

IN THE CHANCERY COURT OF TENNESSEE
FOR THE TWENTIETH JUDICIAL DISTRICT

TELISE TURNER,
GARY WYGANT, and
FRANCIE HUNT

Plaintiffs,

v.

BILL LEE, Governor,
TRE HARGETT, Secretary of State,
MARK GOINS, Tennessee Coordinator
of Elections; all in their official
capacity only,

Defendants.

NF
CASE NO. 22-0287-IV

Russell T. Perkins, Chief Judge
J. Michael Sharp, Judge
Steven W. Maroney, Chancellor

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**ORDER DENYING PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF
NON-PRIVILEGED DOCUMENTS AND TESTIMONY**

On September 30, 2022, Plaintiffs filed their Motion to Compel Production of Non-Privileged Documents and Testimony, with supporting exhibits. In summary, Plaintiffs' Motion seeks 1) all non-public draft maps prepared by Attorneys Doug Himes (for the House) and John Ryder (for the Senate) during the reapportionment process; 2) all documents containing substantive communications between General Assembly members and Attorneys Himes and Ryder concerning the reapportionment process; 3) the reopening of Himes' deposition following the production of these documents (Ryder unfortunately passed away without having been deposed); and 4) the production of a supplemental privilege log reflecting withheld documents concerning the Senate reapportionment process. Plaintiffs assert they are not seeking documents or testimony concerning legal advice or requests for legal advice, such as would be protected by attorney-client privilege. They also argue that the documents in question were not prepared under any specific threat of litigation, and are therefore not protected work product.

Defendants' Response in Opposition to Plaintiffs' Motion to Compel was filed on October 17, 2022. Defendants' argument, in summary, is that: 1) Senate Reapportionment Documents are irrelevant and not in their Possession; 2) the documents and testimony sought are protected by attorney-client privilege, the work product doctrine, and legislative privilege; and 3) Defendants' counsel could not produce the requested supplemental privilege log due to the inability to make inquiry of Ryder prior to his passing.

On October 19, 2022, the Panel heard oral argument by telephone. The matter was taken under advisement, and the Panel now delivers its opinion.

Discussion

The attorney-client privilege is the oldest privilege recognized in Tennessee both at common law and by statute. *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 212 (Tenn.Ct.App.2002) (citations omitted). The privilege "encourages full and frank communication between attorney and client by sheltering these communications from disclosure." *State ex rel. Flowers v. Tenn. Trucking Ass'n Self Ins. Group Trust, Inc.*, 209 S.W.3d 602, 615–16 (Tenn. Ct. App. 2006) (citing Tenn. Code Ann. § 23-3-105); *Federal Ins. Co. v. Arthur Anderson & Co.*, 816 S.W.2d 328, 330 (Tenn. 1991)).

The attorney-client privilege, however, is not absolute, and does not encompass all communications between an attorney and a client. For the privilege to apply, "[t]he communication must involve the subject matter of the representation and must be made with the intention that the communication will be kept confidential." *Flowers*, 209 S.W.3d at 616 (citing *Bryan v. State*, 848 S.W.2d 72, 80 (Tenn. Crim. App. 1992)). The privilege is codified at Tennessee Code Annotated § 23-3-105, but whether it applies to a communication is "necessarily question, topic and case specific." *Bryan* at 80 (citing *Johnson v. Patterson*, 81 Tenn. 626, 649 (1884)).

To invoke the protection of the attorney-client privilege, the burden is on the client to "establish the communications were made pursuant to the attorney-client relationship and with the intention that the communications remain confidential." *Flowers*, 209 S.W.3d at 616 (citing *Bryan*, 848 S.W.2d at 80).

The privilege protects both the client's communications to the attorney and the attorney's communications to the client when the communications are based on the client's communications or when disclosure of the attorney's communications would reveal the

substance of the client's communications. *Boyd*, 88 S.W.3d at 213 (citing *Burke v. Tenn. Walking Horse Breeders' & Exhibitors' Ass'n*, No. 01A01-9611-CH-00511, 1997 WL 277999, at *11 (Tenn. Ct. App. May 28, 1997); *Bryan*, 848 S.W.2d at 80)).

The work product doctrine, now set forth in Rule 26.02(3) of the Tennessee Rules of Civil Procedure provides:

Subject to the provisions of subdivision (4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) 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 court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.*

(Emphasis added).

The Tennessee Court of Appeals recently declined to extend the scope of legislative immunity to circumstances presented in a case reviewing the trial judge's use of the doctrine to bar the deposition of outside counsel retained by the City of Knoxville. *Gene Lovelace Enterprises, LLC v. City of Knoxville*, 2021 WL 2395957, *5 (Tenn. Ct. App. 2021). In the same case, however, the Court of Appeals upheld the trial judge's decision to also bar the deposition on the basis of attorney-client privilege and the work product doctrine. The proposed deposition sought to gain information concerning the basis of materials presented to the Knoxville City Council to aid in the City's drafting of a licensing ordinance applicable to sexually oriented businesses. The trial court's order provided the following reasoning:

[Plaintiffs] want to depose [Attorney Bergthold] to show the Court that the data relied upon by the [City] is "shoddy" by using the impressions of [Attorney Bergthold] and his opinions and why he chose the information he chose to present to the City which supported his conclusions. *The Court is of the opinion that those*

things are clearly covered by the attorney-client privilege as [Attorney Bergthold] was hired by the City to help them develop the ordinance which is a legal function and something that the City Attorney does on a regular basis. To rule otherwise would open up the City Attorney to being deposed every time someone decided to question the efficacy of an ordinance prepared by that office. Questioning [Attorney Bergthold] as to why he chose the information he chose will not test whether the data relied on was based on shoddy work by those who developed it. That would have nothing to do with the data but [Attorney Bergthold's] opinions as to why he chose the data he chose. Any documents that were filed with the ordinance or in support thereof are now public record and have clearly lost any protection of attorney-client privilege and are discoverable. [Plaintiffs have] the right to hire their own expert who can examine those documents and make whatever determination and reach whatever conclusions about or opinions she or he may make. Any statements made by [Attorney Bergthold] in a public forum have also lost any attorney-client privilege but have already been disclosed. However, [Attorney Bergthold's] thoughts, impressions, [and] reasoning as to why he decided to use certain information in making his recommendation is covered by the attorney-client privilege and work product and therefore not discoverable.

Id. at 2, 3 (emphasis added).

In the present case, the Panel adopts the logic of the trial judge and appellate court in *Lovelace*. The Panel declines to extend the scope of legislative immunity to the subject of the present Motion to Compel.

However, the last sixty years have demonstrated that Tennessee's decennial redistricting process routinely and regularly invites litigation, which is anticipated as part of the redistricting process. It was logical for the members of the General Assembly to engage counsel to provide guidance in the drafting of the redistricting legislation for the purpose of withstanding legal challenges to such legislation. The Panel therefore dismisses Plaintiffs' argument that the documents in question were not prepared under any specific threat of litigation so as to make the work product doctrine inapplicable.

To lay bare the communications between members of the General Assembly and their counsel would have a chilling effect on "full and frank communications" between

attorneys and clients, particularly troublesome since the redistricting process is one which will likely repeat after each succeeding decennial census, not to mention the anticipated litigation which will likely follow each such process.

Therefore, the Panel finds that the thoughts, impressions, and reasoning employed by Attorneys Himes and Ryder in recommending certain maps, in considering and declining to recommend other maps, including draft options initially created and subsequently abandoned, as well as the maps, data, documents, and materials created in forming these thoughts, impressions, and reasoning, are covered by the attorney-client privilege and work product and therefore not discoverable.

Likewise, the communications between the members of the General Assembly and Attorneys Himes and Ryder, which both generated and responded to those thoughts, impressions, and reasoning, including any the maps, data, documents, and materials exchanged within those communications, are also covered by the attorney-client privilege and work product and therefore not discoverable.

The Panel declines to address the issue raised by Defendants concerning their alleged lack of possession of the documents at issue, as this has been rendered moot by the Panel's ruling above.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Motion to Compel is respectfully DENIED.

s/Russell T. Perkins
RUSSELL T. PERKINS,
Chief Judge

s/J. Michael Sharp
J. MICHAEL SHARP
Judge

s/Steven W. Maroney
STEVEN W. MARONEY
Chancellor

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 **MAILED** 
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