UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

JANET JENKINS, et al., Plaintiffs, v. KENNETH L. MILLER, et al., Defendants.	No. 2:12-cv-184-WKS

PLAINTIFFS' RESPONSE TO DEFENDANT RENA LINDEVALDSEN'S UNOPPOSED MOTION FOR *IN CAMERA* REVIEW

Plaintiffs Janet Jenkins and Isabella Miller-Jenkins agree with Defendant Rena Lindevaldsen that the recent communications Lindevaldsen received from Defendant Lisa Miller and John Doe should be disclosed to Plaintiffs. *See* Def. Rena Lindevaldsen's Mot. for Leave to Submit Potentially Privileged Communication for *In Camera* Review ("Mot.") ¶ 6, ECF 477. Plaintiffs submit this response in support of that position to raise additional relevant authorities and points of law.

ARGUMENT

Federal common law governs Lisa Miller's and Doe's privilege claim because this action raises both federal and state-law claims. *See In re McCray, Richardson, Santana, Wise, & Salaam Litig.*, 928 F. Supp. 2d 748, 753 (S.D.N.Y. 2013) (citing Fed. R. Evid. 501; *von Bulow v. von Bulow*, 811 F.2d 136, 141 (2d Cir. 1987)). The formulation of the federal attorney–client privilege is familiar:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence

> of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

SEC v. Yorkville Advisors, LLC, 300 F.R.D. 152, 161 (S.D.N.Y. 2014) (quoting *United States v. United Shoe Machine Corp.*, 89 F. Supp. 357, 358–59 (D. Mass. 1950) (Wyzanski, J.)). Lisa Miller and Doe bear the "demanding" burden of establishing each one of these elements. *Jansson v. Stamford Health, Inc.*, 312 F. Supp. 3d 289, 293–94 (D. Conn. 2018) (citing *von Bulow*, 811 F.2d at 146). The privilege is narrowly construed and applies "only where necessary to achieve its purpose" of facilitating open communication between clients and their attorneys. *In re Cty. of Erie*, 473 F.3d 413, 418 (2d Cir. 2007) (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976)).

Based on the admittedly limited facts available to Plaintiffs about the recent communications received by Defendant, Plaintiffs believe the following points of law should guide the Court's review of those communications.

I. No privilege exists without an attorney–client relationship.

The first requirement of the attorney–client privilege is that the party asserting the privilege actually has, or at least intends to have, an attorney–client relationship with the attorney. *Yorkville Advisers, LLC*, 300 F.R.D. at 161. "The key, of course, to whether an attorney/client relationship existed is the intent of the client …." *Newmarkets Partners, LLC v. Sal. Oppenheim Jr. & Cie, S.C.A.*, 258 F.R.D. 95, 100 (S.D.N.Y. 2009) (quoting *United States v. Dennis*, 843 F.2d 652, 657 (2d Cir. 1988)). Doe and Lisa Miller did not have, and could not have reasonably intended to create, an attorney–client relationship with Defendant upon which to base a privilege assertion.

a. The attorney–client relationship between Lisa Miller and Defendant in the underlying custody dispute terminated years ago.

Even when no formal notice of termination is given, an attorney–client relationship terminates when the purpose for which it was created is accomplished or comes to an end. *Calamar Enter., Inc. v. Blue Forest Land Grp.*, 222 F. Supp. 3d 257, 264 (W.D.N.Y. 2016). In January 2005, Lisa Miller engaged Liberty Counsel, including Defendant Lindevaldsen, to represent her regarding "her [custody dispute with Janet Jenkins] in Vermont and her soon-to-be-filed case in Virginia." Aff. of Rena Lindevaldsen ¶ 4, ECF 66-5. That dispute ended on October 29, 2010, when the Vermont Supreme Court affirmed the order of the Rutland Family Court transferring sole physical and legal custody of Isabella Miller-Jenkins to Janet Jenkins. *See Miller-Jenkins v. Miller-Jenkins*, 189 Vt. 518.[1] Moreover, despite Plaintiffs' evidence to the contrary, Defendant has repeatedly asserted that she has not communicated with Lisa Miller since September 12, 2009. Mot. ¶ 1 (citing previous affidavits filed in this case). Defendant has repeatedly stated that she has never represented and has no intention of representing Lisa Miller "in this action or in any civil or criminal proceeding related to Lisa Miller's disappearance." Mot. ¶ 5.

Defendant's role as Lisa Miller's attorney in the underlying custody dispute therefore ended almost a decade ago. *See Calamar Enter., Inc.*, 222 F. Supp. 3d at 265–66 (holding that no continuous attorney–client relationship existed when purpose was accomplished and "no work was performed and no legal bills were rendered" for several years). Accordingly, no assertion of privilege over the current correspondence can be based on that relationship.

[1] The Virginia case ended on May 5, 2010, when the Virginia Supreme Court refused Lisa Miller's petition to appeal the decision of the Court of Appeals of Alexandria requiring registration of the Vermont custody order. *See Miller-Jenkins v. Miller-Jenkins*, No. 0705-09-4, 2010 WL 605737 (Va. Ct. App. Feb. 23, 2010).

b. Neither Lisa Miller nor Doe could reasonably believe that Defendant would represent them.

The attorney–client privilege cannot be asserted over communications made after the client has reason to know that the attorney does not and will not represent them. *Dennis*, 843 F.2d at 657; *Calamar Enter., Inc.*, 222 F. Supp. 3d at 265–66 (holding that purported client's belief in attorney–client relationship was insufficient to create one where belief was "plainly unreasonable under the circumstances"); *see also* 2 Christopher B. Mueller & Laird C. Kirkpatrick, Fed. Ev. § 5:14 (4th ed. 2019) ("The attorney-client relationship comes into being when a person consulting a lawyer *reasonably* believes that the lawyer is willing to undertake, or consider undertaking, professional legal services on behalf of the client." (emphasis added)). Defendant stands accused in this litigation of conspiring with Lisa Miller to kidnap Isabella, an act for which three of her co-defendants have been criminally convicted. Indeed, Defendant has sought to distance herself legally from Lisa Miller since the latter's disappearance in September 2009, going so far as to file a motion to withdraw as her attorney in the Rutland Family Court in January 2010. *See* Mot. to Withdraw, ECF 261-2.

Coupled with Defendant's claim that she has not had any contact with Lisa Miller for nearly a decade, these facts render any belief by Lisa Miller or Doe that Defendant would represent them patently unreasonable. *See Dennis*, 843 F.2d at 657 (person who knowingly attempts to engage an attorney with an obvious conflict of interest "does not need or deserve the protection of the privilege." (internal citation omitted)).

c. Lisa Miller and Doe wrote to Defendant as Lisa Miller's friend, not their attorney.

Lisa Miller and Doe fully understood that Defendant was not and could not reasonably be expected to become their attorney. According to the motion, Lisa Miller's letter says that she

wrote to Defendant "as a friend, not an attorney" and requests advice "if not as an attorney, then as a friend." Mot. ¶ 7(a). The letters also represent that Lisa Miller and Doe consulted other attorneys for legal advice before writing to Defendant. *Id.*

The record in this case is replete with evidence of the friendship between Defendant and Lisa Miller. *See, e.g.*, Rena Lindevaldsen, *Only One Mommy: A Woman's Battle for Her Life, Her Daughter, and Her Freedom: The Lisa Miller Story* 61 (2011) (calling Lisa Miller her "personal friend"). Against this backdrop, Lisa Miller's statement that she writes to Defendant "as a friend, not an attorney" indicates that she and Doe intended to consult Defendant as Miller's friend who happens to be a lawyer, not to form an attorney–client relationship.

The attorney–client privilege does not extend to communications when a lawyer is consulted as a friend rather than as an attorney. *In re Cty. of Erie*, 473 F.3d at 421. This is true even when the lawyer–friend is asked to comment upon the individual's legal situation or discuss legal advice and strategy offered by other attorneys. *See United States v. Tedder*, 801 F.2d 1437, 1442 (4th Cir. 1986) (holding no privilege over discussions of legal strategy with lawyer–friend); *United States v. Salyer*, 853 F. Supp. 2d 1014, 1021 (E.D. Cal. 2012) ("While [defendant's] legal situation is often discussed, the predominate purpose of the conversations is manifestly personal in nature."). Nor does a request for confidentiality, Mot. ¶ 7(a), transform a friendly conversation into an attorney consultation, nor does it create any ethical obligation on the part of the lawyer–friend in the absence of an attorney–client relationship. *See, e.g.*, Vt. R. Prof'l Conduct 1.6 cmt. 1 ("This rule governs the disclosure by a lawyer of information *relating to the representation of a client* during the lawyer's representation of the client." (emphasis added)).

II. Third-party disclosure waives the attorney–client privilege.

Even assuming an attorney-client relationship exists, the attorney–client privilege does not extend to communications disclosed to parties outside the attorney–client relationship. *See*

Yorkville Advisers, LLC, 300 F.R.D. at 161; *see also NXIVM Corp. v. O'hara*, 241 F.R.D. 109, 138 (N.D.N.Y. 2007). The narrow exception for third parties acting as the agents of the attorney or the client extends only to those actually necessary to "improve the comprehension of the communications between attorney and client." *United States v. Ackert*, 169 F.3d 136, 139–40 (2d Cir. 1999). Thus, a client waives the privilege by disclosing privileged communications to a third party who acts as "nothing more than an intermediary" unless the intermediary's role was strictly necessary.[2] *Certain Underwriters at Lloyd's v. Nat'l R.R. Passenger Corp.*, 162 F. Supp. 3d 145, 151–52 (E.D.N.Y. 2016) (citing *Ackert*, 169 F.3d at 139–40). Nor are bare assertions of necessity, without more, sufficient to preserve the privilege. *Id.* (holding that bare assertion that communication through third-party intermediary was the "only way possible" to communicate with lawyers was insufficient to preserve the privilege).

Doe's letter to Defendant apparently indicates that Doe has read Lisa Miller's letter to Defendant. *See* Mot. ¶ 7(b). If so, the letters must also show—in a manner beyond bare assertions—that communication through Doe was strictly necessary for Lisa Miller to communicate with Lindevaldsen. Otherwise, Lisa Miller cannot carry her burden of establishing that disclosure to Doe did not waive any privilege over the letter. *See id.*; *Jansson*, 312 F. Supp. 3d. at 293–94.

[2] Defendant purports to quote *Oxyn Telecommunications, Inc. v. Onse Telecom*, No. 01 Civ. 1012 (JSM), 2003 WL 660848, at *2 (S.D.N.Y. Feb. 27, 2003), to show that communication via "a messenger" or "any other intermediary" preserves the privilege. Mot. ¶ 7(b). But the passages quoted from *Oxyn Telecommunications, Inc.* were in turn parenthetical quotations from New York state court decisions interpreting New York's privilege rules, not the federal common law. *See* 2003 WL 660848, at *2 (citing *Stroh v. Gen. Motors Corp.*, 213 A.2d 267, 268 (N.Y. 1st Dep't 1995); *Mileski v. Locker*, 178 N.Y.S.2d 911, 915–16 (Sup. Ct. N.Y. Cty. 1958). A comparison of these authorities makes clear that New York's agency exception, which permits agents necessary "to *facilitate* communication," *id.*, is broader than that adopted by the Second Circuit, which requires that the agent be necessary to "*improve the comprehension* of the communications between attorney and client," a stricter and narrower exception. *Ackert*, 169 F.3d at 139–40 (emphasis added).

III. The privilege does not apply to Doe's identity.

"[I]n the absence of special circumstances client identity … do[es] not fall within the attorney-client privilege because [it is] not the kind[] of disclosure that would not have been made absent the privilege and [its] disclosure does not incapacitate the attorney from rendering legal advice." *Vingelli v. United States*, 992 F.2d 449, 452 (2d Cir. 1993) (citing cases); *accord Lefcourt v. United States*, 125 F.3d 79, 86 (2d Cir. 1997). A client's identity "is not protected by the privilege even though the client may strongly fear the effects of disclosure, including incrimination." *In re Shargel*, 742 F.2d 61, 63 (2d Cir. 1984).

Under the confidential communication exception, the attorney–client privilege protects a client's identity if "its disclosure would in substance be a disclosure of the confidential communication between the attorney and client." *Vingelli*, 992 F.2d at 452. The Second Circuit has rejected an exception when "there is a strong probability that disclosure would implicate the client in the very criminal activity for which legal advice was sought." *Lefcourt*, 125 F.3d at 87 (quoting *In re Grand Jury Subpoenas (Anderson)*, 906 F.2d 1485, 1488 (10th Cir. 1990)).

Defendant's Motion merely states that "John Doe expressly requests confidentiality of his identity … in connection with the legal advice sought." Mot. ¶ 7(d). Defendant does not explain how the disclosure of Doe's identity would in substance be a disclosure of the confidential communication from Doe. Therefore, his identity is not privileged.

IV. The privilege does not apply to Doe's address.

The general rule that client identity is not privileged also applies to client-identifying information, such as the client's address. *See, e.g.*, *Litton Industries, Inc. v. Lehman Bros. Kuhn Loeb Inc.*, 130 F.R.D. 25, 26 (S.D.N.Y. 1990) (holding client's address was not privileged). However, it too can be privileged under special circumstances, such as if the client's address "is communicated for the specific purpose of receiving legal advice and the address itself is at the

heart of the advice sought." *Matter of Grand Jury Subpoenas Served Upon Field*, 408 F. Supp. 1169, 1173 (S.D.N.Y. 1976) (holding client's address is privileged because "it was in the course of receiving advice from his attorneys concerning relocation and retention of counsel in his new place of residence that [client] revealed the place to which he intended to move").

Defendant's Motion merely states that "John Doe expressly requests confidentiality of his … address in connection with the legal advice sought." Mot. ¶ 7(d). She does not state that Doe communicated his address for the specific purpose of receiving legal advice about his address. Given that Lindevaldsen received Doe's communication by mail, *see* Mot. ¶ 2, it is likely that Defendant knows Doe's address merely because he included it as a return address on the envelope enclosing his letter. Without more, Doe's address is not privileged.

V. The balance of the equities favors disclosure.

As Defendant's motion notes, the letters are responsive to Plaintiffs' document requests. Mot. ¶ 6; *see also* Pls' 1st Reqs. for Produc. of Docs. to Rena Lindevaldsen 8, ECF 361-1 (Request 6 requests "[a]ll … communications concerning Defendant Lisa Miller; Request 8 requests "[a]ll communications with Defendant Lisa Miller."). Moreover, because Liberty Counsel is a defendant in this action as well as Defendant's attorney, permitting Defendant to withhold the letters would unfairly allow two defendants to access them without corresponding access by the Plaintiffs and other defendants. *See, e.g., Wardius v. Oregon*, 412 U.S. 470, 475–76 (1973) ("[D]iscovery must be a two-way street."). Finally, Plaintiffs note that Lisa Miller has also been a defendant in this action since it was filed in August 2012, and that she is also subject to discovery obligations that she has avoided only because of her continuing status as a fugitive from justice. The balance of the equities therefore weighs strongly in favor of disclosure.

CONCLUSION

For the foregoing reasons, the Court should hold that the letters are not privileged and order Defendant Rena Lindevaldsen to disclose them to Plaintiffs.

March 23, 2020

Respectfully submitted.

/s/

J. Tyler Clemons
Southern Poverty Law Center
201 St. Charles Avenue, Suite 2000
New Orleans, Louisiana 70170
Phone: (504) 526-1530
Fax: (504) 486-8947
Email: tyler.clemons@splcenter.org

/s/

Frank H. Langrock
Langrock Sperry & Wool, LLP
111 S. Pleasant Street
P.O. Drawer 351
Middlebury, Vermont 05753-0351
Phone: (802) 388-6356
Fax: (802) 388-6149
Email: flangrock@langrock.com

Sarah Star
Sarah Star, PL
P.O. Box 106
Middlebury, Vermont 05753
Phone: (802) 385-1023
Email: srs@sarahstarlaw.com

Diego A. Soto
Maya G. Rajaratnam
Southern Poverty Law Center
400 Washington Avenue
Montgomery, Alabama 36104
Phone: (334) 956-8200
Fax: (334) 956-8481
Email: diego.soto@splcenter.org

Email: maya.rajaratnam@splcenter.org

Scott D. McCoy
Southern Poverty Law Center
P.O. Box 10788
Tallahassee, FL 32302-0788
Phone: (850) 521-3042
Fax: (850) 521-3001
Email: scott.mccoy@splcenter.org

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that, on this date, the foregoing document was served on the following counsel of record and unrepresented parties through the Court's CM/ECF system:

Richard Boyer
Integrity Law Firm, PLLC
Counsel for Defendant Linda M. Wall

Anthony R. Duprey
Neuse, Duprey & Putnam, PC
Counsel for Defendants Liberty Counsel, Inc. and Rena M. Lindevaldsen

Roger K. Gannam
Liberty Counsel
Counsel for Defendants Liberty Counsel, Inc. and Rena M. Lindevaldsen

Adam S. Hochschild
Hochschild Law Firm, LLC
Counsel for Defendant Linda M. Wall

Brooks G. McArthur
Jarvis, McArthur & Williams, LLC
Counsel for Defendant Kenneth L. Miller

Horatio G. Mihet
Liberty Counsel
Counsel for Defendants Liberty Counsel, Inc. and Rena M. Lindevaldsen

Daniel Joseph Schmid
Liberty Counsel
Counsel for Defendants Liberty Counsel, Inc. and Rena M. Lindevaldsen

Norman C. Smith
Norman C. Smith, PC
Counsel for Defendant Linda M. Wall

Michael J. Tierney
Wadleigh, Starr & Peters, PLLC
Counsel for Defendant Timothy D. Miller

Defendant Philip Zodhiates

March 23, 2020

/s/
J. Tyler Clemons
Counsel for Plaintiffs