

Richard W. McCoy, Esq.

WRITING SAMPLE

I have attached hereto a writing sample. This writing sample was originally prepared by me as part of an exercise in my Pre-trial methods class in spring on 2007, but I have since then made a number of minor revisions. The background scenario for this writing sample is as follows:

1. The plaintiff served interrogatories on the defendant, including Interrogatory No. 4, which requested information regarding certain statements made by the defendant's employees.
2. The defendant answered Interrogatory No. 4: "Investigator John Doe took a written statement from Lou Smith. Objection to producing same on the basis of privilege." (Lou Smith was a former employee of the defendant, and the Investigator was hired by defendant's counsel to investigate plaintiff's claim).
3. The plaintiff moved that the Court compel discovery of the written statement, as follows:

Plaintiff moves for an order compelling Defendant to answer in full interrogatories previously served on Defendant, pursuant to Rule 37 of the Federal Rules of Civil Procedure. In support of her motion Plaintiff states:

1. Plaintiff served interrogatories on Defendant on March 1, 2007.
2. Defendant partially answered these interrogatories on March 15, 2007, but objected to answering Interrogatory No. 4 on the basis of privilege, without an additional explanation.
3. Defendant's answer to Interrogatory No. 4 stated "Investigator John Doe took a written statement from Lou Smith. Objection to producing same on the basis of privilege."
4. To date Defendant has neither supplemented his interrogatory answers nor advised Plaintiff that no additional answers will be forthcoming, although Plaintiff has requested that Defendant submit supplemental answers.

WHEREFORE, Plaintiff requests the court to order Defendant to serve supplemental interrogatory answers within ten (10) days and award reasonable expenses, including attorney's fees, incurred by Plaintiff as a result of this motion.

4. I was instructed to prepare a brief in opposition to the to the plaintiff's motion to compel discovery.

Associated documents such as the Defendant's Opposition to Plaintiff's Motion and Certificates of Service are not included.

WRITING SAMPLE ONLY

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Sharon Donaldson,
Plaintiff

v.

Empire Car Rental Company, Inc.
Defendant

No. _____

Civil Action

**DEFENDANT’S MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO PLAINTIFF’S MOTION TO COMPEL DISCOVERY**

AND NOW here comes the defendant, Empire Car Rental Company, Inc., by and through their attorney, Richard W. McCoy, Esq. to submit the following Memorandum of Points and Authorities in Opposition to Plaintiff’s Motion to Compel Discovery:

The statement requested by the plaintiff is protected by the Attorney Work Product Rule and by the Attorney-Client Privilege, and is thus not discoverable. The defendant, Empire Car Rental Company, Inc. (hereinafter “Empire”), has taken all necessary and appropriate steps to preserve the protected status of the statement and has fully complied with the Federal Rules of Civil Procedure in this matter. Furthermore, the plaintiff has failed to establish that any exemption to the protected status of the statement applies.

I. THE ATTORNEY WORK PRODUCT RULE

The statement given by Lou Smith to an investigator retained by Empire’s counsel is not discoverable because it was “prepared in anticipation of litigation or for trial” and the plaintiff has completely failed to make a showing that they have “substantial need of the materials in the

preparation of [their] case” or that they are “unable without undue hardship to obtain the substantial equivalent of the materials by other means.” Fed. R. Civ. P. 26(b)(3). Furthermore, Empire has acted appropriately under Fed. R. Civ. P. 26(b)(5)(a) by specifically identifying the nature of the statement given by Lou Smith and expressly claiming that such statement is protected from discovery.

Plaintiff has failed to show either that they have substantial need of Lou Smith's statement or that they are unable without undue hardship to obtain the substantial equivalent. In *Hickman v. Taylor*, wherein the Supreme Court first expounded the Work-Product Rule now codified in Fed. R. Civ. P. 26(b)(3), Justice Jackson recognized that “Discovery was hardly intended to enable a learned profession to perform its functions ... on wits borrowed from the adversary.” 329 U.S. 495, 516 (1947) (concurring).

Rule 26(b)(3) provides in part:

[A] party may obtain discovery of documents and tangible things otherwise discoverable ... and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) **only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.**

Fed. R. Civ. P. 26(b)(3) (Emphasis added).

The plaintiff has offered no explanation, much less support, for their claim that they have a substantial need of Lou Smith's statement. Likewise the plaintiff has offered neither explanation nor support for their claim that they are unable, without undue hardship, to obtain the substantial equivalent of that statement by other means. The plaintiff has not asserted, either in their motion or otherwise, what attempts they have made to secure their own statement from Mr. Smith. The plaintiff has *not* claimed that they have attempted and failed to secure either an interview with or a deposition of Mr. Smith, nor has the plaintiff offered any other accounting of why an exception to the Work Product Rule should be granted. In the absence of such a showing by the plaintiff, their motion to compel discovery should be denied.

II. THE ATTORNEY CLIENT PRIVILEGE

The statement given by Lou Smith to Empire's investigator was privileged because Lou Smith is 'sufficiently identified' with Empire as a corporate defendant and the statement was secured to assisting Empire's counsel in evaluating the plaintiff's claim. In determining whether a communication is protected by the Attorney Client Privilege, "[t]he central inquiry is whether the communication was made by a client to an attorney for the purpose of obtaining legal advice." *Smithkline Beecham Corp. v. Geneva Pharm., Inc.*, 232 F.R.D. 467, 473 (E.D. Pa. 2005) (quoting *In re Spalding Sports Worldwide*, 203 F.3d 800, 805 (Fed.Cir.2000)). Although the Privilege "does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation[.]" *Smithkline* at 473, it can apply to statements given by employees of a corporate defendant for the purpose of assisting counsel in evaluating a claim:

[A]n employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment.

Hasso v. Retail Credit Co., 58 F.R.D. 425, 428 (E.D.Pa. 1973). In *Hasso*, after recognizing that the employee's statement was protected by the Attorney Client Privilege, the Eastern District of Pennsylvania "note[d] in passing that [the] plaintiffs [were] not prejudiced ... and have not suffered from a dearth of discovery." *Id.* In *Hasso*, the plaintiff was able to depose the witness and "explor[e] in depth the basis for his [statement.]"

Although Lou Smith is not a current employee of Empire, his entire involvement in this case arises through his former employment with Empire, and his statement was taken by Empire's investigator to assist in evaluating the plaintiff's claim against Empire. As before noted, the plaintiff has not asserted, either in their motion or otherwise, what attempts they have made to secure their own statement from Mr. Smith, and thus have shown no reason why they could not

obtain substantially the same information without invading the realm of opposing counsel's preparatory communications.

III. EMPIRE HAS COMPLIED WITH RULE 26(b)(5)(A) AND THUS PRESERVED THE PROTECTED STATUS OF THE STATEMENT

Empire has maintained and protected its right to withhold the statement that its investigator obtained from Lou Smith by complying fully with Rule 25(b)(5)(A) of the Federal Rules of Civil Procedure.

Rule 25(b)(5)(A) requires that:

When a party withholds information ... by claiming that it is privileged or subject to protection as trial -preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

In answering Plaintiff's Interrogatory No. 4, Empire clearly informed the plaintiff of the existence, identity, and source of the statement and expressly informed the plaintiff that an objection was thereby made to its disclosure.

The plaintiff argues that Empire has "failed to designate and describe the witness statement[,]” and has thus waived the protected status of the statement. (Pl.'s Mot. to Compel at 2.) The plaintiff's argument begs the actual language of the Rule, which requires only that a party "shall describe the nature of the documents ... in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.” Rule 25(b)(5)(a), *supra*. In answering the Interrogatory, Empire clearly described the nature of the document as a "written statement from Lou Smith” that was taken by Investigator John Doe, and stated that an objection was made to disclosing that statement on the basis of privilege. (Def.'s Answer to Pl.'s Interrog. 4.) Such information is more than sufficient to uniquely identify the document in question and provide sufficient context to "enable other parties to assess the applicability of the privilege or protection.”

The plaintiff also suggests that the failure of Empire to attach an affidavit supporting the claim of attorney-client privilege is dispositive because of a requirement found in the Eastern

District of Pennsylvania that claims of attorney-client privilege in interrogatory responses must be supported by an affidavit. (*Rhone-Poulenc Rorer, Inc. v. The Home Indem. Co.*, No. 88-9752, 1992 WL 394425, *8 (E.D. Pa. 1992) (referencing *Barr Marine Products Co., Inc. v. Borg Warner*, 84 F.R.D. 631, 636 (E.D.Pa.1979)). The plaintiff has not offered any authority whatsoever that the same requirement or a similar requirement exists in this jurisdiction, and after diligent research, Empire's counsel has not found any authority from the Middle District of Pennsylvania that would support the plaintiff's assertion that such a requirement also exists in this jurisdiction. Empire has therefore complied with the applicable rules of this Court and taken all necessary steps to preserve the protected status of the statement.

WHEREFORE the defendant requests that this Court deny plaintiff's motion to compel discovery.

Date: _____

/s/ _____
Richard W. McCoy, Esq.
Attorney for Empire Car Rental
Company, Inc.