

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
AT CHATTANOOGA**

KENCO GROUP, INC., <i>et. al</i>	)	
Plaintiff,	)	
	)	
v.	)	Case No. 1-20-cv-00129-DCLC- CHS
	)	
JAMES KENNEDY, III	)	
Defendant.	)	

**ORDER**

**I. Introduction**

This matter is before the Court upon Plaintiff's Supplemental Motion to Compel Discovery of certain emails from the smart phone of a non-party witness [Doc. 63]. The Court conducted a hearing on this motion on September 15, 2021. Present were Attorney Tom Gautreaux for Plaintiffs, Attorney Mike Richardson for Defendant, and Attorney Bill Horton for the non-party witness, Gail Caylor. Plaintiffs seek discovery of seven emails from Ms. Caylor's email account. For the reasons stated herein, the motion to compel is **GRANTED** in part and **DENIED** in part .

**II. Background**

Plaintiffs have filed a 95 page amended complaint in this action [Doc. 46] from which the Court gleans the following allegations: In May 2015, Kenco Grp., Inc. ("Kenco"), Jane Kennedy Greene, and James Kennedy III ("Kennedy III"), among others, entered into a settlement agreement to resolve a lawsuit filed by Kennedy III against Kenco and Greene following Kennedy III's exit as CEO at Kenco. As a part of the settlement agreement, the parties agreed not to disparage one another. Plaintiffs allege that, after entry of the settlement agreement, Kennedy III embarked on a campaign of disparagement of Plaintiffs to James Kennedy Jr. (his father and co-founder of

Kenco—hereinafter, "Kennedy Jr.") in an effort to regain control of Kenco. Plaintiffs allege that this was a breach of the settlement agreement by Kennedy III. Plaintiffs further allege that attorney Wayne Peters simultaneously represented Kennedy Jr. and Kennedy III at this time (prior to the arbitration) and assisted Kennedy III in improperly influencing Kennedy Jr., in order to regain control of Kenco. The parties proceeded to arbitration on April 27, 2020, to address whether, among other issues, either side had breached the settlement agreement by disparaging the other. Attorney Mike Richardson represented Kennedy III at the arbitration. Ultimately, the arbitrator found in favor of Kennedy III and against Kenco and Greene.

Plaintiffs have brought this action to set aside the arbitrator's award on the grounds, generally, that the arbitrator exceeded her authority and failed to conduct the arbitration in conformance with the contract and controlling law. More specifically, for purposes of this motion, Plaintiffs allege—as one of several bases to set aside the arbitrator's award—that the arbitrator ignored evidence of spoliation by Kennedy III. The evidence at issue are recordings surreptitiously made by Gail Caylor, a caregiver for Kennedy Jr., during conversations between Kennedy Jr. and others prior to arbitration. Plaintiffs allege that, prior to the arbitration, Kennedy III was instructed by Attorney Wayne Peters to direct Ms. Caylor to delete these recorded conversations. During the arbitration proceedings, Plaintiffs requested production of these recordings from Kennedy III. According to Plaintiffs, Kennedy III produced a grossly inadequate and false privilege log for the recordings, but he produced no recordings. Also during the arbitration, Plaintiffs attempted to subpoena these recordings directly from Ms. Caylor's cell phone and/or email account. Attorney Wayne Peters represented Ms. Caylor for purposes of the subpoenas during the arbitration. According to Plaintiffs, Ms. Caylor produced some documents in response to the subpoenas.

Eventually, she also produced some recordings. However, according to Plaintiffs, an examination of Ms. Caylor's phone revealed that at least 11 recordings had been deleted.

Since the arbitration, some recordings have been produced in a state court action involving the same parties, but, Plaintiffs allege, other have not and some have been destroyed at Kennedy III's direction. Plaintiffs contend that Kennedy III's failure to produce or include an adequate privilege log for these recordings during arbitration resulted in him obtaining a favorable arbitration award by fraud or undue means.

On May 19, 2021, Plaintiffs in this action filed a motion to compel production of discovery of Ms. Caylor's cell phone and her iCloud email account. The cell phone at issue in this particular motion was Ms. Caylor's new cell phone—a phone she did not possess while caring for Kennedy Jr. The Court allowed discovery as to this cell phone because it appears that some data from the first cell phone may have been transferred to the new cell phone. On June 14, 2021, this Court granted the motion [Doc. 61] directing that Logic Force Consulting, LLC ("Logic Force") a professional forensic e-discovery vendor, be given access to Ms. Caylor's iPhone and iCloud email account. The order further directed that Logic Force copy all data from the iCloud email account that is responsive to searches conducted by Logic Force utilizing certain key search terms identified by Plaintiffs' counsel, Mr. Gautreaux, to Ms. Caylor's counsel, Mr. Horton, in an April 23, 2021 email. The Court also ordered that Plaintiffs were entitled to view all the data retrieved by Logic Force pursuant to this process—except for any communications between Bill Horton and his client, Ms. Caylor.

Logic Force conducted the permitted searches and a number of documents have been produced to Plaintiffs. However, Ms. Caylor resists production of seven emails. With respect to most of these emails, counsel for other people (e.g., Attorney Mike Richardson for Kennedy III;

Attorney Bill Horton for Ms. Caylor; Attorney Sam Elliot for Wayne Peters; and/or Attorneys Samantha Lunn and Alan Cates for a trust established by Kennedy Jr.) are recipients of the emails or copied on the emails. Ms. Caylor asserts that these seven emails are protected from production by either the attorney-client privilege or the work product doctrine.

A privilege log was produced simply identifying who sent the email to whom, who was copied on the email, and the date of the email. Mr. Horton provided the Court with copies of the emails at the September 14, 2021 hearing. Given that discovery closed on September 15, 2021, the Court elected to conduct an *in camera* review of the documents rather than direct Mr. Horton to produce a more descriptive privilege log. In a telephone conference with Mr. Gautreaux and Mr. Horton on September 17, 2021, the Court described in detail the nature of each email and the Court's ruling as to whether it would compel production of the email.

### **III. Analysis**

The work product doctrine, first articulated by the Supreme Court in *Hickman v. Taylor*, 329 U.S. 495 (1947), protects two types of information created in anticipation of litigation: (1) opinion work product, *i.e.*, material reflecting the attorney's mental processes, impressions, opinions, or legal theories; and (2) fact work product, *i.e.*, the written or oral information transmitted to the attorney and recorded as conveyed by the client. *Hickman*, 329 U.S. at 511; *In re Columbia/HCA Healthcare Corp.*, 293 F.3d at 294. "The doctrine is designed to allow an attorney to 'assemble information, sift what he considers to be relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference . . . to promote justice and to protect [his] client's interests.'" *In re Columbia/HCA Healthcare Corp.*, 293 F.3d at 294 (brackets original) (quoting *Hickman*, 329 U.S. at 510).

The work product doctrine, as it applies to documents and tangible things, is now embodied in Fed. R. Civ. P. Rule 26(b)(3). Under Rule 26, if documents and other tangible things were prepared in anticipation of litigation by or for the other party—or by or for the other party's representative—a party may obtain discovery of the materials "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Fed. R. Civ. P. 26(b)(3)(A). However, under Rule 26(b)(3)(B), "[i]f the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." *See also In re Columbia/HCA Healthcare Corp.*, 293 F.3d at 294 ("absent waiver, a party may not obtain the 'opinion' work product of his adversary.") A party asserting the work product privilege bears the burden of establishing that the documents he or she seeks to protect were prepared 'in anticipation of litigation.'" *United States v. Roxworthy*, 457 F.3d 590, 593 (6th Cir. 2006) (quoting *In re Powerhouse Licensing, LLC*, 441 F.3d 467, 473 (6th Cir. 2006)).

Work product protection can be waived if it is disclosed to a third party—provided that the third party is an adversary. *In re Columbia/HCA Healthcare Corp.*, 293 F.3d at 307 ("Other than the fact that the initial waiver must be to an 'adversary,' there is no compelling reason for differentiating waiver of work product from waiver of attorney-client privilege"); *see also id.* at 307, n. 29. Disclosure typically only waives work-product protection with respect to any document actually disclosed. *Baylor*, 320 F.R.D. at 442 (internal citation omitted); *see also In re Columbia/HCA Healthcare Corp.*, 293 F.3d at 305-06 (same).

During the September 17, 2021 hearing, the seven emails at issue were labeled one through seven. The Court will discuss each of these emails in relation to their numbers given at the hearing.

**A. Email One**

In email one, dated March 23, 2021, Mike Richardson is forwarding a letter from Attorney John Konvalinka to Bill Horton. The email itself contains a short question related to the status of imaging Ms. Caylor's phone. Copied on the email are Ms. Caylor and Sam Elliot, who currently represents Wayne Peters. It is self-evident that this email was created in anticipation of litigation. The Court finds this email is protected by the work product doctrine and that the work product protection was not waived by sharing this email with Sam Elliot or Ms. Caylor. There is no waiver because Kennedy III (represented by Mike Richardson) is not in an adversarial position with respect to Wayne Peters (represented by Sam Elliot) or Gail Caylor (represented by Bill Horton).

Further the Court concludes that this email is not relevant to the claims or defenses in the case. There is absolutely nothing in this email that supports Plaintiffs' allegations of spoliation of evidence related to Ms. Caylor's phone or email. Plaintiffs contend that the mere fact that Mike Richardson and Bill Horton are discussing Ms. Caylor's phone makes it more probable (*see* Fed. R. Evid. 401) that, during arbitration, Mike Richardson and Wayne Peters (then counsel for Ms. Caylor) communicated about Ms. Caylor's phone and other digital devices in an effort to subvert production. The Court does not agree. Communication about a subject is not evidence of efforts to spoliage, and Mr. Horton was not involved in the arbitration. Further, it is not unusual that Mr. Horton, who is new to this case, might have some questions regarding prior discovery for the lawyers who were involved in the prior matter. Consequently, the Court will not compel the production of email one.

**B. Email Two**

Email two, dated March 23, 2021, is an email from Sam Elliot to Mike Richardson. Bill Horton and Ms. Caylor are copied on the email. Substantively, the message is a brief response regarding the status of imaging Ms. Caylor's phone. For the reasons set forth with respect to email one, the Court finds that this email is protected by the work product doctrine and that it is not relevant to the claims and defenses in this case. The Court will not compel the production of email two.

**C. Email Three**

Email three, dated March 23, 2021, is an email from Bill Horton to Mike Richardson. Sam Elliot is copied. It is a recitation of the factual background of this action as gleaned by Bill Horton from the pleadings, the arbitrator's decision, and depositions. Nothing in this email evinces an attempt to hide or spoliage evidence. It was clearly prepared in anticipation of litigation and is protected as work product. Disclosure of this message to Mike Richardson and Sam Elliot does not result in waiver because these attorneys do not represent clients whose positions are adverse to that of Attorney Horton's client, Gail Caylor. Further, there is nothing in this email, in terms of factual content, that Plaintiffs' counsel could not obtain from another source. The Court will not compel the production of email three.

**D. Email Four**

Email four, dated March 23, 2021, is from Bill Horton to Mike Richardson. Sam Elliot is copied. The subject matter concerns the status of imaging Ms. Caylor's phone. For the reasons set forth with respect to email one, the Court finds this email is protected by the work product doctrine and is not relevant to the claims or defenses in this case. The Court will not compel the production of email four.

**E. Email Five**

Email five, dated May 20, 2021, is an email from Bill Horton to Gail Caylor. Attorney Samantha Lunn, an attorney for a trust established by Kennedy Jr., is copied. The subject matter concerns the trust. It is self-evident that this email constitutes communications between attorney and client for the purpose of receiving legal advice and, therefore, the attorney-client privilege applies. *Reed v. Baxter*, 134 F.3d 351, 356 (6th Cir. 1998) (the attorney-client privilege protects communications from a client to her attorney made for the purpose of obtaining legal advice). However, since this communication was shared with a third party, Ms. Lunn, the attorney-client privilege was waived. *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 294 (6th Cir. 2002) (the attorney-client privilege is waived as to communications which are disclosed to a third party). Ms. Caylor shall produce this email to Plaintiffs.

**F. Email Six**

Email six, dated May 20, 2021, is from Bill Horton to Mike Richardson. Copied on the email are Sam Elliot, Attorneys Alan Cates and Samantha Lunn (as attorneys for a trust established by Kennedy Jr.), and Cindy Richardson, administrative assistant for Mike Richardson. The subject of the email is, once again, the status of the imaging of Ms. Caylor's phone. For the reasons set forth with respect to email one, the Court concludes this email is protected by the work product doctrine and is not relevant to the claims or defenses in this case. The Court will not compel the production of email six.

**G. Email Seven**

Email seven, dated April 12, 2021, is an email from Bill Horton to Mike Richardson. Copied on the email are Attorneys Alan Cates and Samantha Lunn (attorneys for a trust established by Kennedy Jr.), as well as Attorney Mike Richardson's administrative assistant, Cindy

Richardson. The subject of email seven is the status of discovery related to Ms. Caylor's phone. For the same reasons set forth with respect to email one, the Court concludes that this email is protected by the work product doctrine and, further, it is not relevant to the claims or defenses in this case. The Court will not compel the production of email seven.

#### **IV. Conclusion**

For the reasons stated herein, the Plaintiffs' Supplemental Motion to Compel is **GRANTED** in part and **DENIED** in part as follows:

1. Gail Caylor does not need to produce emails 1, 2, 3, 4, 6, and 7.
2. Gail Caylor must produce email 5.

**IT IS SO ORDERED.**

*/s/ Christopher H. Steger*  
UNITED STATES MAGISTRATE JUDGE