

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
 REPLY TO PLAINTIFF’S RESPONSE TO LINDEVALDSEN’S
 UNOPPOSED VERIFIED MOTION FOR LEAVE TO SUBMIT
POTENTIALLY PRIVILEGED COMMUNICATION FOR *IN CAMERA* REVIEW**

The point of Plaintiff Janet Jenkins’ “Response” (dkt. 483) to Defendant Rena Lindevaldsen’s unopposed motion for *in camera* review (dkt. 477) is not clear. Jenkins did not oppose that motion, and, by the time Jenkins filed her purported “Response,” that motion had already been granted by the Court. (Dkt. 478). Moreover, Jenkins readily admits, as she must, that she has only “limited facts” because she has not seen the potentially privileged communication (dkt. 483 at 2), and thus her purported analysis is necessarily based on assumptions and conjecture not useful to the Court. In any event, Lindevaldsen submits the following brief points in reply to Jenkins’ purported “Response,” to assist the Court in determining whether the communication at issue, **or any portion thereof**, is privileged:

1. Given Jenkins’ admission that a communication between potential client and attorney is privileged if, among other things, the communication is “for the purpose of securing ... an opinion on law,” (dkt. 483 at 1-2, quoting *SEC v. Yorkville Advisors, LLC*, 300 F.R.D. 152, 161

(S.D.N.Y. 2014)), Jenkins' admissions that Lindevaldsen's representation of Lisa Miller in the custody litigation ended a long time ago, and that Lindevaldsen has not communicated with Lisa Miller since September 12, 2009, are of no relevance whatsoever to the current inquiry.¹ Neither one of those things would preclude Lisa Miller from purportedly sending a sudden and unsolicited request **to her former lawyer** for "an opinion on law" many years later. As the Court will see in its *in camera* review, both John Doe and Lisa Miller purport to solicit Lindevaldsen's opinion on multiple questions of law (unrelated to Lisa Miller's remaining a fugitive or avoiding capture), which arguably makes their solicitation privileged.

2. Jenkins' claim that John Doe and Lisa Miller could not "reasonably" solicit Lindevaldsen's opinion on **any** questions of law because of an "obvious conflict of interest" arising from being jointly accused in this case (dkt. 483 at 4) presumes too much. As one party to the "conspiracy" alleged by Jenkins, Lisa Miller must know that Lindevaldsen (and Liberty Counsel) were not involved in any "conspiracy," since they never even had knowledge of Lisa Miller's plans to disappear, much less assisted with the disappearance. Moreover, Lisa Miller and John Doe may not even have access to this Court's docket, and may not be aware of the "conspiracy" concocted by Jenkins to include Lindevaldsen and Liberty Counsel. And, since neither Lisa Miller nor John Doe are lawyers, they may not understand the "obvious conflict" posited by Jenkins. In the case cited by Jenkins, *United States v. Dennis*, 843 F.2d 652, 657 (2d Cir. 1988) (dkt. 483 at 4), the "obvious conflict" that made the client's expectation of confidentiality unreasonable was that "the

¹ Jenkins cannot help but to gratuitously throw in a cryptic reference to her supposed "evidence to the contrary," meaning supposed "evidence" that Lindevaldsen and Lisa Miller communicated after September 12, 2009. (Dkt. 483 at 2). Of course, even now, after receiving all of Lindevaldsen's and Liberty Counsel's document production, Jenkins **still** cannot specify or cite **any** such "evidence," which is not surprising because no such evidence exists. Hearsay, speculation and conjecture about a concocted conspiracy involving Lindevaldsen and Liberty Counsel is not "evidence."

client **understood** the attorney refused to act for him **and that the attorney was retained by another person in an adverse position.**” *Id.* (emphasis added). The attorney in question specifically responded to the client’s inquiry by telling him **“he would not represent him and that further communications would be subject to cross-examination.”** *Id.* at 656 (emphasis added). Even so, the Second Circuit had no trouble concluding that the client’s **initial inquiry** to the attorney, before receiving the attorney’s response, was privileged. *Id.* (“**To be sure, initial statements** made while Pilgrim intended to employ Gerace **were privileged even though the employment was not accepted.**” (emphasis added)). Here, Lisa Miller and John Doe presumably could understand an “obvious conflict,” without any explanation from a lawyer, if they knew, hypothetically, that Lindevaldsen was now representing Jenkins. But without the benefit of any legal advice, and without the benefit of any response from Lindevaldsen, they cannot reasonably (a) be charged with knowing what Jenkins’ “conspiracy” entails, (b) be charged with knowing the legal import of Jenkins’ allegations viz any conflict of interest, and (c) be deprived of privilege **over even their initial communication** soliciting Lindevaldsen’s opinion on legal questions.

3. Jenkins’ focus on the past “friendship” between Lisa Miller and Lindevaldsen is also not helpful. (Dkt. 483 at 4-5). For one, there is no “friendship” between John Doe and Lindevaldsen, and he is not writing Lindevaldsen “as a friend” when he solicits her opinion on matters of law. Beyond that, as the Court will be able to confirm *in camera*, notwithstanding Lisa Miller’s purported approaching of Lindevaldsen “as a friend” in one instance, it is clear in other instances that she is seeking Lindevaldsen’s opinion on legal issues, and that she is writing Lindevaldsen because she knows that Lindevaldsen is a lawyer.

4. Jenkins’ argument on third party disclosure (dkt. 483 at 5-6) completely misses the point that John Doe himself is purportedly soliciting Lindevaldsen’s opinion on questions of law,

that he is providing Lindevaldsen with facts (including advice from other lawyers) to assist Lindevaldsen in answering his and Lisa Miller's questions, and that he is the conduit through which Lisa Miller's purported questions reach Lindevaldsen, and without which Lindevaldsen would have never even known of this communication.

5. Finally, with respect to John Doe's identity, Jenkins twice acknowledges that the identity of the client is privileged if "its disclosure would in substance be a disclosure of the confidential communication between the attorney and client." (Dkt. 483 at 7). Given John Doe's express request to Lindevaldsen to keep his identity confidential, there is a very strong possibility that disclosing his identity would be a disclosure of the confidential communication between the putative client and the attorney. As the Court will confirm *in camera*, it is clear from the communication and its context that John Doe would not have written Lindevaldsen – whom he apparently knows to be a lawyer – to impart information and ask for her opinion on legal matters, if John Doe would have thought or known that Lindevaldsen would disclose his identity to others. This is why Lindevaldsen has felt compelled to provide this communication to the Court, so that the Court can make the determination.

6. At the end of the day, Lindevaldsen and her counsel seek only the Court's guidance on how to discharge their discovery obligations to Jenkins, and how to defend properly against Jenkins' claims, without violating any potential attorney-client privilege. This situation is very unusual, and the unsolicited communication at issue, while exculpatory in nature, has many indicia of privilege. Whether or not the unsolicited purported communication from a fugitive and her intermediary – **or at least some part of it** – is privileged, Lindevaldsen and her counsel seek to avoid even the appearance of impropriety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th 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
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