

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 VALDEZ’S MOTION FOR CLARIFICATION AND RECONSIDERATION  
OF ORDER ON ORAL MOTION**

The Valdez Plaintiffs seek clarification and reconsideration of a portion of the Court’s order relating to *in camera* review and Valdez’ oral motion for the court to conduct a further review.<sup>1</sup> The Motion is Granted to the extent that Valdez is asking the Court to accept clarification of the oral motion Valdez made on the record.<sup>2</sup> The Motion is denied to the extent that Valdez is asking the Court to undertake an additional *in camera* review of documents with the title “VRA”, “Valdez” or “Mat-Su.”

Valdez’s request essentially asks this court to engage in the process of *in camera* review in the hope that non-privileged documents may be found by the court that would be helpful to the Plaintiffs’ case. While that goal is understandable, that is not the Court’s role. *In camera* review is not conducted by the Court simply because a party requests it. As a threshold matter, there must be some showing that there is a legitimate reason to question the assertion of privilege before the court will engage in the review.

The Alaska Supreme Court addressed the process for *in camera* review where a party seeks to defeat the privilege in *In Re Mendel*.<sup>3</sup> The *Mendel* case specifically involved the “crime or fraud” exception to the attorney-client privilege, but both the policy and the process used by the court are relevant to this case. The Court first noted the policy underlying the attorney-client privilege “is to promote the freedom of consultation of legal advisors by clients by removing the apprehension of compelled disclosure by the legal

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<sup>1</sup> *Order Following In Camera Review and for Production of Additional Privileged Documents for In Camera Review* (January 22, 2022.)

<sup>2</sup> Valdez’s oral motion was made on the record during the Discovery hearing on January 19, 2022.

<sup>3</sup> *In Re Mendel*, 897 P.2d 68, 73-74 (Alaska 1995).

advisors.”<sup>4</sup> The Court went on to require the party seeking discovery of the communications between the attorney and the client to present *prima facie* evidence of a fraud or crime in the attorney-client relationship.<sup>5</sup> In addition, the privilege would only cease to exist for ongoing and future wrongdoing, not past wrongdoing.<sup>6</sup> Finally, the *Mendel* Court set forth the procedure to follow if an *in camera* review is conducted:

The trial judge should redact the attorney's mental impressions, conclusions, opinions or legal theories as well as any privileged attorney-client communications which are unrelated to the subject matter of the litigation. The court should then give the attorney the opportunity to examine the redacted records and make any arguments as to why any of the unredacted material is subject to the absolute privilege discussed in Rule 26(b)(3). Only at this point should the relevant, unprivileged information be produced.<sup>7</sup>

Turning to the request in this case, Valdez (and the other requesting parties) must show a factual basis sufficient to support a reasonable, good faith belief that *in camera* inspection may reveal evidence that information in the materials is not privileged. But even if that threshold showing is made suggesting the possibility of a questionable application of the privilege, *in camera review* is not automatic.<sup>8</sup> In the end, the decision whether to conduct the review rests within the discretion of the court. In making that determination, the Court is mindful that the case is extraordinarily accelerated, and substantial evidence has already been discovered.

The Court is further guided by the *in camera* review which has already conducted. It is true the Court ordered production of some additional materials from the documents it reviewed. But, the Court cannot say the Board's assertion of privilege was unfounded or appeared to be made in bad faith. Further, there is simply no question the Board (and its counsel) appears to have been operating under the good faith belief that its communications with counsel were privileged. To throw open the doors now and require

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<sup>4</sup> *Id.* at 73 (quoting *United Services Automobile Ass'n v. Werley*, 526 P.2d 28 (Alaska 1974)).

<sup>5</sup> *In Re Mendel*, 897 P.2d at 74 (citations omitted).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See, eg, *Rock River communications, Inc. v Universal Music Group, Inc.* 745 F.3d 343, 353 (9<sup>th</sup> Cir. 2014)(mere suspicion that documents are not actually privileged was insufficient to justify *in camera* review).

production when the Board as the client expected the communications would remain confidential is an extraordinary remedy. Indeed that remedy is the antithesis of the policy underlying the attorney-client privilege. As the Court noted in *Mendel*, the privilege is designed to encourage those who may have committed a prior wrong to seek legal advice, and perhaps curtail such conduct in the future.<sup>9</sup> For that reason, the Court distinguishes between past and ongoing or future wrongdoing even where the fraud or crime exception may apply.<sup>10</sup>

The Plaintiffs here seem to be under a misimpression<sup>11</sup> about the Court's order on Rule of Law that it held that all written communication of "any general legal advice should be disclosed to the plaintiffs . . ."<sup>12</sup> But that is not the case. As noted in the Court's other orders, the Court granted a rule of law motion grounded in the alleged OMA violations – that ruling should not be interpreted as meaning that all written communications by the Board's lawyers containing general legal advice have lost their privileged status. Indeed, *Griswold*<sup>13</sup> suggests the opposite – the Board retains its right to claim privilege over the written communications with counsel. In the Court's view, the plaintiffs must demonstrate something more than mere suspicion or desire to see the written communications reflecting general advice given by the Board's lawyers.

Valdez asks the Court to review 97 emails based on its review of the "subject." The Court has reviewed the privilege log and cannot say the Board's assertion of privilege is unfounded. On the contrary, the log appears to show communications between attorney and client pertaining to legal advice. A sample review of the emails identified by Valdez shows this is not an exercise that will likely yield more non-privileged documents.

257.1	This is a 10/11/2021 email from Board staff to a board member copied to the lawyer "re (AC) VRA-Anchorage". The subject indicates it involves
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<sup>9</sup> *In Re Mendel*, 897 P.2d at 74.

<sup>10</sup> *Id.*

<sup>11</sup> The Court acknowledges that its orders may have caused confusion on this point. It also acknowledges there is a clear need for guidance in this area from the Supreme Court. For the policies underlying the attorney-client privilege, and the policies underlying the Open Meetings Act seem to be starkly in conflict as evidenced by the dispute in this case.

<sup>12</sup> Valdez Reply in Support of Motion for Clarification at p3 (January 23, 2022).

<sup>13</sup> *Griswold v Homer City Council*, 428 P.3d 180, 186-188 (Alaska 2018).

	VRA relating to Anchorage. But, there is no indication on its face that the claim of privilege is ungrounded.
297.1	This is a 10/26/2011 email from the lawyer to board staff "re (AC) revised DRAFT-VRA Compliance-v4.docx". The subject indicates it involves a draft VRA compliance document and the email is written by a lawyer to client. Once again, there is no indication on its face that the claim of privilege is ungrounded.
326.1	This is another email dated 9/12/2021 from board staff to the lawyer "Re: (AC) Confidential- VRA update [IWOV-pdx.FID4635476]." On its face, there appears to be no reason to question whether the communication is protected by attorney-client privilege.
338.1	This email is from board staff dated 9/30/2021 to the lawyer and the board's VRA experts re "AC: VRA Analysis of 6 Proposed Plans." Here again, no reason to question whether the communication is protected by attorney-client privilege.
365.1	This email is from board staff dated 10/3/2021 to the lawyer and the board's VRA experts re "Re: AC: VRA Analysis of 6 Proposed Plans. Again, no reason to question whether the communication is protected by attorney-client privilege.

Each of the five emails identified above involved communications from a client to a lawyer, or a lawyer to a client. They are all identified by the board as subject to attorney-client privilege. The subject line of each email gives no indication to the Court that the Board's assertion of privilege is not made in good faith or is otherwise improper.

The Court acknowledges that attorney-client privilege in this context should be narrowly construed. But the board is not just entitled to engage counsel to provide advice, it is required by the constitution to do so. There is a conflict in the policies underlying the privilege and the open public dialogue that is required by the OMA. But this Court is simply not prepared to say that a violation of the Open Meetings Act breaks open the privilege in all ways.

This court began the process of conducting an *in camera* review of certain privileged documents that related to meetings because of the concerns about violation of the OMA. But that review has now turned into a request by the Plaintiffs for the court to

engage in what appears to be a discovery exercise by the Court. While the Plaintiffs have made a concrete specific request for the Court to review specific emails, that request does demonstrate for the Court a reason to believe the assertion of privilege is unfounded. Accordingly, the request by Valdez in this instance is DENIED.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 27<sup>th</sup> day of January, 2022.



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Thomas A. Matthews  
Superior Court Judge

I certify that 1/27/22 a copy of this Order was sent to the following:

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