NO. HHD CV 16-6065384-S	:	SUPERIOR COURT
KEVIN BLAKE, EXECUTOR OF THE ESTATE OF DORIS BLAKE AND KEVIN BLAKE, INDIVIDUALLY	:	J.D. OF HARTFORD
VS.	:	AT HARTFORD
HARVEST NEW ENGLAND, LLC AND PETER BOWMAN	:	MARCH 17, 2017

DECISION RE: DEFENDANTS' PRIVILEGE AND PROTECTION ASSERTION

This matter comes before the court on the defendants' claim that three documents are protected from disclosure because of the attorney-client privilege, attorney work product protection and because they are materials prepared in anticipation of litigation. The following procedural history is relevant to this decision. The plaintiff, Kevin Blake, brought suit as the executor of the Estate of Doris Blake, his deceased wife, and individually for loss of consortium. The complaint claims that on January 26, 2015 a vehicle driven by the defendant, Peter Bowman, and owned by the co-defendant, Harvest New England, LLC, his employer, crossed the center line of Bushy Hill Road in Simsbury, Connecticut and struck a vehicle driven by the decedent causing her death. Bowman's negligence and recklessness are alleged to have been the cause of the collision. The plaintiffs served standard interrogatories and requests for production and the defendants objected to disclosing: (1) a memorandum detailing a co-employee's recollection of the events of day of the accident (memorandum), (2) notes taken by Wayne Davis, an attorney and vice president of government and regulatory affairs, of an interview of Bowman (interview

cc: Logan + Mencuccini LLC (P)
Hassett + Donnelly PC (D)
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notes) and (3) an e mail from Davis relating to the investigation (e mail.) [1] The defendants assert that all of the above investigation was undertaken at the direction of Matthew L. Vittiglio - an attorney admitted to practice law in Massachusetts - who is the Vice President, Corporate Counsel for Harvest Power, Inc., which, at the time of the fatal accident wholly owned the defendant, Harvest New England, LLC. Vittiglio asserts that he ordered the investigative activities for purposes of assisting him in giving legal advice to Harvest New England, LLC relative to its potential liability.

The memorandum, dated January 28, 2015, was prepared by the co-employee, John de Rahm, an equipment operator and truck driver, and recounts the events of January 26, 2015 from 3:00 p.m. through the next day. It apparently was drafted by him without assistance of counsel but prepared at the request of Sharon Brignano, Site Manager of the Farmington Harvest location who in turn was directed by Vittiglio to have de Rahm prepare the timeline. The interview notes prepared by Davis contain a list of questions, presumably drafted by him, and his notations as to Bowman's answers. The e mail documents Davis' recommendations regarding future strategy, the investigation of the accident and activity related to the investigation.

The plaintiff filed a motion to determine the validity of the asserted privilege pursuant to Practice Book § 13-3 which included a request that the original privilege log provide more information than merely the identity of the "author" and "recipient" of the documents. The

[1] The defendant initially claimed five sets of documents were protected from disclosure but subsequently withdrew the claim as to two of the documents.

plaintiff also requested an in camera inspection by the court of the claimed privileged documents. The court ordered the defendants to provide a more specific privilege log and the defendants thereafter filed a log that provided the information required by Practice Book §§ 13-3(1) through (6). Thereafter the defendant filed a memorandum in support of its objection to the production of the documents it claimed were privileged. Accompanying the objection was the affidavit of Vittiglio. The affidavit additionally avers that he directed Davis to interview Bowman for the purpose of investigating the accident, Harvest's potential liability and for the provision of legal advice to Harvest New England, LLC. He also directed Brigano to ask de Rahm to create a timeline of the events of the day leading up to the accident, also for purposes of permitting him to provide legal recommendations to Harvest. The e mail from Davis was, according to Vittiglio, part of the investigation. Finally, Vittiglio asserts in his affidavit that the documents were prepared in confidence; they were shared only with company employees and later outside counsel, with the expectation of confidentiality and in anticipation of future litigation.

The plaintiff again filed a motion for the court to conduct an in camera review of the documents to which the court assented. The plaintiff argued for the disclosure of the documents on the basis that Harvest New England, LLC and Harvest Power, Inc. are two separate corporations and there is no indication that Vittiglio was acting in a capacity of corporate counsel for the defendant, Harvest New England, LLC. Further, a corporate designee testified at deposition that neither Vittiglio nor Davis were corporate counsel for the defendant, Harvest

New England, LLC. The court received the documents on March 8, 2017 and this order follows the court's review of the documents. The trial is scheduled for May 30, 2017.

I. Attorney-Client Privilege

"As a general rule, [c]ommunications between client and attorney are privileged when made in confidence for the purpose of seeking legal advice." (Internal quotation marks omitted.) *Olson* v. *Accessory Controls & Equipment Corp.*, 254 Conn. 145, 157, 757 A.2d 14 (2000). "In Connecticut, the attorney-client privilege protects both the confidential giving of professional advice by an attorney acting in the capacity of a legal advisor to those who can act on it, as well as the giving of information to the lawyer to enable counsel to give sound and informed advice." *Metropolitan Life Ins. Co.* v. *Aetna Casualty & Surety Co.*, 249 Conn. 36, 52, 730 A.2d 51 (1999).

"A communication from attorney to client solely regarding a matter of fact would not ordinarily be privileged, unless it were shown to be inextricably linked to the giving of legal advice." *Ullmann* v. *State*, 230 Conn. 698, 713, 647 A.2d 324 (1994). The attorney-client privilege is not a blanket one; rather, "[b]ecause the application of [the privilege] tends to prevent the full disclosure of information and the true state of affairs, it is both narrowly applied and strictly construed." *Harrington* v. *Freedom of Information Commission*, 323 Conn. 1, 12, 144 A.3d 405 (2016).

With respect to the application of the attorney-client privilege in a corporate context, there are four criteria that must be present. "[C]ommunications to an attorney for a [corporation]

are protected from disclosure by privilege if the following conditions are met: (1) the attorney must be acting in a professional capacity for the [corporation], (2) the communications must be made to the attorney by current employees, (3) the communications must relate to the legal advice sought . . . from the attorney, and (4) the communications must be made in confidence." *Shew* v. *Freedom of Information Commission*, 245 Conn. 149, 159, 714 A.2d 664 (1998). Protection is also afforded when otherwise protected communications are made by employees to in house corporate attorney, acting in capacity as legal counselor, no less than outside lawyers. See *Upjohn Co.* v. *U.S.*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981) (communications made to general counsel protected by attorney client privilege.) The burden of proving each element of the privilege rests on the party asserting it. *State* v. *Hanna*, 150 Conn. 457, 466, 191 A.2d 124 (1963).

II. Work Product Doctrine

The work product protection is codified in Practice Book § 13-3 which provides that "a party may obtain discovery of documents and tangible things otherwise discoverable ...and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the judicial authority shall not order disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative

of a party concerning the litigation." Practice Book § 13-3(a). "The work product doctrine protects an attorney's interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs and countless other tangible and intangible [items]." (Internal quotation marks omitted). *Barksdale* v. *Harris*, 30 Conn. App. 754, 760, 622 A.2d 597, cert. denied, 225 Conn. 927, 625 A.2d 825 (1993). "Work product can be defined as the result of an attorney's activities when those activities have been conducted with a view to pending or anticipated litigation." (Internal quotation marks omitted.) *Stanley Works* v. *New Britain Redevelopment Agency*, 155 Conn. 86, 95, 230 A.2d 9 (1967). To invoke the doctrine, "[t]he attorney's work must have formed an essential step in the procurement of the data which the opponent seeks, and the attorney must have performed duties normally attended to by attorneys." *Stanley Works* v. *New Britain Redevelopment Agency*, supra, 155 Conn. 95. The protection may be invoked by corporate counsel under the appropriate circumstances. "[I]t makes no difference whether the attorney functions autonomously or in the employ of a corporation in its legal department, so long as he is actually engaged in trial preparation or is preparing the material 'with an eye toward litigation.'" 35 A.L.R.3d 412 (Originally published in 1971). It is axiomatic that "[o]nly documents created 'because of anticipated litigation' may be protected by work product privilege. . . Records and materials prepared in the ordinary course of business, or those which would have been 'prepared in a substantially similar form' even without anticipation of litigation are not protected." *Public Service Insurance Co.* v. *Mount View Realty, LLC.*, No. 3:15CV740(AWT), 2016 WL 4649803, at *1 (D. Conn., Sept. 6, 2016)(interpreting Fed. R. Civ.

P. 26(b)(3) the language of which is similar to that of Practice Book § 13-3.[2] A document falls within the scope of the work-product privilege where it was "created because of anticipated litigation, and would not have been prepared in substantially similar form but for the prospect of that litigation." *United States* v. *Adlman,* 134 F.3d 1194, 1195 (2d Cir.1998).

The United States Supreme Court first addressed the work product doctrine in *Hickman* v. *Taylor,* 329 U.S. 495, 505, 67 S. Ct. 385, 391, 91 L. Ed. 451 (1947) wherein it rejected the disclosure of materials collected by an adverse party's counsel in the course of preparation for possible litigation. The specific documents sought to be disclosed were signed witness statements taken by defendant's attorney and his memoranda regarding his interview of other witnesses "whose identity [were] well known and whose availability to petitioner appears unimpaired." *Hickman* v. *Taylor, supra,* 329 U.S. 509. "Following *Hickman,* the work-product doctrine 'evolved into a two-pronged' approach that consists of both tangible work product (consisting of trial preparation documents such as written statements, briefs, and attorney memoranda) and intangible work product (consisting of an attorney's mental impressions, conclusions, opinions, and legal theories—sometimes called opinion work product)." *State ex rel. Rogers* v. *Cohen,* 262 S.W.3d 648, 654 (Mo. 2008). "At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can

[2] Due to the similarity between the two rules "Connecticut courts have often looked to federal decisions in order to decide . . .work product issues." *Hotchkiss Sch.* v. *Spilbor Painting & Decorating, Inc.*, Superior Court, judicial district of Litchfield, Docket No. LLICV136009540 (2014 WL 4494620, at *3) (August 1, 2014, *Pickard, J.*)

analyze and prepare his client's case." *U.S.* v. *Nobles*, 422 U.S. 225, 238, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975). For this reason, disclosure of an attorney's "notes and memoranda of witnesses' oral statement is particularly disfavored because it tends to reveal the attorney's mental process." *Upjohn Co.* v. *U.S.,* supra, 449 U.S. 399.

III. Findings and Analysis

The court finds, based on Vittiglio' s affidavit, that he was acting in a legal and professional capacity on behalf of the defendant, Harvest New England, LLC, and Harvest Power Inc., in his direction of the litigation and request for the preparation of the documents at issue. Vittiglio directed the investigation and preparation of the documents to assist him in giving legal advice to the defendant at a time when future litigation was reasonably anticipated by him and both corporations. It is true that Vittiglio is identified in his affidavit as corporate counsel only for Harvest Power, Inc. and no evidentiary basis has been provided that he had or has a direct relationship with the defendant, Harvest New England, LLC. However, the plaintiff provides no authority for the proposition that counsel for a parent company, as a matter of law, does not or cannot act in a professional legal capacity for a wholly owned subsidiary in his investigation of liabilities to which the subsidiary, and consequentially the parent company, might be exposed. The court is of the view, and so finds, that Vittiglio was in fact acting on behalf of both Harvest New England, LLC and Harvest Power, Inc. in the capacity of a professional legal adviser when he directed Davis, also an attorney, to interview Bowman and Brigano to request a statement from de Rahm. Thus, if the documents possess the other

attributes required for protection under the attorney-client privilege or as work product they may not be disclosed.

The court is persuaded that the memorandum prepared by de Rahm is protected from disclosure by application of the attorney-client privilege. The court finds that the memorandum was solicited by Vittiglio to assess the legal position of the defendants and to render advice concerning their liability. That it was given initially to Brignano, a fellow employee, does not defeat the privilege. This is so because communications to non-lawyer employees with a "menial or ministerial" responsibility that involves relating communications to an attorney, where the employee acts as an agent of the attorney, retain the cloak of the privilege. *U.S.* v. *Kovel*, 296 F.2d 918, 921 (1961). Thus the second element of the privilege, a communication to the attorney by current employees, is present. The third element, that the communications relate to the legal advice sought, is also present. Here, the enumeration by de Rahm, Bowmen's co-employee, of his activities related to Bowmen during the day of the accident, satisfy this element. Finally, the fourth element, that of confidentiality, is met as to the memorandum. Vittiglio's affidavit, which is credited by the court, avers that the memorandum, as well as the other two documents, were shared only with Harvest employees and later their outside counsel with the expectation that they would remain confidential. The court therefore finds that de Rahm's memorandum is a communication which is entitled to immunity from disclosure under the attorney-client privilege.

As to the interview notes, the court finds that Davis, an attorney, was also acting in a legal capacity at the direction of Vittiglio when he interviewed Bowmen. These notes are clearly the product of "an attorney's activities when those activities have been conducted with a view to pending or anticipated litigation." *Stanley Works* v. *New Britain Redevelopment Agency*, supra, 155 Conn. 95. The plaintiff argues that Davis is not claimed to have had any attorney-client relationship with Harvest New England, LLC because he is employed as Vice President of Government and Regulatory Affairs for Harvest Power, Inc. Similar to Vittiglio, there is no reason why Davis could not or did act in a professional legal capacity for the subsidiary in his investigation of potential liabilities to which the subsidiary, and consequentially the parent company, is exposed. Moreover, Davis' title as vice president of government and regulatory affairs does not foreclose his acting in a professional legal capacity in some other field of law. The court finds that the interview notes are the result of an attorney's activities when those activities have been conducted with a view to pending or anticipated litigation and are thus protected from discovery. *Stanley Works* v. *New Britain Redevelopment Agency*, supra, 155 Conn. 95. A review of the interview notes demonstrates that they are the type of product of an attorney's work that is particularly likely to reflect and reveal the attorney's impressions, areas of strategic interest and theories of a case. For these reasons the court finds that they are protected from disclosure.

Finally, the court finds that portions of the email are privileged. The e mail contains four points of discussion, three of which regard strategy and subjects related to anticipated litigation.

While the court finds that these three were made in confidence by, and to, attorneys acting in a professional capacity as well as employees of the corporations, were related to legal advice and thus are cloaked in the attorney-client privilege. *Shew* v. *Freedom of Information Commission*, supra, 245 Conn. 159. The fourth subject, which appears in paragraph 3 of the February 5, 2015, e mail, is a mere statement of fact that does not relate to the giving or seeking of professional advice and is therefore not protected from disclosure. *Ullmann* v. *State*, supra, 230 Conn.713. The court therefore orders the defendants to disclose the e mail with the redaction of paragraphs one, two and four.

For the foregoing reasons the court finds that the memorandum and interview notes are privileged and protected and the e mail is subject to disclosure with the redactions mentioned above.

BY THE COURT

Cesar A. Noble, J.

CHECKLIST FOR CLERK

Docket Number CV 16-6065384-S

Case Name Kevin Blake, Executor of the Estate of Doris Blake and Kevin Blake, Individually, vs. Harvest New England, LLC and Peter Bowman

Memorandum of Decision dated 3-17-17

File Sealed: yes____ no X

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This memorandum of Decision may be released to the Reporter of Judicial Decisions for publication. X

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HHD-CV16-6065384-S BLAKE, KEVIN, EXECUTOR OF THE ESTATE OF DORIS BLAK Et Al v. HARVEST NEW ENGLAND, LLC Et Al

Prefix: HD4 **Case Type:** V01 **File Date:** 01/20/2016 **Return Date:** 02/09/2016

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Case Information

Case Type: V01 - Vehicular - Motor Vehicles - Driver and/or Passenger(s) vs. Driver(s)
Court Location: HARTFORD JD
List Type: No List Type
Trial List Claim:
Last Action Date: 03/09/2017 (The "last action date" is the date the information was entered in the system)

Disposition Information

Disposition Date:
Disposition:
Judge or Magistrate:

Party & Appearance Information

Party		No Fee Party	Category
P-01	KEVIN BLAKE EXECUTOR OF THE ESTATE OF DORIS BLAKE **Attorney:** LOGAN & MENCUCCINI LLC (421662) File Date: 01/20/2016 733 EAST MAIN ST TORRINGTON, CT 06790		Plaintiff
P-02	KEVIN BLAKE **Attorney:** LOGAN & MENCUCCINI LLC (421662) File Date: 01/20/2016 733 EAST MAIN ST TORRINGTON, CT 06790		Plaintiff
D-01	HARVEST NEW ENGLAND, LLC **Attorney:** HASSETT & DONNELLY PC (432210) File Date: 02/11/2016 100 PEARL STREET 11TH FLOOR HARTFORD, CT 06103		Defendant
D-02	PETER BOWMAN **Attorney:** HASSETT & DONNELLY PC (432210) File Date: 02/11/2016 100 PEARL STREET 11TH FLOOR HARTFORD, CT 06103		Defendant

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