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October 21, 2011

By Electronic Filing

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

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

Dear Judge Lowe:

We, along with the Becket Fund for Religious Liberty, represent Plaintiffs in the above-referenced matter. We write in reference to the Court's October 7, 2010 Text Order stating that "it is Plaintiffs' burden to establish that a privilege is applicable" to communications involving Marianne and David Fisher (the "Fishers"), which were identified on Plaintiff's privilege log dated July 10, 2009 (the "Fisher Documents"), and to provide "whatever submissions they feel are necessary to meet this burden."

As a preliminary matter, Plaintiffs do not dispute that they have the burden of establishing that the communications between and among the Fishers, on the one hand, and Plaintiffs and/or their counsel (*i.e.*, my firm, the Becket Fund and Steve Ballan, Plaintiffs' counsel for purposes of defending against the prosecutions initiated by defendant Morristown) on the other hand, are protected by the attorney-client privilege and/or the attorney work product doctrine. Plaintiffs' September 23, 2011 letter to the Court (*see* Docket No. 81) did not mean to suggest otherwise. In our September 23 letter, we intended to make the point that an *in camera* review of the Fisher Documents should not occur, if at all, without at least some action on the part of Defendants to object to the assertion of privilege and explain such objections to the Court.[1]

The attorney-client privilege and attorney work product doctrine clearly apply here. As we explained in our September 23 letter, the Second Circuit has long held that the privileges extend not only to attorneys, but also to their agents, and to third parties whose assistance "is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit." *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961). *Kovel* explained that such parties are analogized to translators who assist the attorneys in understanding the communications of their clients, and vice versa. The privilege extends to individuals such as accountants, consultants, outside experts, even volunteers who perform important services for the client. *See id.* (accountant); *NXIVM Corp. v. O'Hara*, 241 F.R.D. 109, 139-41 (N.D.N.Y. 2007) (unpaid volunteer); *Hudson Ins. Co. v. Oppenheim*, 72

[1] In connection with this letter, we undertook an additional review of the documents identified on Plaintiffs' privilege log and have determined that two of them should be produced in response to Defendants' document requests. We produced these documents to Defendants on October 20, 2011.

A.D.3d 489, 489 (1st Dep't. 2010) (consultant). The important fact is not the title of the person involved, but whether that person "assist[s] in analyzing or preparing the case, as adjunct to the lawyer's strategic thought processes, thus qualifying for complete exemption from disclosure" or otherwise "improve[s] the comprehension of the communication between attorney and client." *NXIVM*, 241 F.R.D. at 141; *Hudson*, 72 A.D.3d at 489 (quotations omitted).

Defendants' October 6, 2011 letter makes no effort to explain why these authorities should not apply here.[2] Rather, Defendants contend that the Fisher Documents should not be immune from discovery because: (i) there is no indication that the Fishers were retained by Plaintiffs' counsel; and (ii) "it appears that the Fishers are simply individuals who have 'over the years' become friendly with the Amish community in general and who perhaps Plaintiffs' counsel may have used as a convenient intermediary." Defendants are wrong on both accounts.

First, my law firm, on behalf of Plaintiffs, expressly retained Marianne Fisher as a consultant in connection with the litigation. (*See* October 27, 2008 Engagement Agreement, annexed hereto as Exhibit 1). In relevant part, that engagement agreement states:

> In light of your special relationship with, and specialized knowledge of, [Plaintiffs], Proskauer wishes to retain you as a consultant to assist Proskauer, the Becket Fund for Religious Liberty and Steven G. Ballan, Esq. (collectively, "Counsel") in connection with their representation of [Plaintiffs] (including in connection with the action entitled Yoder, et al. v. Town of Morristown, et al., 7:09-cv-00007-TJM-GHL, currently pending in the United States District Court for the Northern District of New York). You have agreed to assist Counsel by performing, on their behalf and under their supervision, certain services relating to the Project. The work to be performed by you will be a necessary adjunct to Counsel's legal services to [Plaintiffs].
>
> Your work will be directed by Counsel or such persons as Counsel may designate. Your work, including your communications with [Plaintiffs], and/or Counsel, will be, and will be deemed to be,

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[2] The two decisions cited by Defendants are not to the contrary. In *Allied Irish Banks, p.l.c. v. Bank of America*, 240 F.R.D. 96 (S.D.N.Y. 2007), Allied Irish Banks ("AIB") sought to prevent disclosure of a draft internal investigation report. The report was prepared by a law firm that had not executed a letter of engagement, was made available publicly, and was not created primarily or predominantly for the purpose of providing legal advice. Moreover, the court concluded that neither AIB nor the law firm provided any evidence regarding the manner in which the law firm's purported legal advice was provided to AIB, and AIB did not claim that the investigator was acting as an agent for the law firm in delivering legal advice to AIB. Thus, the attorney-client privilege did not attach to the report. In *United States v. Ackert*, 169 F.3d 136 (2d Cir. 1999), the Second Circuit held that there was no privilege between a general counsel and an investment banker from whom the general counsel sought information relating to the tax consequences of a transaction because the investment banker was acting as a banker, advising on potential investments, rather than a "translator or interpreter of client communications." *Id.* at 139-40.

> privileged and confidential information designed to assist Counsel in representing Plaintiffs in anticipated or actual litigation matters.

The engagement agreement confirms that the Fisher Documents are communications that were made with the expectation that they be maintained in confidence and are immune from discovery.

The engagement agreement also proves that the Fishers were, contrary to Defendants' assertions, retained as more than a "convenient intermediary." Moreover, as explained in our September 23 letter, the Fisher Documents were made solely in furtherance of the legal representation of Plaintiffs and the Fishers did, in a very real sense, act as translators and interpreters, facilitating and improving the comprehension of communications between lawyer and client. They are therefore privileged. The Fishers reside in Plaintiffs' community and have, over the years, gained the trust and confidence of the local Amish community, including Plaintiffs. During this time, the Fishers have become very familiar with Plaintiffs' culture. Plaintiffs rely upon the Fishers to transmit messages to counsel and explain counsels' statements to them. The Fishers also assist counsel by explaining to counsel certain cultural customs and facilitating communication with Plaintiffs. Because it is forbidden by Plaintiffs' religious beliefs, we cannot communicate with Plaintiffs via email or telephone and must rely instead on the Fishers to communicate with our clients in a timely fashion. While we can (and do) rely upon U.S. mail or in-person communication, such methods are not always practicable during a litigation. Our clients have consistently communicated with the Fishers in confidence and have done so with the expectation that their communications will be maintained in confidence and would not be disclosed to the governmental entity and officials who are attempting to prosecute Plaintiffs.[3]

In short, the Fishers are an integral part of our clients' legal team. We thus respectfully submit that our September 23 letter, along with this letter, satisfies Plaintiffs' burden and request the Court to conclude that the communications contained in the Fisher Documents are protected by the attorney-client privilege and/or the attorney work product doctrine.

Respectfully,

Russell L. Hirschhorn

Enclosure

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[3] Although David Fisher did not sign the engagement agreement, there can be no dispute that the attorney-client privilege and attorney work product privilege apply to communications with him as well. *See United States v. Devery*, 1995 U.S. Dist. LEXIS 4799, at *44 (S.D.N.Y. 1995) (concluding that communications were privileged notwithstanding the absence of a retainer agreement).

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