UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

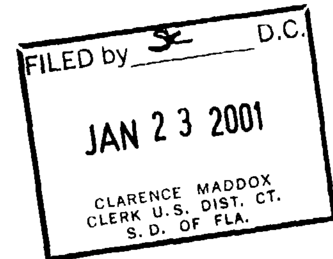
Case Number: 00-3621-CIV-MORENO

LAZARO GONZALEZ; ANGELA GONZALEZ; and MARISLEYSIS GONZALEZ,

Plaintiffs,

vs.

JANET RENO, individually and in her personal capacity; DORIS MEISSNER, individually and in her personal capacity; ERIC HOLDER, individually and in his personal capacity; BETTY A. MILLS; UNKNOWN NUMBER OF AGENTS / OFFICERS OF THE UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE WHOSE NAMES ARE UNKNOWN; AN UNKNOWN NUMBER OF AGENTS / OFFICERS OF THE UNITED STATES BORDER PATROL; AN UNKNOWN NUMBER OF UNITED STATES MARSHALS WHOSE NAMES ARE UNKNOWN; WILLIAM O'BRIEN, individually and in his personal capacity as Chief of the City of Miami Police Department; JOHN BROOKS, individually and in his personal capacity; and the CITY OF MIAMI, a polictical subdivision of the State of Florida,



Defendants.

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ORDER GRANTING MOTION TO COMPEL ANSWERS

Plaintiffs move to compel answers to deposition questions Attorney Donald Appignani to divulge the identities of his clients and the content of certain communications between him and his clients that may be relevant to the above suit. The underlying suit is an action for damages against certain officials and agents of the Federal Government, certain officials and agents of the City of

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Miami, and against the City of Miami in connection with the well-publicized events that occurred during the early morning hours on April 22, 2000 when Elian Gonzalez, a minor, was removed from the Plaintiffs' home and taken into Federal custody, and eventually returned to Cuba.

Attorney Appignani is a labor lawyer representing several U.S. Immigration and Naturalization Service employees who claim to have possible valuable information pertinent to the underlying case. Clients of Appignani instructed Appignani to contact Plaintiffs' Attorney Ronald Guralnick and provide information that employees of the INS had been instructed to destroy or conceal evidence concerning the Gonzalez case. In accordance with the wishes of his clients, Appignani contacted Guralnick in November 2000. At that time, Appignani explained that his clients did not wish to have their identities revealed as they feared retaliation from their employer, the INS. Following several communications with Guralnick, Appignani submitted to a deposition that occurred on December 12, 2000.

During his deposition, Appignani asserted attorney-client privilege when asked the names of his clients and other questions pertaining to communications between Appignani and his clients. Appignani has no first hand knowledge of the events he described, and Appignani is not co-counsel to Plaintiffs' attorneys. Certain questions from his deposition have been certified to this Court for a ruling.

The Plaintiffs essentially present three arguments in support of their motion to compel Appignani's answers. The first is that the identities of Appignani's clients are non-privileged. The second is that Appignani's clients waived their privilege by instructing him to contact and reveal to Guralnick certain information about his clients but not other information relevant to the content of the communications already disclosed. Finally, the Plaintiffs contend that the communications

between Appignani and his clients are not privileged because they pertain to a crime or fraud that may be committed in the future. Plaintiffs also contend that should state law in any way govern the privilege, state law provides no refuge for Appignani's assertion of privilege. Fla. Stat. § 90.502.

The Defendants agree that Appignani should be ordered to disclose the information, but they contend that there is no basis for the crime fraud charge. Appignani opposes the motion on all grounds. The Court finds that the attorney client privilege cannot be asserted to protect the identities of the clients and that, in any event, the clients have waived the privilege by their instruction to their attorney to disclose the information.

Legal Analysis

This Court begins by observing, "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn v. U.S.*, 449 U.S. 383, 389, 101 S.Ct. 677 (1981). However, since it impedes the full and free discovery of the truth, the privilege is to be narrowly construed and recognized only to the limited extent that excluding relevant evidence transcends the normally predominant principle of utilizing all rational means for ascertaining truth. *In re Grand Jury Subpoena*, 204 F.3d 516, 519 (4th Cir. 2000) (citations omitted). This court also notes that the burden is on the party asserting the privilege to demonstrate its applicability. *Id.* at 520.

A. Non-Privileged Matters

The general rule is that the identity of a client falls outside the bounds of the attorney-client privilege. *In re Grand Jury Matter No. 91-01386*, 969 F.2d 995, 997 (11th Cir. 1992); *In re Witness-*

Attorney Before Grand Jury No. 83-1, 613 F.Supp 394, 398 (S.D. Fl. 1984). Appignani asserts that he should not be forced to reveal his clients names because they specifically stated that they did not want them revealed for fear of employment reprisals. Appignani cites Judge Hoeveler's opinion in *In re Witness-Attorney Before Grand Jury No. 83-1* for the proposition that there are certain circumstances where the client's identity is protected by the attorney client privilege. *In re Witness-Attorney Before Grand Jury No. 83-1*, 613 F.Supp 394, 398 (S.D. Fl. 1984). In the case *In re Grand Jury Matter No. 91-01386*, however, Judge Hoeveler denied the motion to compel on the basis that the identity of the clients would yield substantially probative links in a chain of incriminating evidence that would likely lead to the client's indictment. *Id.* at 399.

What Judge Hoeveler articulated was a narrow exception to the general rule that a client's identity is not privileged. The "last link" exception recognized by the Eleventh Circuit extends the attorney-client privilege to non-privileged information when it "protect[s] other attorney-client communications that are privileged where 'the incriminating nature of the privileged communications has created in the client a reasonable expectation that the information would be kept confidential.'" *U.S. v. Leventhal*, 961 F.2d 936, 940 (11th Cir. 1992) (citations omitted).

Plaintiffs and Defendants agree that Appignani's clients' identities are non-privileged under the circumstances. While the parties to the suit acknowledge that privilege can be asserted under the "last link" doctrine where the disclosure of the client's identity reveals the privileged motive for the client to seek legal advice and will incriminate him, the parties contend that is not applicable in the present matter as the motive for the privileged communication has already been revealed. *In re Grand Jury Matter No. 91-01386*, 969 F.2d at 997-98.

Appignani has failed to show how keeping the identities of clients confidential will protect

other privileged communication, and has failed even to plead that his clients names are likely to result in incrimination. The sole basis for his refusal to reveal his clients' identities is not criminal in nature but because his clients feared retaliation from their employers. Though this may be a rational concern for Appignani's clients, it is an insufficient justification for a court to invoke the "last link" doctrine which requires the danger of incrimination. *See In re Grand Jury Matter No. 91-01386*, 969 F.2d at 998 ("This court has applied the 'last link' doctrine only in rare circumstances."). Of course, the I.N.S. employees, as any other workers, benefit from the numerous protections provided by Congress for unlawful retaliation by employers.

B. Waiver

The Plaintiffs argue that the clients of Appignani have caused their attorney to reveal certain privileged communications, therefore the privilege is waived for the yet unrevealed privileged communications. With his client's approval, Appignani contacted Guralnick, and not for the purpose of seeking Guralnick's legal advice. The Defendants agree with the Plaintiffs citing *Cox v. Administrator United States Steel & Carnegie*, 17 F.3d 1386, 1417 (11th Cir. 1994) for the proposition that selective disclosure for tactical purposes waives the privilege.

Appignani counters by asserting that his clients stated clearly that they wished their identities and certain other communications to remain confidential for fear of reprisals from their employer. Appignani also argues that neither the Plaintiffs not the Defendants have exhausted other means of determining this information without having Appignani disclose the information at issue.

Among the factors courts look at to determine whether the attorney-client privilege has been impliedly waived is whether the assertion of the privilege is the result of some affirmative act of the

party asserting the privilege. *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wa. 1975). A closely related factor is whether the asserting party put the protected information at issue by making it relevant to the case. *Id.* Appignani and his clients have clearly engaged in an affirmative act and have put protected information at issue. Therefore they have clearly waived the privilege.

The Eleventh Circuit, however, held in *Cox* that courts generally do not find that there has been an implied waiver "where the party attacking the privilege has not been prejudiced."*Cox*, 17 F.3d at 1417. While the *Hearn* factors are important, neither the Plaintiffs nor the Defendants have articulated how they are prejudiced by Appignani's failure to disclose further communications that occurred between Appignani and his clients, provided their identities are disclosed. Depositions of those witnesses regarding the serious allegations made of ethnic bias and destruction of evidence is the best way to ascertain the truth. If the clients' depositions support the allegations of wrongdoing, then the disclosure of information by using the attorney as a witness, always a disfavored practice, becomes unnecessary. If the depositions of the clients yield no evidence wrongdoing, then the attorney Appignani's disclosure of the content of the client's communication would serve no purpose. Therefore, despite a finding of waiver of the privilege, the Court directs the parties to conduct depositions of the clients first, rendering attorney Appignani's testimony unnecessary at this time.

C. Crime Fraud Exception

Because the Court compels production of the identities of the clients, it need not reach the issue of whether the crime fraud exception to the attorney client privilege applies. The Court notes that the parties have entered into a joint stipulation and incorporated it into an order approved by this

Court that no material relevant to the Elian Gonzalez matter is to be destroyed.

Conclusion

WHEREFORE, the Court compels attorney Appignani to disclose the identities of his clients in order for them to be available for deposition. Although those clients have asserted the attorney client privilege, they can of course, receive the assistance of counsel and invoke any other privilege (e.g. Fifth Amendment, spousal) if supported by the facts and the law. The court acknowledges the representation by attorneys by all parties that it is in the interest of justice to ascertain if the serious allegations of wrongdoing on the part of the government officials occurred in order to take appropriate disciplinary or remedial action.

DONE AND ORDERED in Chambers at Miami, Florida, this 23 day of January, 2001.

FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

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