

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 2001-CA-000531

LEXINGTON PUBLIC LIBRARY

PETITIONER

vs. **MEMORANDUM OF REAL PARTY IN INTEREST IN RESPONSE TO
PETITION FOR WRIT OF PROHIBITION**

HON. THOMAS L. CLARK, JUDGE
FAYETTE CIRCUIT COURT, DIVISION EIGHT

RESPONDENT

and

DIANA KOONCE

REAL PARTY IN INTEREST

* * * * *

The attorney-client privilege does not apply to communications to a lawyer performing functions that any nonlawyer could also perform. The involvement of a lawyer in the ordinary business procedure of assessing an employee's job performance does not cloak the information disclosed in that procedure with privilege. However, legal advice about business options available based on that information is privileged. The Respondent has honored these principles in the order challenged here: production of the documents reflecting the attorney's legal advice has been denied and non-privileged communications about the job performance of the employee in question have been ordered produced. Accordingly and because Petitioner has not demonstrated any abuse of discretion by Respondent, the petition should be **DENIED**.

"Nothing seems to be more frequent in the modern litigation-prone world than a sophisticated client who tries to involve a lawyer in some fact-finding process and thus make privileged both the fact of that process and the information gathered." Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 116 (3rd ed. 1997).¹

"Communications to a lawyer acting as a general agent for the performance of functions that any nonlawyer could also perform are not privileged." *Id.* at 99. "When the lawyer performs such acts, the lawyer is not necessarily 'acting as a lawyer.'" *Id.* "Communications made to a lawyer by a client seeking business judgment or advice rather than legal advice are not privileged." *Id.* at 97.

"When the ultimate corporate decision is based on both a business policy and a legal evaluation, the business aspects of the decision are not protected simply because legal considerations are also involved." *Hardy v. New York News, Inc.*, 114 F.R.D. 633, 643-44 (S.D.N.Y. 1987), *citing* *SCM v. Xerox*, 70 F.R.D. 508, 517 (D.Conn. 1976). Of course, advice about the legal consequences of the various options is generally privileged. Epstein, *supra*, at 98.

¹ The Supreme Court has recognized and relied heavily upon this preeminent treatise. See *Morrow v. Brown Todd & Heyburn*, 957 S.W.2d 722, 726 (1997).

This Court has very limited review in this instance. The extraordinary writ of prohibition should only be issued "upon a showing that the challenged action reflects an abuse of discretion." *Southeastern United Medigroup v. Hughes*, Ky., 952 S.W.2d 195, 199 (1997). "Where the challenge involves matters of fact, or application of law to facts, however, an abuse of discretion should be found only where the factual underpinning for application of an articulated legal rule is so wanting as to equal, in reality, a distortion of the legal rule." *Id.* at 199-200.²

The Respondent here honored the applicable principles and this Court cannot conclude that any abuse of discretion or any distortion of the legal rule has occurred. First, in accordance with *Shobe v. EPI Corp.*, Ky., 815 S.W.2d 395, 398 (1991), the documents were reviewed *in camera*.

Second, the Respondent denied production of the documents reflecting the attorney's legal advice. This correctly applied the privilege. *Epstein*, *supra*, at 98.

Third, the Respondent correctly ordered production of the non-privileged documents reflecting information about the employee's job performance.

² Petitioner nowhere addresses the standard of review that this Court must employ.

Petitioner erroneously contends that because a lawyer suggested it interview knowledgeable people about the employee's job performance the entire procedure and all information disclosed is privileged. The lawyer's suggestion that knowledgeable people be interviewed is a function that a nonlawyer, such as a personnel director, would undertake. "Communications to a lawyer acting as a general agent for the performance of functions that any nonlawyer could also perform are not privileged." Epstein, *supra*, at 99. The lawyer's suggestion is not legal advice and Respondent correctly concluded that it does not cloak the entire procedure with privilege.

Petitioner's contentions also fail because evaluation of employee job performance is a routine business function. Information for those basic business considerations and decisions do not become privileged merely because there are legal aspects as well. *Hardy v. New York News, supra; SCM v. Xerox Corp., supra*. Respondent has appropriately distinguished the business information and the privileged legal advice in any event: the information about the employee's job performance has been ordered produced and the legal advice deemed privileged.

Petitioner's reliance on *Carter v. Cornell University*, 173 F.R.D. 92 (S.D.N.Y. 1997), is misplaced. At issue in

Carter were interviews conducted after the commencement of the lawsuit specifically regarding the plaintiff's discrimination claims. By contrast the information at issue in this case regards another employee's job performance. Disclosure of such information in no way intrudes upon the attorney-client privilege.

Similarly, in *Hasso v. Retail Credit Company*, 58 F.R.D. 425 (E.D.Pa. 1973), at issue was a memorandum the lawyer specifically requested be prepared to assess asserted tort claims made in a settlement demand letter. There is no indication here that the information ordered disclosed was gathered for anything other than a business decision about an employee's job performance. Both *Carter* and *Hasso* are materially distinguishable and neither support issuance of the writ.

As has been observed, "[n]othing seems to be more frequent in the modern litigation-prone world than a sophisticated client who tries to involve a lawyer in some fact-finding process and thus make privileged both the fact of that process and the information gathered." Epstein, *supra*, at 116. The lawyer's involvement here was only to suggest that knowledgeable people be interviewed about an employee's job performance. That involvement does not cloak with privilege the process and the information

gathered. The Respondent did not abuse any discretion or distort any legal rule in recognizing the privilege and in ordering the non-privileged documents produced.

CONCLUSION

For all the foregoing reasons, the petition should be **DENIED.**

Respectfully submitted,

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Certificate of Service

It is hereby certified that a copy of the foregoing was mailed, postage prepaid, this ____ day of March 2001, to the following:

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