

ANSWER TO MPT

STATE OF FRANKLIN GORDON COUNTRY DISTRICT COURT

In re Grand Jury Proceeding 11-10,
SUBPEONA Hammond Container Company

MOTION TO QUASH
DUCES TECUM

ARGUMENT

I. Under the Franklin Rules of Professional Conduct, a lawyer has a duty not to reveal confidential information related to the representation of client, and maintains complete discretion to reveal such information regardless of the circumstances.

The Franklin Rules of Professional Conduct states unambiguously that "a lawyer shall not reveal information relating to the representation of a client..." See FRPC Rule 1.6(a). However, a lawyer may reveal such information under three circumstances: 1) if the client gives informed consent, 2) the disclosure is impliedly authorized in order to carry out the representation, or 3) under FRPC Rule 1.6(b). *Id.* FRPC Rule 1.6(b) also gives the lawyer complete discretion in determining whether to reveal confidential information from a client, explicitly stating that a lawyer "may reveal" confidential information to the extent "the lawyer reasonably believes necessary" under certain circumstances. See FRPC Rule 1.6(b). One of those circumstances under FRPC Rule 1.6(b) is "to prevent, mitigate or rectify substantial injury to the financial interest or property of another that is reasonably certain to result...from the client's commission of a crime of fraud." See FRPC Rule 1.6(b)(3). Once again, however, even if those circumstances are met, an attorney still maintains complete discretion over whether he or she must reveal the confidential communication from the client.

In this case, Attorney Walker is under no obligation to reveal any confidential communication made to her by her client, William Hammond, in the course of her representation of Mr. Hammond. Mr. Hammond has not given Attorney Walker informed consent to reveal any confidential communications, nor is disclosure of any confidential communication impliedly authorized by Mr. Hammond in order for Attorney Walker to carry out her representation of him. See FRPC Rule 1.6(a). Even if those circumstances were present, Attorney Walker would be under no obligation to reveal the confidential communication, because under no circumstances does FRPC Rule 1.6(a) require disclosure by an attorney representing client. *Id.* Additionally, Attorney Walker is not under any obligation to reveal confidential communications from Mr. Hammond under FRPC Rule 1.6(b), as that rule gives Attorney Walker complete discretion to reveal information to the extent that Attorney Walker finds such disclosure "reasonably necessary." See FRPC Rule 1.6(b). Whether the circumstances under FRPC Rule

1.6(b)(3) have been met in this case are irrelevant, because even if Attorney Walker was "reasonably certain" that Mr. Hammond intended to commit a crime or fraud through her service (which Attorney Walker does not have enough information to believe), she could not be compelled to disclose such information under the rule. See FRPC Rule 1.6(b)(3). Nor does the Gordon County District Attorney have the right to compel such information from Attorney Walker, as such action would require Attorney Walker to violate the Franklin Rules of Professional Conduct and subject herself to professional reprimand, since Attorney Walker does not feel it is reasonably necessary to reveal any information that she received from Mr. Hammond under FRPC Rule 1.6(b)(3). *Id.*

For the reasons above, this Court should quash the subpoena *duces tecum* that requires Attorney Walker to reveal confidential client communication in violation of the Franklin Rules of Professional Conduct.

II. Because the attorney-client privilege is a cherished and highly important legal right, the court should adopt the more stringent "probable cause" standard to determine whether the party seeking to compel disclosure of privileged attorney-client communications has provided sufficient evidence to show that the client attained the attorney for improper purposes.

The Franklin Rules of Evidence state that a "client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communication made for the purpose of facilitating the rendition of professional legal services to the client." See FRE Rule 513(b). In addition, an attorney may assert the client's attorney-client privilege on the client's behalf when a party seeks to compel the attorney from disclosing confidential client communications. See FRE Rule 513(b)(3). However, if a client seeks the services of an attorney "to enable or aid" the client in a crime or fraud, then the attorney-client privilege will not apply to the statements made to the attorney by the client in the course of the representation. See FRE 513(d)(1). When a party seeks to compel attorney testimony regarding privileged client communications under the FRE Rule 513(d)(1) exception, the moving party bears the burden of proof by a preponderance of evidence. See FRE 513(d)(1), Comment 3. However, prior to showing proof by a preponderance of evidence, the moving party may compel the party seeking to keep the communication privileged to disclose the confidential communication *in camera*. *Id.* Franklin courts have yet to determine the standard to apply to compel an *in camera* disclosure, and other courts that have addressed the issue are split on which standard to apply. *Id.* The Columbia Supreme Court applies a "probable cause" standard, which requires a showing that establishes probable cause that "the client sought or obtained the attorney's services to further a crime or fraud." See *State v. Sawyer* (Columbia Sup. Ct. 2002). The 15th Circuit has adopted a lower standard, requiring only that the moving party show "some evidence" that the client obtained the attorney's service to perpetrate a crime or fraud. See *United States v. Robb* (15th Cir. 1999).

While Attorney Walker urges the court to adopt the more stringent "probable cause" standard in order to protect the cherished attorney-client privilege, Attorney Walker asserts that she cannot be compelled to disclose Mr. Hammond's confidential

communications under either standard. In *Sawyer*, the Columbia Supreme Court found that an attorney was not required to disclose confidential communications where "evidence would support an inference that [the attorney was retained] to facilitate perjury [and there was] an equally strong inference that [the attorney was retained] to ensure that his choices were informed." See *State v. Sawyer* (Columbia Sup. Ct. 2002). In this case, the facts suggest that there is an equally strong inference that Mr. Hammond retained Attorney Walker to protect himself from potential criminal liability for the fire to his business as there is to suggest that Mr. Hammond retained Attorney Walker to perpetrate fraud upon the Mutual Insurance Company. Whether Mr. Hammond committed the arson or not, he is entitled to legal representation to protect himself from criminal liability because he is a suspect in the arson. See Gordon Police Incident Report. In addition, while there is circumstantial evidence that Mr. Hammond may be attempting to commit fraud against Mutual Insurance (the false alibi, the request for claim forms), that evidence does not suggest that Mr. Hammond retained Attorney Walker to perpetrate the fraud. Rather, the facts only point to suggest that Mr. Hammond retained Attorney Walker to protect himself from criminal liability, and that is not enough under the probable cause standard to suggest that Mr. Hammond's attorney-client privilege should be negated.

In addition, under the "some evidence" standard in *Robb*, Attorney Walker cannot be compelled to reveal Mr. Hammond's statements. In that case, the court compelled disclosure from the attorney where there was evidence that the attorney was retained in the midst of a fraudulent scheme, the attorney was the primary source of legal advice, the attorney had regular contact and access to all client information, and there was actual fraud present. See *United States v. Robb* (15th Cir. 1999). In this case, while Attorney Walker was Mr. Hammond's sole source of legal advice and she may have been retained during a fraudulent scheme of Mr. Hammond, there is no evidence that any fraud has actually occurred yet, nor is there evidence that Attorney Walker has had access to all of Mr. Hammond's records or had regular contact with him (although we may presume she has had regular contact and access as Mr. Hammond's attorney). Additionally, Attorney Walker did not have any information from Mr. Hammond that would suggest that he intended to commit fraud against Mutual Insurance. The fact that no evidence of fraud can be shown and that Mr. Hammond has a right to legal counsel to protect himself from criminal liability for the arson should be sufficient to prevent the Gordon County District Attorney from showing "some evidence" of Mr. Hammond retaining Attorney Walker to perpetrate fraud under the *Robb* standard.

For the reasons above, this Court should quash the subpoena *duces tecum* that requires Attorney Walker to reveal confidential client communication in violation of the Franklin Rules of Evidence and adopt the "probable cause" standard to determine whether the party seeking to compel disclosure of privileged attorney-client communications has provided sufficient evidence to show that the client retained the attorney for improper purposes.