

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

CITY OF SEATTLE, a first-class charter city,

Plaintiff,

v.

THE PROFESSIONAL BASKETBALL CLUB,
LLC, an Oklahoma limited liability company,

Defendant.

No. C07-1620MJP

DEFENDANT'S MOTION (i) TO
EXCLUDE REBUTTAL TESTIMONY OF
CEIS OR (ii) TO COMPEL PRODUCTION
OF ATTORNEY-CLIENT
COMMUNICATIONS

**NOTE ON MOTION CALENDAR FOR
IMMEDIATE CONSIDERATION**

I. INTRODUCTION

The PBC seeks an order precluding the City from eliciting testimony by Deputy Mayor Tim Ceis that the City did not know that its attorneys, K&L Gates, were working with potential buyers to implement the "Poisoned Well" strategy. In discovery, the City repeatedly instructed Ceis not to answer questions about his discussions with K&L Gates and consultant Wally Walker on these matters by asserting the attorney-client privilege. The City should not be allowed to now ambush the PBC on the last day of trial by impliedly waiving this same privilege in its questioning of Ceis. Instead, the City should be held to its previous election and be precluded from questioning Ceis about what K&L Gates and Walker did or did not tell the City or impliedly injecting the same communications by having Ceis testify "I didn't know."

DEFENDANT'S MOTION (i) TO EXCLUDE REBUTTAL
TESTIMONY OF CEIS OR (ii) TO COMPEL PRODUCTION OF
ATTORNEY-CLIENT COMMUNICATIONS (C07-1620MJP) - 1

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1 Alternatively, if such testimony is allowed, a waiver of the City's attorney-client
2 privilege should be declared and the City should be ordered to immediately produce all
3 communications with K&L Gates regarding any efforts to procure a local buyer or force a sale,
4 including: (i) emails or other communications between K&L Gates and any City personnel
5 reflecting efforts to procure a local buyer or force a sale by PBC; (ii) internal K&L Gates
6 memoranda, emails or other documents regarding the creation of the Poisoned Well PowerPoint
7 and/or coordination with the City to find a local buyer or force a sale; and (iii) any
8 communication between the City and K&L Gates regarding the PowerPoint. Any other ruling
9 would allow the City to selectively waive the privilege in its questioning of Ceis and would
10 unfairly disadvantage the PBC in cross-examining Ceis.

11 II. BACKGROUND

12 Friday's Press Conference

13 Last Friday, Wally Walker and Matt Griffin testified about the "Poisoned Well" strategy.
14 Both Walker (the City's consultant) and Griffin testified that Slade Gorton, who signed the
15 Complaint in this matter as the City's lead counsel, was involved in these efforts to force a sale
16 by "bleeding" the PBC. On Friday afternoon, Lawrence and Ceis held their daily press
17 conference and, not surprisingly, were asked about the City's role in this strategy. Lawrence
18 explained that the City would call Ceis as a rebuttal witness to explain that the City was
19 completely unaware of the Poisoned Well strategy being implemented by its lawyers, Gorton and
20 Johnson, and its consultant, Walker:

21 Q: Paul you said they have shown no link between the city and
22 attempting to get Bennett to sell? What is the need for Mr. Ceis to testify?

23 A: Lawrence: To make the point that he made here and I was talking
24 about, at the point of the retention of K&L Gates by the city, it was disclosed to
25 the city that Sen. Gorton and Gerry Johnson had previously and on a ongoing
26 basis had a continuing effort to try to find a prospective owner. And to establish
that Mr. Ceis and nobody at the city had an awareness of the PowerPoint
presentation.¹

¹ Declaration of Steven C. Minson, Ex. 1 at p. 4 (emphasis added). All exhibits referenced herein are attached to the Minson declaration.

1 In contrast to its present plans, when Ceis was deposed, the City repeatedly stopped Ceis
2 from answering questions about whether he knew K&L Gates was working with “a group of
3 potential investors” on grounds of privilege:

4 Q: Did you know that Gorton was working with a group of potential
5 investors in mid October?

6 Mr. Narver: Object to form. Foundation.

7 A: I knew that Mr. Gorton was having conversations with parties that
8 were possible investors, yes.

9 Q: How did you know that?

10 A: He told me that.

11 Mr. Narver. Object to the form and instruct the witness not to disclose
12 anything further.²

13 Q: Did you know that Senator Gorton was in contact about these
14 matters with Matt Griffin?

15 Mr. Narver: That I am going to instruct you not to answer.³

16 Likewise, Ceis was instructed not to answer questions about his discussions with Wally Walker,
17 on the grounds that Walker was covered by the City’s attorney-client privilege given that he was
18 a consultant.⁴ For example:

19 Q: And how about Wally Walker, is he advising the city on this or the Griffin
20 group or where does he fit in on this?

21 A: Wally Walker has been advising the city beginning sometime last fall, the
22 fall of 07, early fall.

23 Q: Who arranged that? Was that through you?

24 A: Wally did contact me and I asked him for some assistance in these matters
25 and he volunteered that he would help, yes.

26 Q: But why did you contact him?

² Ex. 2, Ceis deposition at 38:7-39:3. See also 26:23-27:3; 27:16-19.

³ Id., Ceis deposition at 27:16-19.

⁴ Id. at 20:2-22.

1 A: He contacted me.

2 Q: What did he say?

3 Mr. Narver: I'm going to object to the form that – and instruct him that from the
4 time he is retained as a consultant forward we are asserting privilege as to those
communications to the extent they involved attorney/client involvement as well.⁵

5 Q: Had Walker been retained as a consultant by the City by the time of this
6 meeting?

7 A: I had instructed K&L Gates that he was offering his services to us pro
bono to work on this with us and I instructed them to contact him.

8 Q: What happened at the meeting?

9 Mr. Narver: Object to the form and instruct the witness not to answer on the
10 grounds of privilege.⁶

11 III. ARGUMENT

12 A. If the City Puts Into Issue Ceis' Communications with K&L Gates, It Waives Any Privilege Protecting Those Communications.

13 If Ceis testifies that he or the City never learned of the Poisoned Well strategy, he is of
14 necessity putting into issue any communications by the City's attorneys' office, the Mayor's
15 office, or Ceis with Gorton, other K&L Gates attorneys, and Walker regarding that subject. He
16 is necessarily saying that K&L Gates never had any discussion with him or the City on that
17 subject. Ceis would be testifying that none of the K&L Gates attorneys ever told him anything
18 about the Poisoned Well strategy, about "bleeding" PBC, or about any of the other matters
19 testified to by Walker and Griffin. By affirmatively putting into issue what K&L Gates did or
20 did not tell the City or its personnel, the City is impliedly waiving its attorney-client privilege
21 with K&L Gates. The City cannot on the one hand say it did not know, because K&L Gates
22 never told it about the Poisoned Well strategy, while on the other hand saying that
23 communications with K&L Gates on that subject are privileged.

24 A party cannot selectively testify about privileged information, disclosing those matters
25 which are advantageous while hiding the rest behind a privilege. In this regard, Washington has

26 ⁵ Id., Ceis deposition at 20:2-19.

⁶ Id. at 21:22-22:5.

1 expressly adopted the analysis of Hearn v. Rhay, 68 F.R.D. 574 (E.D. Wash. 1975), that when a
2 party affirmatively acts to put privileged information at issue, there is an implied waiver:

3 [W]here the following three conditions are satisfied, an implied
4 waiver of the attorney-client privilege should be found: (1)
5 assertion of the privilege was the result of some affirmative act,
6 such as filing suit, by the asserting party; (2) through this
7 affirmative act, the asserting party put the protected information at
8 issue by making it relevant to the case; and (3) application of the
9 privilege would have denied the opposing party access to
10 information vital to his defense.

11 Pappas v. Holloway, 114 Wn.2d 198, 207, 787 P.2d 30 (1990), quoting Hearn, 68 F.R.D. at 581.

12 The Ninth Circuit has likewise held that an implied waiver occurs where a party raises a claim
13 which in fairness requires disclosure of the protected communication. Chevron Corp. v. Penzoil
14 Co., 974 F.2d 1156, 1162 (9th Cir. 1992) (“The privilege which protects attorney-client
15 communications may not be used as both a sword and a shield.”). Thus, if the City elicits
16 testimony from Ceis about what K&L Gates did or did not tell him or the City about the
17 “Poisoned Well” strategy, it puts those communications in issue and waives any privilege.

18 **B. A Party Cannot Wait Until Trial to Waive a Privilege.**

19 Next, if a party wishes to waive a privilege by putting confidential information at issue, it
20 must do so in a manner which is fair to the opposing party. In particular, a party may not assert a
21 privilege throughout discovery, and then ambush the opposing party by waiving the privilege
22 during trial. Rather, if waiver is going to occur, it must happen during discovery so that the
23 opposing party may adequately prepare. This is the rule in Washington. See, e.g., Phipps v.
24 Sasser, 74 Wn.2d 439, 446, 445 P.2d 624 (1968) (“The plaintiff should not have the unfair
25 tactical advantage of a trial waiver. . . .”); Seattle Nw. Secs. Corp. v. SDG Holding Co., 61 Wn.
26 App. 725, 743, 812 P.2d 488 (1991) (“The waiver ‘cannot be delayed until the trial itself.’”). It
is also the rule followed by many federal courts. E.g., Fox v. Cal. Sierra Fin. Svcs., 120 F.R.D.
520, 530 (N.D. Cal. 1988) (“Defendants cannot conceal such [privileged] information from
discovery and expect to spring it upon plaintiffs in the midst of trial. . . .”); Int’l Tel. & Tel.
Corp. v. United Tel. Co. of Fla., 60 F.R.D. 177, 186 (M.D. Fla. 1973) (“[T]he failure of a party

1 to allow pretrial discovery of a confidential matter which that party intends to introduce at trial
2 will preclude the introduction of that evidence.”).

3 **C. The City Should Not Be Allowed to Sandbag the PBC by a Last Minute Waiver of**
4 **the Attorney-Client Privilege.**

5 Applying these principles here, the City elected during discovery to assert the attorney-
6 client privilege regarding its communications with K&L Gates about efforts to procure a local
7 buyer and the Poisoned Well strategy. Having elected to repeatedly instruct Ceis not to answer,
8 and thereby deny PBC the opportunity to understand the relevant events, the City should be held
9 to the election it made. If the City were allowed to now change its position to selectively
10 question Ceis on the same subject it precluded discovery on, the PBC would be unfairly
11 disadvantaged. Accordingly, under the case law cited above, the City should not be allowed to
12 question Ceis about what the City did or did not learn about the Poisoned Well strategy. Any
13 other ruling would allow the City to selectively invoke the privilege as both a sword and a shield.

14 **D. Alternatively, the City Should Be Ordered to Immediately Produce All Privileged**
15 **Communications Regarding Efforts to Procure a Local Buyer and Force a Sale.**

16 Alternatively, if the City is allowed to change its mind and waive the privilege at this late
17 date, the Court should hold that the City has waived any privilege as to all communications on
18 the subject matter of Ceis’ testimony. See Weil v. Inv./Indicators, Research & Mgmt., Inc., 647
19 F.2d 18, 24 (9th Cir. 1981); SDG Holding Co., 61 Wn. App. at 739; 5A Karl B. Tegland,
20 Washington Practice § 501.24 (4th ed. 1999) (If privilege is waived by disclosure, “the general
21 rule [is] that the privilege is waived as to the communication in question, and is waived as to
22 other communications ‘relating to the same subject.’”). Accordingly, if the Court allows Ceis to
23 testify about his now claimed lack of knowledge regarding K&L Gates’ efforts to find a local
24 buyer and force a sale, the City should be ordered to produce all: (i) emails or other
25 communications between K&L Gates and any City personnel reflecting any communications
26 about efforts to find a local buyer or force a sale by PBC; (ii) internal K&L Gates memoranda,
emails or other documents regarding the PowerPoint and its creation, and coordination with the

1 City to find a local buyer or force a sale; and (iii) any communications between the City and
2 K&L Gates regarding the Poisoned Well PowerPoint.

3 DATED this 24th day of June, 2008.

4 BYRNES & KELLER LLP

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the 24th day of June, 2008, I electronically filed the foregoing
3 document with the Clerk of the Court using the CM/ECF system which will send notification of
4 such filing to the following:

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