/GHL)

Dear Judge Lowe:

We, along with the Becket Fund for Religious Liberty, represent the Plaintiffs in the above-referenced matter.

Consistent with Court's request during the September 9, 2011 status conference, we write to provide your Honor with an update on outstanding document discovery issues. We have exchanged letters with Defendants' counsel twice since the September 9th conference and are awaiting a representation from Defendants' counsel as to whether they have withheld any non-privileged documents on the grounds that such documents are not relevant. If Defendants have not withheld any documents on that ground, from Plaintiffs' perspective, all document discovery issues appear to have been resolved (subject, of course, to the parties' continuing obligations to supplement their responses as required by the Federal Rules of Civil Procedure). In that case, we are prepared to schedule the depositions of all individuals forthwith. On other hand, if in fact Defendants have withheld documents based on a "relevance" objection, we do not believe that it is a proper objection by which to withhold otherwise responsive documents and we will make an appropriate application to the Court.

Separately, it is our understanding that Defendants' counsel takes issue with our claim of privilege concerning our communications with two of our consultants, Marianne and David Fisher. In their September 16, 2011 letter to us concerning this issue, Defendants suggested that any responsive documents be produced to the Court for *in camera* review. We believe any such review is premature and that Defendants should first be required to prove — which they cannot — that there is no privilege that attaches to our communications with the Fishers.

Over one year ago, we wrote to Defendants to provide them with information concerning our retention of the Fishers as consultants in this litigation. The Fishers, as we explained, are longstanding members of the Morristown community who, over the years, have developed a special relationship of trust with the local Amish community and, in the process, have gained a unique understanding of our clients' customs and practices. As a practical matter, they serve a vital role as "translators" for us and the Becket Fund as counsel. Because we cannot communicate with our clients by email or telephone, we must at times rely upon the Fishers to convey information to them. The Fishers are an integral part of our clients' legal team and our

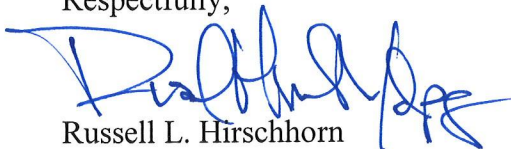
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clients have consistently communicated with the Fishers in confidence and have done so with the expectation that their communications will remain in confidence.

There can be no doubt that our communications with the Fishers are privileged and protected from disclosure. It is well-established that the attorney-client privilege extends to persons “serving as an agent of either attorney or client,” and the work product privilege extends to individuals who “assist in analyzing or preparing the case, as adjunct to the lawyer’s strategic thought processes, thus qualifying for complete exemption from disclosure.” *Hudson Ins. Co. v. Oppenheim*, 72 A.D.3d 489, 489 (1st Dep’t. 2010) (internal quotations omitted); *NXIVM Corp. v. O’Hara*, 241 F.R.D. 109, 141 (N.D.N.Y. 2007) (“If the purpose of the third party’s participation is to improve the comprehension of the communication between attorney and client, then the privilege will prevail.”) (internal quotations omitted). Furthermore, the “scope of the privilege is not defined by the third parties’ employment or function, however; it depends on whether the client had a reasonable expectation of confidentiality under the circumstances.” *People v. Osorio*, 75 N.Y.2d 80, 84 (1989); see *US v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961) (“What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer.”).

It is our understanding that the Court will schedule a status conference within the next couple of weeks.

Respectfully,



Russell L. Hirschhorn

cc: *All by Electronic Mail*
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