

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Konica Minolta Business Solutions :
U.S.A., Inc., : Case No. 2:06-CV-00071
Plaintiff, : Judge Graham
v. : Magistrate Judge Abel
Allied Office Products, Inc., *et al.*, :
Defendants.

Order

On April 28, 2010, counsel for the parties participated in a telephone discovery conference with me. During the conference, defendant/counterclaim plaintiff Jon D. McCarthy's April 9, 2010 motion for *in camera* inspection of documents withheld as subject to the attorney-client privilege or the work product doctrine.

Konica Minolta has asserted that the following emails sent by and to its in-house counsel, Sharon Umhoefer, are protected from disclosure based on the attorney-client privilege or the work product doctrine. Konica Minolta has not provided any affidavit to the Court to support its arguments. Konica Minolta has only provided the Court with its assertions stated in the privilege log. McCarthy asks that the Magistrate Judge perform an *in camera* inspection of those emails to insure that they do not contain unprivileged information.

The elements of attorney-client privilege are:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived. *Fausek v. White*, 965 F.2d 126, 129 (6th Cir. 1992)(citing *United States v. Goldfarb*, 328 F.2d 280, 281 (6th Cir. 1964)).

Reed v. Baxter, 134 F.3d 351, 355-56 (6th Cir. 1998). See, *Guy v. United Healthcare Corp.*, 154 F.R.D. 172, 177 (S.D. Ohio 1993)(King, Magistrate Judge). The party asserting the privilege has the burden of proving each element of the claim. The claim of privilege must be made question-by-question and document-by-document. *United States v. Lawless*, 709 F.2d 485, 487 (7th Cir. 1983). A document that was created for a business purpose does not become a privileged document merely by showing it to an attorney.

The work product doctrine, as described in *Hickman v. Taylor*, 329 U.S. 495 (1947), was codified in Rule 26 of the Federal Rules of Civil Procedure. The work product of an attorney engaged in an investigation in anticipation of litigation can only be obtained upon a showing that the party seeking discovery has “substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.” Fed. R. Civ. P. 26(b)(3). The Court must protect “against the disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” *Id.* In order for the work product doctrine to apply, the materials in question must be (1) documents or other tangible things (2) prepared in anticipation of litigation or for trial (3) by or for a

party or that party's representative. *Id.* "Although the doctrine extends to materials prepared before litigation actually commences, the scope of the protection is limited to that time in which a real and substantial possibility of litigation exists." *Guy v. United Healthcare Corp.*, 154 F.R.D. 172, 181 (S.D. Ohio, 1993).

Plaintiff has submitted 13 sets of documents for *in camera* review.

Set 1. Set 1 contains a December 6, 2005 email from Sharon Umhoefer, Konica Minolta's General counsel, transmitting a draft letter. These documents are protected by the attorney/client privilege and the work product doctrine. This set also contains a page of written notes by an unknown person, most likely Tom Batten, regarding the rationale for requiring McCarthy to execute the promissory note and guarantee. These notes will be discussed in connection with set 10.

Sets 2 & 3. Sets 2 and 3 consist of a December 5, 2005 email from Tom Batten to Sharon Umhoefer concerning a company policy and requesting guidance on processing an order. These documents are protected by the attorney/client privilege.

Set 4. Set 4 consists of a string of three emails from Frank Darrigo and Tom Batten seeking the advice of Umhoefer. These documents are protected by the attorney/client privilege.

Set 5. Set 5 is a September 14, 2005 memorandum signed by Tom Batten containing a request to transfer Allied Office Products, Inc.'s account to "doubtful" status. The memorandum does not indicate who it was sent to or its distribution. Although there is what appears to be an email header, the "To:" "cc:", and "subject:"

lines are blank. The privilege log identified Tom Batten as the author. The addressee is not identified. The document is described as an email “referencing discussion with counsel.” However, the document appears to be a business document. There are two references to Umhoefer. There is no indication that the document was created by direction of Umhoefer in anticipation of litigation. It does not constitute or contain attorney-client communications. Konica Minolta may redact the sentences containing references to Umhoefer, but it is ORDERED that the document be produced.

Set 6. Set 6 contains the same email string as set 4 and an exposure analysis of Allied Office Products, Inc. There is no indication in the emails or the exposure analysis that it was attached to the emails. In any event, it appears to be a business document. Merely showing it to general counsel would not render it privileged. Konica Minolta is ORDERED to produce the exposure analysis.

Sets 7 & 8. Sets 7 and 8 consist of a string of emails beginning in July 28, 2005 in which Tom Batten asks for legal advice from Umhoefer. The email messages are protected by the attorney/client privilege. Set 7 includes a statement evaluating Allied’s exposure and recommending a limited credit line for Allied. This statement appears to be the basis for the September 14, 2005 memorandum signed by Tom Batten in set 5. There is no indication that the document was created at the direction of Umhoefer in anticipation of litigation. Konica Minolta is ORDERED that the document be produced.

Set 9. Set 9 contains a string of emails between Umhoefer, William Soresent, John Schanck, and Tom Batten. These documents are protected by the attorney/client privilege.

Set 10. Set 10 contains a July 28, 2005 email from the email string provided in sets 7 and 8, a draft of a letter addressed to McCarthy, and the handwritten notes also provided in set 1. The email messages are protected by the attorney/client privilege. The handwritten notes appear to be have been made in drafting the September 14, 2005 memorandum signed by Tom Batten in set 5. There is no indication that the document was created at the direction of Umhoefer in anticipation of litigation. Konica Minolta is ORDERED that the document be produced.

Set 11. Set 11 contains a string of emails between Umhoefer, Steve Jones, Todd Foote, and John Schank. These documents are protected by the attorney/client privilege.

Sets 12 & 13. Sets 12 and 13 consist of a May 31, 2005 email from Tom Batten to Umhoefer. These documents are protected by the attorney/client privilege.

Under the provisions of 28 U.S.C. §636(b)(1)(A), Rule 72(a), Fed. R. Civ. P., and Eastern Division Order No. 91-3, pt. F, 5, either party may, within fourteen (14) days after this Order is filed, file and serve on the opposing party a motion for reconsideration by the District Judge. The motion must specifically designate the Order, or part thereof, in question and the basis for any objection thereto. The District

Judge, upon consideration of the motion, shall set aside any part of this Order found to be clearly erroneous or contrary to law.

s/Mark R. Abel
United States Magistrate Judge