

1 **WRITTEN DECISION - NOT FOR PUBLICATION**

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ENTERED 6.2.08
FILED
MAY 30 2008
CLERK, U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY JS DEPUTY

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

11 In re) Case No. 04-00769-PB11
12)
12 NORTH PLAZA, LLC,) ORDER ON TRUSTEE'S MOTION
13) TO COMPEL DISCOVERY FROM
13 Debtor.) ISAAC LEI/THE ALCON GROUP
14)

15 Richard Kipperman, chapter 11 Trustee ("Trustee") of the
16 estate of North Plaza, LLC ("Debtor") seeks discovery consisting
17 in part of communications between Isaac Lei/The Alcon Group
18 (collectively "Lei") and counsel for Dynamic Finance Corporation
19 ("Dynamic") and Angela Sabella ("Sabella") (referred to at times
20 collectively "Sabella"). Sabella objected to the discovery on
21 the ground that Lei was serving as her "client representative"
22 and hence the information was protected by the attorney-client
23 privilege. The Trustee brought a motion to compel, which is
24 before the Court.

25 The Court, having conducted an evidentiary hearing and
26 reviewed the authorities cited by the parties, determines that

1 Lei was not serving as "client representative" of Sabella for the
2 purposes of the attorney-client privilege. The "client
3 representative" extension of the attorney client-privilege does
4 not extend so far as to cover Lei under the facts of this case.
5 Accordingly, the Trustee's motion to compel is granted over the
6 objection by Sabella on the ground of attorney-client privilege.

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8 **FACTS**

9 Pursuant to Rule 2004 and this Court's Order dated September
10 19, 2006, the Trustee served the subpoenas to Alcon Group Inc.,
11 Custodian of Records of Alcon Group, Inc., and Isaac Lei on
12 February 16, 2007. Under the subpoenas, Alcon and Lei were
13 requested to appear and produce documents on March 2 and 5, 2007.
14 On February 26, 2007, Lei served the Trustee with an Objection to
15 the Subpoenas, which raised several objections including that
16 Lei's communications with counsel for Sabella were protected by
17 the attorney-client privilege because Lei was serving as "client
18 representative" of Sabella.¹

19 The Trustee filed a motion to compel responses from Lei.
20 After substantial briefing and a lengthy evidentiary hearing, the
21 Court took the matter under submission. For the reasons set
22 forth below, the Court finds that Lei was not acting as a "client
23 representative" of Sabella, and is thus not covered by her
24 attorney-client privilege.

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26 ¹ Although the objection was filed by Lei, counsel for Lei explained that Lei would not
be participating substantively in the matter – that it was "going to be a Dynamic Sabella show..."
See Transcript dated January 29, 2008, at 18:4-5.

1 DISCUSSION

2 "Parties may obtain discovery regarding any nonprivileged
3 matter that is relevant to any party's claim or defense"
4 Fed.R.Civ.P. 26(b)(1). Thus, a discovery request is
5 objectionable under Rule 26(b)(1) if it requests information
6 which is privileged.

7 In deciding whether a particular case presents facts which
8 warrant the recognition and application of a privilege, certain
9 principles apply. Foremost among these is the "fundamental
10 maxim," recognized "[f]or more than three centuries, ... that the
11 public ... has the right to every man's evidence." United States
12 v. Bryan, 339 U.S. 323, 331, 70 S.Ct. 724, 94 L.Ed. 884 (1950).

13 Thus, a court shall start "with the primary assumption that
14 there is a general duty to give what testimony one is capable of
15 giving, and that any exemptions which may exist are distinctly
16 exceptional, being so many derogations from a positive general
17 rule.'" Id., at 323. "Because the privilege 'stands in derogation
18 of the public's "right to every man's evidence, ... it ought to
19 be strictly confined within the narrowest limits consistent with
20 the logic of its principle.'" In re Grand Jury Subpoenas Dated
21 January 20, 1998, 995 F.Supp. 332, 337 (1998) (citations

22 omitted.) It is the party seeking an exception from this
23 principle that bears the burden of establishing the existence of
24 a privilege and its applicability to a particular case. See,

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1 e.g., United States v. International Bhd. of Teamsters, 119 F.3d
2 210, 214 (2d Cir.1997).²

3 The attorney-client privilege prevents disclosure of a
4 communication from a client to a lawyer, where that
5 communication:

6 relates to a fact of which the attorney was informed
7 (a) by his client (b) without the presence of strangers
8 (c) for the purpose of securing primarily either (i) an
9 opinion on the law or (ii) legal services or (iii)
10 assistance in some legal proceeding, and not (d) for
11 the purpose of committing a crime or tort; and (4) the
12 privilege has been (a) claimed and (b) not waived by
13 the client.

11 United States v. United Shoe Machinery Corp., 89 F.Supp. 357, 358
12 (D.Mass.1950); Colton v. United States, 306 F.2d 633, 637 (2d
13 Cir.1962).

14 There is no statutory definition of the attorney-client
15 privilege in the Federal Rules of Evidence (FRE). However,
16 proposed FRE 503 (also referred to as Supreme Court Standard 503)
17 provides guidance which has been used by courts in defining the
18 privilege. The most relevant aspect of Standard 503 is its
19 statement of the general rule:

20 A client has a privilege to refuse to disclose and to
21 prevent any other person from disclosing confidential
22 communications made for the purpose of facilitating the
23 rendition of professional legal services to the client,
24 (1) between himself or his representative and his
25 lawyer or his lawyer's representative, or (2) between
26 his lawyer and his lawyer's representative, or (3) by
him or his lawyer to a lawyer representing another in a
matter of common interest, or (4) between

² Counsel for Sabella acknowledges that she has the burden of establishing that Lei is a
"client representative" because she is the one asserting the attorney-client privilege. See
Transcript dated January 29, 2008, at 14:12-17.

1 representatives of the client or between the client and
2 a representative of the client, or (5) between lawyers
representing the client.

3 Supreme Court Standard 503(b).

4 Supreme Court Standard 503 does not define "representative."
5 However, Uniform Evidence Rule 502(a)(4) also explains that
6 communications between an attorney and a client and a client's
7 representative can be protected.³ Uniform Rule of Evidence
8 502(a)(4) defines "client representative":

9 "Representative of the client" means a person having
10 authority to obtain professional legal services, or to
11 act on legal advice rendered, on behalf of the client
12 or a person who, for the purpose of effectuating legal
representation for the client, makes or receives a
confidential communication while acting in the scope of
employment for the client.

13 The parties to this dispute agree that, as to the law within
14 the Ninth Circuit, the case of Memry Corp. v. Ky. Oil Tech., NV.,
15 2007 U.S. Dist. LEXIS 3094 (N.D.Cal. 2007), adopting the Eighth
16 Circuit decision in In re Bieter Co., 16 F.3d 929, 937 (8th Cir.
17 1994), best sets forth the inclusion of "client representatives"
18 within the attorney-client privilege, at least where the client
19 is a corporation.

20 As stated above, the attorney-client privilege is an
21 exception to the general rule that all information is
22 discoverable, and is thus to be applied narrowly. It is
23 generally destroyed if the client discloses the communications to
24 third parties. The "client representative" concept is a limited

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26 ³ Uniform Evidence Rule 502 has been described as "a clear statement of the scope of
the privilege as now generally accepted." McCormick on Evidence, (6th Ed. 2006).

1 extension of the attorney-client privilege to third parties to
2 whom communications are disclosed if such disclosure is necessary
3 for the client to obtain legal services. This extension, in
4 turn, must also be applied narrowly within the limits of its
5 purpose.

6 Case law shows the "client-representative" to be applicable
7 in two distinct situations. The first is where the client is a
8 corporation and requires communication on its behalf. See e.g.
9 Memry and Bieter. The second is where an individual is in some
10 unique position requiring another to intervene between she and
11 counsel.

12 In Bieter, the court specifically extended the reach of the
13 test it had adopted in Diversified Indus., Inc. v. Meredith, 572
14 F.2d 596 (8th Cir. 1977), from corporations to partnerships and
15 other such entities. However, the court drew the line at
16 individuals:

17 The test we adopted in Diversified, although expressly
18 applicable to corporations and their employees, is not
19 less instructive as applied to a partnership, or some
other client entity (as opposed to an individual), and
its employees...."

20 Bieter, 16 F.3d at 935.

21 Having considered the evidence produced, the Court
22 determines that the line of cases which governs this dispute are
23 those involving an individual. The objection to the Trustee's
24 subpoenas is made in the name of "Dynamic Finance Corporation and
25 Angella C. Sabella." However, the Court finds that with respect
26 to the lending activities in which Lei was involved, it was

1 Sabella the individual that was the lender/client. Though the
2 Court is aware that Sabella conducts business at times in the
3 name of Dynamic, it is clearly her individual business and loans
4 made by her. The testimony at the trial indicated that it was
5 Sabella who made the decision of whether to loan personally or
6 through Dynamic. The relationship with Lei began as a personal
7 relationship between Lei and Sabella's husband. Sabella the
8 individual extended to Lei the opportunity to make money acting
9 as loan broker. In the view of the Court, after considering the
10 evidence, this case is about a personal relationship between
11 Sabella and Lei implemented to carry out Sabella's lending
12 business, which sometimes was funded through Dynamic. Thus, the
13 applicable authority is those cases considering the application
14 of the "client representative" extension of the attorney-client
15 privilege to individuals.

16 In the situation of an individual, courts have recognized
17 the "client representative" extension where the individual client
18 is somehow disabled and unable to conduct their legal affairs.
19 "While individuals can speak for themselves, a corporation must
20 speak through its representatives." Leone v. Fisher, 2006 WL
21 2982145 at 4 (D.Conn. Oct. 18, 2006). "A private person,
22 however, generally has no need for a representative to
23 communicate with an attorney. Only in extraordinary cases ...
24 has the attorney-client privilege been extended to the designated
25 representative of an individual client." In re Grand Jury
26 Subpoenas Dated January 20, 1998, 995 F.Supp. 332, 340 (1998).

1 In the case of an individual, the "client representative"
2 exception was held to apply to communications between counsel for
3 a college student involved in a life-threatening accident and his
4 parents where the client's "injuries and the comprehensive
5 medical interventions necessary to treat those injuries inhibited
6 plaintiff from independently seeking legal counsel." See
7 Hendrick v. Avis Rent a Car Sys., Inc., 944 F.Supp. 187, 189
8 (W.D.N.Y. 1996).

9 The extension was also applied to a mother's communications
10 with counsel on behalf of her son who was incarcerated.

11 Gerheiser v. Stephens, 712 So.2d 1252, 1254 (Fla.App. 1998).

12 Also, communications between the parents of a minor child and the
13 child's attorney. Grubbs v. K Mart Corp., 411 N.W.2d 477, 480
14 (Mich.Ct.App. 1987). In each situation, the communication
15 between counsel and the representative was necessitated by the
16 client's inability, temporary or otherwise, to seek legal
17 counsel.

18 In Leone, on the other hand, the court did not extend the
19 attorney-client privilege to communications between counsel and
20 the client's husband where there was no evidence that the client
21 could not have communicated directly with counsel herself.

22 2006 WL 2982145 at 5.

23 In the case at hand, the Court finds no reason to extend the
24 exception to cover the communications between Lei and counsel for
25 Sabella. The parties asserting the exception have established no
26 "disability" which required Lei to communicate with counsel on

1 Sabella's behalf. The evidence reveals that Sabella is an
2 experienced business woman and that she is fluent in the English
3 language.

4 As already noted, the evidence adduced at the evidentiary
5 hearing made clear that the relationship between Sabella and Lei
6 was a personal one. But assuming, arguendo, that Lei had a
7 relationship with Dynamic that was not already subsumed in his
8 relationship with Sabella, the Court finds and concludes that
9 Dynamic has failed to meet its burden of establishing that Lei
10 was somehow its "client representative" for purposes of
11 invocation of the attorney-client privilege. Lei denies he was
12 an employee of Dynamic or Sabella. He had no equity
13 participation in any of the projects. His only economic interest
14 was in payment of his commissions, which were payable by the
15 borrowers, not by Dynamic or Sabella. In this Court's view, the
16 relationships of Klohs in In re Bieter Co., supra, and Van
17 Moorlegem's in Memry Corp. v. Ky. Oil Tech., NV, supra, are
18 vastly different than Lei's relationship to Dynamic.

19 Accordingly, if the Court considers Lei's relationship with
20 Dynamic separately from his relationships with Sabella (which the
21 facts do not support), the Court finds and concludes Lei's
22 relationship with Dynamic does not support a finding that he was
23 acting as a "client representative" for Dynamic for purposes of
24 shielding his communications with Sabella's (and Dynamic's) same
25 attorneys under the attorney-client privilege.

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CONCLUSION

The facts of this case do not warrant an extension of Sabella's (or Dynamic's) attorney-client privilege to communications between counsel and Lei. Accordingly, the Trustee's motion to compel production of those records with respect to which the privilege was asserted is granted.

IT IS SO ORDERED.

DATE: MAY 30 2008

A handwritten signature in black ink, appearing to read "Peter W. Bowie", written over a horizontal line.

PETER W. BOWIE, Judge
United States Bankruptcy Court