

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

_____)	
JANET JENKINS, ET AL.,)	
)	
Plaintiffs,)	
)	Docket No. 2:12-cv-00184
v.)	
)	
KENNETH L. MILLER, ET AL.,)	
)	
Defendants.)	
_____)	

DEFENDANT RENA M. LINDEVALDSEN’S UNOPPOSED VERIFIED MOTION FOR LEAVE TO SUBMIT POTENTIALLY PRIVILEGED COMMUNICATION FOR *IN CAMERA* REVIEW, WITH INCORPORATED MEMORANDUM OF LAW IN SUPPORT

Pursuant to Local Rule 7, Defendant Rena M. Lindevaldsen (“Lindevaldsen”), by and through the undersigned counsel, hereby files this motion for leave to submit under seal, for the Court’s *in camera* review, a potentially privileged communication she received on March 11, 2020 from someone purporting to be Lisa Miller, so that the Court may offer guidance on whether or not Lindevaldsen may disclose the contents of the communication to Plaintiff, and use the communication in Lindevaldsen’s defense to Plaintiff’s claims in this action, or whether Lindevaldsen is legally and/or ethically prohibited from such disclosure by the attorney-client privilege. In support, Lindevaldsen shows the Court as follows:

1. As previously sworn by Lindevaldsen under oath, the last communication from her former client Lisa Miller was on September 12, 2009, after which Lisa Miller suddenly ceased all communications and disappeared, without any warning or hint to Lindevaldsen or Liberty Counsel. (Dkt. 66-5, p.5, ¶ 9; dkt. 213-2, p.2, ¶ 4).

2. On the afternoon of March 11, 2020 (less than 30 hours before filing this motion), Lindevaldsen received by mail an unsolicited letter from a previously unknown individual (hereinafter “John Doe”), who claims to enclose a letter from Lisa Miller (hereinafter the “Communication”).

3. In their respective letters, both John Doe and Lisa Miller purport to provide facts related to Lisa Miller’s legal situation; disclose legal advice that Lisa Miller purportedly received from other, unnamed legal counsel on issues that are **not** related to remaining a fugitive or avoiding capture; request Lindevaldsen’s advice on various legal questions and issues **not** related to remaining a fugitive or avoiding capture; and request that Lindevaldsen maintain their confidence.

4. This is the first purported contact allegedly from Lisa Miller that Lindevaldsen has received, directly or indirectly, since September 12, 2009.

5. Lindevaldsen has no intent to respond to the Communication, and neither she nor Liberty Counsel intend to represent Lisa Miller or John Doe in any civil or criminal proceeding related to Lisa Miller’s disappearance.

6. Because the Communication is exculpatory, Lindevaldsen desires to disclose it to Plaintiff (it is responsive to Plaintiff’s document requests), and to rely upon it in defending against Plaintiff’s baseless and manufactured claims against Lindevaldsen and Liberty Counsel.

7. However, there are several indicia that the Communication is or may be privileged, and that Lindevaldsen is or may be legally and ethically required to maintain it in confidence, including, without limitation:

a. First, preliminary communications from a potential client to counsel, sent in confidence for the purpose of requesting legal services or legal advice, and not for the purpose of committing a crime or tort, are privileged, even though counsel receiving the communication is

not ultimately retained. *See e.g., In re Grand Jury Proceedings*, 727 F.2d 1352, 1355 (4th Cir. 1984) (“The attorney-client privilege as traditionally recognized at common law and as now incorporated in the Federal Rules of Evidence, controls in all federal judicial proceedings.”); *Feirro v. Gallucci*, No. 06-CV-5189 (JFB)(WDW), 2007 WL 4287707, *7 (E.D.N.Y. Dec. 4, 2007) (“[A]ny communication made during this preliminary consultation is protected by the duty of confidentiality and protected by the attorney-client privilege.”); *Hopkins v. Booth*, No. 16-CV-1020V(F), 2019 WL 4941863, *2 (W.D.N.Y. Oct. 8, 2019); *Egiazaryan v. Zalmayev*, 290 F.R.D. 421, 430 (S.D.N.Y. 2013); *United States v. Gumbaytay*, 276 F.R.D. 671 (M.D. Ala. 2011). As the Court could see from an *in camera* inspection of the Communication, John Doe and Lisa Miller purport to ask numerous, clearly legal questions of Lindevaldsen. They expressly request confidentiality. They relate purported advice received from other counsel, and ask Lindevaldsen to comment upon that legal advice. And they do **not** seek advice to help Lisa Miller remain a fugitive, avoid capture, or otherwise violate the law. While in one instance Lisa Miller purports to write Lindevaldsen “as a friend, not an attorney,” in other instances Lisa Miller requests Lindevaldsen to “please advise” her on legal issues related to her situation, on legal advice she is purportedly receiving from other counsel, and requests advice “**if** not as an attorney, then as a friend.” (Emphasis added).

b. Second, the inclusion of John Doe in the Communication does not necessarily vitiate a privilege claim. For one, John Doe appears to disclose purported facts related to his own situation, and to ask legal questions that do or may affect him as well as Lisa Miller. Beyond that, “[c]ommunications made to counsel through one serving as an agent of the client **to facilitate communication** generally will be privileged,” and “communications to any person whose intervention is necessary to secure and facilitate the communication between an attorney

and client are privileged, [such] as communications through an interpreter, **a messenger or any other intermediary.**” *Oxyn Telecom, Inc. v. Onse Telecom*, No. 01 Civ. 1012 (JSM), 2003 WL 660848, *2 (S.D.N.Y. Feb. 27, 2003) (second modification in original) (emphasis added) (internal quotation marks omitted) (quoting *Stroh v. Gen. Motors Corp.*, 213 A.2d 267, 268 (N.Y. 1st Dep’t 1995) and *Mileski v. Locker*, 178 N.Y.S.2d 911, 915-16 (Sup. Ct. N.Y. Cnty. 1958)). As the Court could see from an *in camera* inspection of the Communication, in addition to discussing his own situation, John Doe claims to be an indispensable intermediary or messenger for Lisa Miller’s obtaining legal advice, and Lisa Miller purports to confirm that claim.

c. Third, Lisa Miller’s status as a fugitive does not waive her attorney-client privilege or disentitle her from confidentially seeking the advice of counsel, if the advice sought is not for purposes of remaining a fugitive, evading capture, or otherwise violating the law. *See e.g., In re Grand Jury Subpoena Duces Tecum*, 391 F. Supp. 1029, 1034 (S.D.N.Y. 1975) (“The fact that Vesco is now in flight from the United States does not bar him from asserting through counsel his attorney-client privilege thereby withholding from the grand jury certain of these papers.”); *United States v. Hurley*, 728 F. Supp. 66, 67 (D. Mass. 1990) (“That the holder of the privilege is a fugitive is not in itself sufficient to deny the client the right to assert it.”); *In re Grand Jury Subpoenas dated March 9, 2001*, 179 F. Supp. 2d 270, 288 (S.D.N.Y. 2001) (“[E]ven though Rich and Green were fugitives, they are not barred by the fugitive disentitlement doctrine from invoking the work product privilege.”). As the Court could see from an *in camera* inspection of the Communication, the advice purportedly sought by John Doe and Lisa Miller is not related to Lisa Miller remaining a fugitive, or evading capture or otherwise violating the law.

d. Fourth, John Doe’s identity and address are arguably protected from disclosure under recognized exceptions to the general rule that a client’s identity is not privileged.

See, e.g., Colton v. United States, 306 F.2d 633, 637 (2d Cir. 1962) (“To be sure, there may be circumstances under which the identification of a client may amount to the prejudicial disclosure of a confidential communication”); *In re Kaplan*, 8 N.Y.2d 214, 218 (1960) (“But there is a distinct cleavage of opinion in this State and many exceptions, some of them for situations where giving out the client's name would serve no necessary purpose but on the contrary would make public the very fact as to which the client desired and was entitled to secrecy.”); *Baird v. Koerner*, 279 F.2d 623, 631 (9th Cir. 1960) (“We conclude there is no federal body of law that requires the exclusion of the identity of the client from the extent of the attorney-client privilege. We believe it must be assessed on a case to case basis, depending on the particular facts of each case.”); *Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb Inc.*, 130 F.R.D. 25, 25–26 (S.D.N.Y. 1990) (“In *Field* and *Stolar*, the court found exceptional circumstances justifying the sustaining of a claim of privilege as to the client's address.” (citing *In re Grand Jury Subpoenas Served Upon Field*, 408 F. Supp. 1169, 1173 (S.D.N.Y. 1976), and *In re Stolar*, 397 F. Supp. 520, 523–25 (S.D.N.Y. 1975))). As the Court could see from an *in camera* inspection of the Communication, John Doe expressly requests confidentiality of his identity and address in connection with the legal advice sought.

8. Lindevaldsen and Liberty Counsel wish to comply with their legal and ethical responsibilities viz any attorney-client privilege, but also wish to comply with their discovery obligations to Plaintiff, as well as comply with all applicable laws and rules, as they have done throughout their previous representation of Lisa Miller and throughout the course of this lawsuit.

9. Lindevaldsen therefore respectfully requests leave from the Court to submit the Communication for *in camera* review, so that the Court may determine whether the Communication is in fact privileged, as Lindevaldsen believes it may be, or whether the

Communication may be disclosed and used in defending against this lawsuit.

10. Prior to filing the instant Motion, counsel for Lindevaldsen conferred with counsel for Plaintiff, who indicated that Plaintiff does not oppose the relief sought herein. Therefore, **Lindevaldsen's motion is unopposed.**

WHEREFORE, for good cause shown, Defendant Rena M. Lindevaldsen respectfully request that this Court grant the instant motion and grant leave for Lindevaldsen to submit under seal, for the Court's *in camera* review, the Communication described herein, and that upon reviewing said Communication, the Court provide guidance on whether or not Lindevaldsen may disclose the contents of the Communication to Plaintiff, and use the Communication in Lindevaldsen's defense to Plaintiff's claims in this action, or whether Lindevaldsen is legally and/or ethically prohibited from such disclosure by the attorney-client privilege.

Respectfully submitted,

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VERIFICATION

I declare under penalty of perjury under the laws of the United States of America that the factual assertions in the foregoing document are true and correct.

Executed on March 12, 2020

/s/ Rena M. Lindevaldsen
Rena M. Lindevaldsen

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March, 2020, I caused a true and correct copy of the foregoing to be electronically filed with this Court. Service will be effectuated on all counsel of record via this Court's ECF/electronic notice system.

/s/ Horatio G. Mihet
Horatio G. Mihet