IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

In the Matter of the	)	
	)	
2021 REDISTRICTING PLAN.	)	Case No. 3AN-21-08869CI
	)	

ORDER RE *IN CAMERA* REVIEW OF MS. BAHNKE'S NOTES
(DENYING PRODUCTION)

During the recent deposition of board member Malanie Bahnke, a dispute arose concerning notes she apparently made during a "deposition prep" session with her attorneys. Valdez' counsel asked for production of the notes after Ms. Bahnke appeared to review the notes during the deposition. The Board objects, citing attorney-client privilege and work-product. The Court was called, and ordered the notes, along with the transcript submitted for the Court's *in camera* review. Valdez has also submitted a copy of the deposition video. The Court has independently reviewed all of the submitted materials, and now denies production of the notes.

I. THE DISPUTE

This dispute clearly arose because Ms. Bahnke was unable to be present with her lawyers for either preparation or the deposition itself. The Board's counsel has asserted he was unaware that Ms. Bahnke made any notes during their preparation session, and he certainly would have instructed her to leave the notes outside the deposition room had they been together. The Court has no reason to doubt that assertion.

It is also clear from the video that Ms. Bahnke appeared to review the notes at a few points during the deposition. The parties dispute whether she was "glancing" at the notes or studying them in more detail. If the record were clear that the notes had refreshed Ms. Bahnke's recollection about a topic she was previously unable to remember, the notes would likely be subject to disclosure. But the record is not so clear.

II. THE NOTES

More importantly, the Court has reviewed the notes and they appear to be precisely what counsel and the witness suggested they were during the deposition. The notes contain brief summaries of what each of the 5 plaintiffs are claiming in this litigation. There are other miscellaneous words that may or may not reflect comments made by Ms. Bahnke's attorney during her conversation with him. Both the attorney-client privilege and the attorney work product doctrine are implicated.

III. APPLICABLE LAW

A. The Attorney-Client Privilege

Alaska Rule of Evidence 503 provides that a client has a privilege to refuse to disclose confidential communications made between lawyer and client for the purpose of facilitating the rendition of professional legal services to the client.[1] "The attorney-client privilege protects confidential disclosures made by a client to an attorney in order to obtain legal advice ... as well as an attorney's advice in response to such disclosures."[2] Alaska has long recognized the privilege, both as part of the common law, and in the Rules of Evidence.[3] Generally, the attorney-client privilege under state law is nearly absolute, assuming the limited number of exceptions are not applicable.[4] Still, concerned about possible abuse of the privilege, the Alaska Supreme Court has held "that the scope of the attorney-client privilege should be strictly construed in accordance with its purpose."[5] Because it may impede discovery of the truth, the attorney-client privilege is strictly construed.[6]

Not all communications by a lawyer to a client, or vice versa are protected by the privilege. The communication must be made for the purpose of facilitating legal advice.[7]

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[1] Alaska R. Evid. 503(b).
[2] *United States v. Ruehle*, 583 F.3d 600, 608 (9th Cir. 2009).
[3] *See Griswold v Homer City council*, 428 P3d 180, 187 (Alaska 2018).
[4] *Am. Nat. Watermattress Corp. v. Manville*, 642 P.2d 1330, 1332 (Alaska 1982).
[5] *Langdon*, 752 P.2d at 1004 (citation omitted).
[6] *Ruehle*, 583 F.3d at 607; *USAA v Werley*, 526 P.2d 28, 31 (Alaska 1974); *see also Cool Homes, Inc. v Fairbanks North Star Borough*, 860 P.2d 1248, 1261-1262 (Alaska 1993) ("The privilege should not be applied blindly"—applying attorney-client privilege narrowly in the context of a public body).
[7] Alaska R. of Evid. 503(b).

"When an attorney is merely acting as a conduit for information, i.e., as a messenger, the privilege is inapplicable."[8]

B. Attorney-Work Product

The work product doctrine is distinguished from the attorney-client privilege. The work product doctrine protects the mental impressions, opinions, legal theories and strategy of an attorney. In order to qualify for "work product" protection, three requirements must be met. "The material involved must be (1) a document or other tangible thing, (2) prepared in anticipation of litigation or for trial, and (3) prepared by or for the opposing party's attorney or representative.[9] If these requirements are met, the party seeking discovery must then show substantial need and undue hardship before he will be entitled to such materials."[10]

Courts have recognized the need to protect the mental impressions of the attorney as "opinion work product."[11] And Rule 26(b)(3)(B) refers to the opinions of "a party's attorney or other representative," providing protection of the impressions of agents and others assisting in preparation of the case, not just the attorney themselves.[12]

If the notes are work product, then Alaska Rule of Civil Procedure 26 contemplates disclosure of work product materials only upon showing the party has a substantial need of the materials and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.[13]

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[8] *Downie v Superior Court*, 888 P.2d. 1306, 1308 (Alaska App. 1995) (holding that attorney's act of communicating trial date to client is not protected communication; quoting Stephen A. Saltzburg, Michael M. Martin, & Daniel J. Capra, Federal Rules of Evidence Manual (6th ed. 1994), Vol. 2, p. 595.)
[9] *Langdon v. Champion*, 752 P.2d 999, 1005 (Alaska 1988) (citations omitted).
[10] *Id.*
[11] Many federal courts note that opinion work product is nearly immune from discovery and can only be discovered in "extraordinary" circumstances, without further clarifying what circumstances might be sufficient. *See Vinson & Elkins*, 124 F.3d at 1307 (citing Fed. R. Civ. P. 26(b)(3) and *Upjohn*, 449 U.S. at 401–02); *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977) ("... opinion work product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances"); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 732 (4th Cir. 1974) (holding opinion work product is immune from discovery); The Work–Product Rule—Mental Impressions and Legal Theories, 8 Fed. Prac. & Proc. Civ. § 2026 (3d ed.) (collecting some cases).
[12] *Id.*
[13] Alaska R. Civ. P. 26(b)(3).

C. Waiver

Both attorney-client and work product privileges may be waived. Such waiver may be either explicit or implicit; implicit waiver is determined by operation of the *Hearn* test.[14] A party may waive attorney-client privilege to certain subject matter without fully waiving privilege for his representation as a whole.[15] "A party may not selectively disclose privileged communications that it considers helpful while claiming privilege on damaging communications relating to the same subject."[16]

IV. DISCUSSION

In this case, it is plain from the Court's review of the notes that they were taken during a discussion with counsel. The notes are not detailed, but are organized and describe in summary fashion the claims made by each Plaintiff. It is apparent that the notes reflect the mental impressions and work product of counsel as to what is significant. It is also apparent that the notes were made by the witness in this case because she was seeking legal advice about the lawsuit, and her potential testimony. Accordingly, the notes are protected by both the attorney-client privilege and the work-product doctrine.

The harder question is whether the privilege has been waived because Ms. Bahnke reviewed the notes during her deposition. It is clear to this court that the witness made an innocent mistake. It was caused by both the rushed nature of this litigation, and the fact that she was stuck in another state because her flight home from a holiday vacation was cancelled. In any other deposition, the notes would not have come out, and would not have been reviewed during the deposition. Therefore, there is no intentional waiver.

To the extent the notes are work product, and that appears to be the case, the Plaintiffs have not made a sufficient showing of "substantial need" to gain access.

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[14] *Gefre v Davis Wright Tremaine, LLP*, 306 P.3d 1264, 1280 (Alaska 2013); *Hearn v Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975).
[15] *Hernandez v Tanninen*, 604 F.3d 1095, 1100 (9th Cir. 2010).
[16] *Handguards, Inc. v Johnson & Johnson*, 413 F.Supp. 926, 929 (N.D. Cal 1976).

Plaintiffs certainly know the theory of their cases, and they do not need a summary made during a depo prep session to tell them what's important about the case.

Further, if anything, this represents an inadvertent disclosure. Such disclosures are routinely made the subject of "claw back" agreements. Indeed, the parties have already discussed the need for such provisions in this case because of the rapid pace of discovery. As an inadvertent disclosure, the court finds no waiver.

Moreover, since the deposition in question was a discovery deposition, there is nothing that will prevent counsel for Valdez from cross-examining the witness about the same subjects at trial, and making appropriate arguments about the weight to be given the witness' testimony.

Finally, and most significantly, the Court has reviewed the notes in the context of the questions being posed to Ms. Bahnke at the time. From the Court's view, there is nothing contained in the notes that likely refreshed Ms. Bahnke's memory in any way that informed or altered her subsequent testimony. In the ordinary course of testimony, where a witness does not recall when responding to a question, a document or notes might be used to refresh the witness' memory. Here, there may be an *appearance* of such an action. But having reviewed the notes, the Court does not believe that is what happened.

For the foregoing reasons, the request for production of Ms. Bahnke's notes is DENIED.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 13th day of January, 2022.

Thomas A. Matthews
Superior Court Judge

I certify that 1/13/22 a copy of this Order was sent to the following:

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