

VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 21-CV-01018

Tina Fleurrey v. Vermont Department of Aging and Independent Living, et al

ENTRY REGARDING MOTION

Title: Motion to Enforce Subpoena, for Contempt and for Imposition of Sanctions
(Motion: 14)
Filer: John J. Boylan, III
Filed Date: June 20, 2023

The motion is GRANTED IN PART.

The present matter before the Court concerns a motion to enforce a subpoena and compel production of documents from a non-party to the current litigation.

Briefly, the present matter before the Court concerns a wrongful death action that has been summarized by the Vermont Supreme Court in *Fleurrey v. Vermont Department of Aging and Independent Living*, 2023 VT 11 (concerning the dismissal of Defendant 3378 VT Route 12, LLC). The remaining Defendants in this matter are Azwala Rodriguez, the decedent's live-in caretaker, and Upper Valley Services ("UVS"), the non-profit organization that oversaw the decedent's care.

Shortly after this action was filed in 2021, UVS contacted its insurer, Philadelphia Insurance Companies to provide coverage. Philadelphia agreed, and it retained Attorney Richard Windish who was practicing with the firm of Hayes Windish & Badgewick. In September 2021, Philadelphia also contacted Defendant Rodriguez and notified her under a reservation of rights letter that it did not interpret its policy to cover Defendant Rodriguez and that Philadelphia would not indemnify Ms. Rodriguez for any judgment entered against her. While Philadelphia was declining indemnity coverage, it nevertheless indicated that it was voluntarily invoking a duty to defend and would be providing legal representation to Ms. Rodriguez at Philadelphia's cost. To represent her, Philadelphia contacted and engaged Gary Karnedy at Primmer Piper Eggleston & Cramer. At the time, Attorney Karnedy and Attorney Windish had separate practices.

In early 2022, Attorney Windish joined Primmer. At that time, it appears that the firm recognized a conflict between the two clients and elected not to continue its representation of Ms. Rodriguez. Philadelphia elected to have Attorney Thomas Simon pick up the representation, which was communicated to Ms. Rodriguez through Attorney Karnedy. Primmer, through Attorney Windish, continued to represent UVS. Primmer claims that Attorneys Karnedy and Windish were walled off from each other's files and did not have access to each other's files. In April 2023, UVS, through Attorney Windish, filed a cross-claim against Ms. Rodriguez. Two months later, Attorney Windish moved to withdraw from representing UVS. Attorney Bonnie Badgewick entered her notice of appearance.

Sometime prior to February 2023, Ms. Rodriguez's insurance through AAA accepted coverage and Attorney Simon was replaced by Ms. Rodriguez's current counsel, Attorney John Boylan. As part of his due diligence, Attorney Boylan has requested Ms. Rodriguez's files from her former counsels, Karnedy and Simon.

The dispute here concerns whether Attorney Karnedy and Primmer have turned over the complete client file. Attorney Karnedy and Primmer contend that they have released all portions of the client file owed to Ms. Rodriguez. They also admit that they have withheld certain documents for which Philadelphia has claimed privilege. It is not clear if these documents lie outside Ms. Rodriguez's client file or if this privilege is being asserted concurrently to Ms. Rodriguez's claim as a client to her files and property.

The nature of insurance defense work creates what is known as a tripartite relationship between the insurer, the insured, and the legal counsel who is retained to defend the insured, but is paid by the insurer. As insurance companies have grown more sophisticated, this relationship has grown more complex. As at least one court has noted, "when an insurer assigns an attorney to represent an insured, the lawyer has a duty to the insurer arising from the understanding that the lawyer's services are ordinarily intended to benefit both insurer and insured when their interests coincide. This duty exists even if the insurer is a nonclient." *Paradigm Ins. Co. v. Langerman Law Offices, PA*, 24 P.3d 593, 602 (Ariz. 2001).

While such relationships "contain rife possibilities of conflict," they are generally allowed. *General Sec. Ins. Co. v. Jordan, Coyne & Savits, LLP*, 357 F.Supp.2s 951, 957 (E.D. Va. 2005) (quoting

Atlanta Intern. Ins. Co. v. Bell, 475 N.W.2d 294, 297 (Mich. 1991)). As the Michigan Supreme Court in *Atlanta Intern.* noted:

[T]he relationship between the insurer and the retained defense counsel, while less than a client-attorney relationship, unquestionably differs from the relationship between a defense counsel and a party-opponent. The relationship differs because “[l]iability insurance policies typically include provisions that both obligate the insurer to provide the insured with a defense and entitle the insurer to control the defense ...[;] the insurer has both a ‘duty’ and a ‘right’ in regard to the defense of the insured...” It has been appropriately recognized that “[defense counsel] occupies a fiduciary relationship to the insured, as well as to the insurance company ... [and] implicitly, if not explicitly, represents to the insured the ability to exercise professional competence and skill in conducting the insured's defense.” Furthermore, because the insurance company, not the client, is required to satisfy a judgment arriving from a defense counsel's malpractice, the client has no real incentive to sue defense counsel.

475 N.W.2d. at 497 (quoting Keeton & Widiss, *Insurance Law* at 822). As noted by Primmer in its reply, some courts have recognized that not only is there an attorney-client relationship between defense counsel and the insurer, but that there are confidentiality duties that may accompany such a relationship. *Spratley v. State Farm Mut. Auto. Ins. Co.*, 78 P.3d 603, 607 (Utah 2003).

It is fair to note, as Ms. Rodriguez does in her response, that this area of law is both far from settled and has very little Vermont precedent. The Court's research, however, has led it to understand that there are general trends that reflect both the reality of insurance defense work and a growing body of case law seeking to parse these issues and address the complex relationship that form in these situations.

In the present case, the Court is aware that Philadelphia provided defense coverage to Ms. Rodriguez pursuant to an insurance policy, which has not been produced or used to explain the terms from this policy that apply to Primmer's representation of Ms. Rodriguez, and presumably govern some of the relationship and expectations of Primmer. This policy is the logical starting point as the reservation of rights letter that began this process expressly states that defense services are to be provided to Ms. Rodriguez “under the terms of the policy.” Ex. E at *1. Without this document, the Court cannot evaluate the parameters or reasonable expectations of the parties entering the Agreement or identify the parameters of Primmer's duties to Philadelphia in contrast or comparison to its duties to Ms. Rodriguez.

For example, does the policy control whether the insurer or insured makes decisions regarding the control and direction of the defense? Who authorized and approved the scope of defense work?

The Court also needs to understand the nature of Primmer's relationship with Philadelphia. Is Primmer's position that there is an implied attorney–client relationship by virtue of Philadelphia's position as the financier? Or has there been an express agreement defining the parameters of the relationship. To the extent that Primmer is seeking to assert privilege over the withheld documents, the Court must understand if this privilege lies solely with Philadelphia or if the privilege for some or all documents are held jointly with Ms. Rodriguez.

Several courts have adopted the Restatement (Third) of the Law Governing Lawyers, which includes section 134, which governs the relationship of parties in these circumstances. This rule requires the insured to know and consent to the circumstances and conditions of such a payment relationship. Mr. Rodriguez's counsel has indicated that she was not aware of these conditions because they were not in the retainer letter sent by Primmer. How was Ms. Rodriguez made aware of the nature of Primmer's relationship with Philadelphia.

As to the documents themselves, the Court would benefit from a Vaughn index that includes (1) the number of documents in each set, (2) a brief and general description of each withheld document or set of documents, (3) the basis for withholding; (4) whether they are part of or outside Ms. Rodriguez's client file; and (5) whether they are subject to an attorney–client privilege shared with Ms. Rodriguez or exclusive to Philadelphia.¹ The Court directs Primmer prepare such an index by September 1, 2023.

Finally, the Court is also aware that there is a key missing party to this motion, namely, the Philadelphia Insurance Company. The Court understands that Primmer has asserted attorney-client privilege over certain documents based on instructions by Philadelphia Insurance Company, but the right to waive such privilege lies solely with Philadelphia under Vermont Rules of Professional Conduct 1.6. Nevertheless, there is a

¹ Although Vaughn indexes are specific to public records cases, the Court is borrowing the concept here to assist in the process of sorting out what document are at issue and the general nature of them.

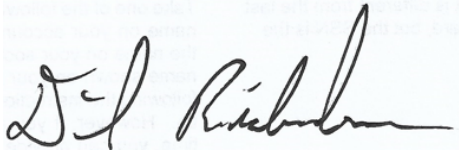
potential conflict created by this situation with Rules 1.15(d) and 1.16, which requires an attorney to return files and documents to a client in a timely manner upon termination of representation, particularly if such files are necessary to protect the client in on-going representation. For the Court to analyze and rule on these documents, it would be a benefit to know Philadelphia's position regarding specific documents. By way of example, the lists of rates that Philadelphia claims to be a trade secret may or may not be part of Ms. Rodriguez's file as it would not be directly relevant to, or a part of, her defense, but it may be an essential part of Philadelphia's attorney-client relationship with Primmer. If so, it would be helpful to understand Philadelphia's interest.

To facilitate this process, the Court will schedule a 45-minute hearing in this matter. Primmer shall provide notice of this hearing to Philadelphia Insurance, who may, if it elects, participate on a limited basis. The purpose of the hearing shall be to provide the Court with additional information regarding the relationship of the parties as outlined above and review the Vaughn index provided prior to the hearing. At the end of the hearing, the Court shall decide if the material sought should be released, withheld, or be subject to an *in camera* review.

As noted above, Primmer shall also produce a Vaughn-index of the withheld documents on or before September 1, 2023.

So Ordered.

Electronically signed on 8/5/2023 1:43 AM pursuant to V.R.E.F. 9(d)

A handwritten signature in black ink, appearing to read "D. Richardson", written over a light blue rectangular background.

Daniel Richardson
Superior Court Judge