

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT - 2nd DIVISION
CIVIL ACTION NO. 03-CI-2844

AMY E. HERRINGTON

PLAINTIFF

v. **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION
TO COMPEL DEPOSITION TESTIMONY, PRODUCTION OF DOCUMENTS
AND INTERROGATORY ANSWERS**

BAPTIST HEALTHCARE SYSTEM, INC.,

DEFENDANT

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STATEMENT OF POINTS AND AUTHORITIES

	<u>Page No.</u>
INTRODUCTION	1
Summary of Plaintiff's Motion	1
STATEMENT OF THE CASE.....	3
Defendant's Criminal Scheme to Obstruct Justice and Non-Privileged Discussions With Counsel In Furtherance of Same.....	4
The "Investigation": Defendant's Representations Regarding It, Plaintiff's Discovery Efforts and Defendant's Objections.....	7
ARGUMENT POINT 1	10
<p>THE COMMUNICATIONS BETWEEN DEFENDANT'S GENERAL COUNSEL AND THE CORPORATION'S OUTSIDE COUNSEL ARE NOT PRIVILEGED BECAUSE OF THE CRIME-FRAUD EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE AND BECAUSE OF THE GENERAL COUNSEL'S INVOCATION OF THE "ADVICE OF COUNSEL" DEFENSE</p>	
KRE 503(d)(1)	10
KRS 524.020	11,13-15
18 U.S.C. § 201(c)(2)	11,15-16
18 U.S.C. § 1512(b)(2)(A)	11, 15
KRS 524.010(3)	13
KRS 524.010(4)	13
<u>Black's Law Dictionary</u> 700 (5 th ed. 1979)	14
<u>American Heritage Dictionary of the English Language</u> (4 th ed.) at http://bartleby.com/61/28/I0132800.html (February 28, 2003)	14
<i>McAndrew v. Lockheed Martin</i> , 206 F.3d 1031 (11 th Cir.	

2000) (<i>en banc</i>)	15
18 U.S.C. § 371	15
Lawson, <u>Kentucky Evidence Law</u> § 5.05[10] at 363 (4 th ed. 2003)	16
POINT 2	16

INFORMATION REGARDING THE "INVESTIGATION" UNDERTAKEN REGARDING THE DEFICIENT CARE REPORTED BY HERRINGTON IS NOT SHIELDED FROM DISCOVERY BY EITHER THE ATTORNEY-CLIENT PRIVILEGE OR THE ATTORNEY WORK-PRODUCT DOCTRINE WHERE (A) THE ATTORNEY-CLIENT PRIVILEGE DID NOT APPLY BECAUSE THE LAWYER WAS PERFORMING A BUSINESS RATHER THAN A LEGAL FUNCTION; (B) THE ATTORNEY-CLIENT PRIVILEGE DID NOT APPLY BECAUSE DEFENDANT INTENDED TO DISCLOSE THE RESULTS OF THE INVESTIGATION TO HERRINGTON AS MANDATED BY KRS 216B.165(2); (C) DEFENDANT WAIVED THE ATTORNEY-CLIENT PRIVILEGE BY AFFIRMATIVELY DISCLOSING THE LAWYER'S COMMUNICATIONS REGARDING THE INVESTIGATION; (D) DEFENDANT IMPLIEDLY WAIVED THE ATTORNEY-CLIENT PRIVILEGE BY PLACING THE LAWYER'S INVESTIGATION AT ISSUE THROUGH ITS WRITTEN COMMUNICATION TO HERRINGTON, AND (E) DEFENDANT WAIVED THE ATTORNEY-CLIENT PRIVILEGE AND THE ATTORNEY'S WORK PRODUCT - THE INVESTIGATION - IS AT ISSUE IN THE LITIGATION.

1. The Attorney-Client Privilege Does Not Apply To Communications Made To a Lawyer Acting In a Non-Lawyer Function 17

Epstein, <u>The Attorney-Client Privilege and the Work-Product Doctrine</u> (ABA 3 rd ed. 1997)	17-18
--	-------

Lawson, <u>Kentucky Evidence Law</u> (4 th ed. 2003)	17
---	----

<i>Lexington Public Library v. Clark, Ky.</i> , 90 S.W.3d 53 (2002)	17-18
--	-------

<i>Mission Nat. Ins. Co. v. Lilly</i> , 112 F.R.D. 160 (D. Minn. 1986)	18
--	----

2. The Attorney-Client Does Not Apply Where the Client Intends to Make a Disclosure to A Third

Person.....	19
KRE 503(a)(2)(5)	19
<i>In re Grand Jury 83-2 John Doe No. 462 (Under Seal),</i> 748 F.2d 871 (4 th Cir. 1984)	19
<i>In re Grand Jury Proceedings, 727 F.2d 1352 (4th Cir.</i> 1984)	19-20
<i>United States v. Cote, 456 F.2d 142 (8th Cir. 1972)</i>	19-20
KRS 216B.165(2)	20
3. A Client Waives the Attorney-Client Privilege Where It Makes A Disclosure Inconsistent With Maintaining The Confidential Nature of the Attorney-Client Relationship	21
Lawson, <u>Kentucky Evidence Law</u> § 5.05[10] (4 th ed. 2003)	21
<i>United States v. Jones, 696 F.2d 1069 (4th Cir. 1982) ...</i>	21-22
4. The Attorney-Client Privilege Is Impliedly Waived Where The Client Takes Action Putting the Substance Of The Communications In Issue.....	22
Lawson, <u>Kentucky Evidence Law</u> § 5.05[10] (4 th ed. 2003)	22-23
<i>United States v. Bilzerian, 926 F.2d 1285 (2d Cir. 1991)</i>	22-23
5. Where the Client Puts the Attorney Work Produce At Issue, The Work Produce Doctrine Does Not Preclude Discovery	23
KRS 216B.165	23
<i>Morrow v. Brown Todd Heyburn, Ky., 957 S.W.2d 722 (1997)</i>	23
CONCLUSION.....	24
CERTIFICATE OF SERVICE.....	24

Introduction

This case arises from the criminal assault of the defendant healthcare corporation on the integrity of the judicial system. Intending to influence the outcome of pending medical malpractice lawsuits, defendant attempted to coerce plaintiff Amy Herrington to withhold her expert witness testimony from such proceedings by threatening her continued employment. Defendant terminated her employment when she refused to abet its criminal scheme.

Also at issue in this case is a report of deficient care that Ms. Herrington made regarding her grandfather, who died while a patient at defendant's Central Baptist Hospital in February 2003. This report also contributed to Ms. Herrington's termination in violation of KRS 216B.165.

Summary of Plaintiff's Motion

(1) Defendant's actions to coerce Herrington into withholding her testimony violate at least the following statutes: KRS 524.020,¹ 18 U.S.C. § 1512(b)(2)(A),² 18 U.S.C. §

¹ KRS 524.020(1) provides, in pertinent part, as follows: "A person is guilty of bribing a witness when he offers, confers, or agrees to confer any pecuniary benefit upon a witness or a person he believes may be called as a witness in any official proceeding with intent to .. (a) influence the testimony of that person[.]" Defendant concedes that the offer of continued employment to Herrington was an offer of pecuniary benefit. Answer ¶ 2. Furthermore, defendant admits that coercing a witness to withhold their testimony influences the testimony. Kubow depo. At 73-74; Walker depo. At 42; Jones depo. at 66.

² 18 U.S.C. § 1512(b)(2)(A) provides, in pertinent part, as follows: "Whoever knowingly uses intimidation, threatens, ... or attempts to do so, or engages in misleading conduct toward another person with intent to (2) cause

201(c)(2).³ At the deposition of defendant's General Counsel, Janet Norton, the attorney-client privilege was asserted, and the witness instructed not to answer questions regarding her communications with counsel made for the purpose of furthering this criminal scheme.

KRE 503(d)(1) precludes application of the attorney-client privilege where "the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud." The rarely-invoked crime-fraud exception to the attorney-client privilege applies here. Furthermore, it appears that defendant's General Counsel is raising the "advice of counsel" defense to defendant's unlawful and criminal conduct. The assertion of this defense waives the attorney-client privilege.

(2) Herrington also seeks production of documents, interrogatory answer and deposition testimony related to an "investigation" defendant conducted regarding the deficient care provided to her grandfather. Defendant informed Ms. Herrington

of induce any person to (A) withhold testimony .. from an official proceeding ... shall be fined under this title or imprisoned not more than ten years, or both."

³ 18 U.S.C. § 201(c)(2) provides, in pertinent part, as follows: "Whoever ... directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing or other proceeding, before any court, ..., or for or because of such person's absence therefrom .. shall be fined under this title or imprisoned for not more than two years, or both."

that its lawyer had looked into her grandfather's care and determined that it was not deficient, and, accordingly, now claims that the attorney-client privilege and/or work product doctrine bars production of the "investigation" documents and related deposition testimony.

Neither the attorney-client privilege nor the work-product doctrine provides the shield that defendants assert. First, the attorney-client privilege does not apply, because whether or not deficient was care was provided is a medical rather than a legal issue. A medical investigation does not become privileged merely because defendant involved a lawyer. Second, even if the attorney-client privilege could apply, it has been waived by defendant's affirmative disclosure regarding and reliance on the investigation. Third, defendant's affirmative disclosure and reliance on the lawyer's investigation has placed the investigation "at issue" and the work product doctrine thus provides no protection.

STATEMENT OF THE CASE

Herrington is a registered nurse who was employed at defendant's Central Baptist Hospital (CBH) from about August 2000 to March 4, 2003. She is a gifted, dedicated and knowledgeable nurse.

In addition to taking care of patients, Herrington also served on occasion as an expert witness in lawsuits involving

deficient nursing practices. Her employment was terminated after she reported within the scope of KRS 216B.165⁴ deficient care provided to her grandfather who died while a patient at CBH and after she refused to violate KRS 524.030⁵ by agreeing to abet defendant's efforts to obstruct justice by withholding her testimony as an expert witness in pending litigation.

Defendant's Criminal Scheme to Obstruct Justice and Non-Privileged Discussions With Counsel In Furtherance of Same

On January 13, 2003, Herrington met with defendant's risk manager at CBH, Todd Jones, and its human resources director, Phillip Kubow. Defendant knew by that date that Herrington was an expert witness for the plaintiff in a medical malpractice case pending in federal district court in Cincinnati, Poynter v. University Hospital, et al, and had reviewed her deposition.⁶

Defendant also knew that Herrington had been similarly engaged

⁴ KRS 216B.165 provides, in pertinent part, as follows: (1) Any ... employee of a health care facility ... who knows or has reasonable cause to believe that the quality of care of a patient, patient safety, ... is in jeopardy shall make an oral or written report of the problem to the health care facility." Subsection 3 of the statute prohibits a health care facility receiving such a report "by policy, contract, procedure, or other formal or informal means subject to reprisal, or directly or indirectly use, or threaten to use, any authority of influence, in any manner whatsoever, which tends to discourage, restrain, suppress, dissuade, deter, prevent, interfere with, coerce, or discriminate against any agent or employee who in good faith" makes such a report.

⁵ KRS 524.030 provides, in pertinent part, as follows: "A witness or a person believing he may be called as a witness in any official proceeding is guilty of bribe receiving by a witness when he .. accepts or agrees to accept any pecuniary benefit upon an agreement or understanding that; (a) His testimony will thereby be influenced."

⁶ Defendant was contacted by the defense attorney in the Poynter case, who was dismayed by the expert testimony supporting the plaintiff's claims given by Herrington and another nurse employed at CBH, Kim Mobley. Defendant has produced this correspondence in discovery and it is attached and marked Exhibit 1.

in a case pending in Fayette Circuit Court against St. Joseph's Hospital. Herrington informed Jones and Kubow that she was engaged in other matters as well.

Knowing this defendant acted to force Herrington to withdraw as a witness and withhold her testimony from these cases as a condition of continuing her employment. She declined. Kubow described this scenario as follows:

Q: And she - The choice was presented to her of either taking those steps of getting out of testifying as an expert witness or having her employment terminated?

A: Well, terminated from - how do define - if she didn't, she would in essence be resigning from her position, as that was a requirement for her to remain employed at Central Baptist.

Kubow depo. at 43-44.

...

Q: The reason why Amy Herrington is no longer employed at Central Baptist Hospital is that she did not agree to terminate her involvement in any and all matters in which she had been engaged as an expert witness and do whatever she had to do to keep from testifying as an expert witness; is that correct?

A: That is correct.

Kubow depo. at 67.

Defendant's efforts to obstruct justice and undermine the integrity of the judicial process were brought to the attention

of the court presiding over the Poynter case. That Court observed as follows of defendant's actions:

The intimidation of witnesses in a federal court proceeding is a serious matter that may expose perpetrators to both civil and criminal liability. See, e.g., 18 U.S.C. § 1512(b)(2)(A)(prescribing punishment of up to ten years in prison for "knowingly us[ing] intimidation ... with intent to ... cause or induce any person to ... withhold testimony ... from an official proceeding); 42 U.S.C. § 1985(2)(prohibiting conspiracy "to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully). Here, Plaintiff has identified Nurse Mobley and Nurse Herrington as potential trial witnesses and represents to the Court that he intends for both to testify. The record shows that Central Baptist used both witnesses' continued employment as leverage to pressure them not to testify and intends to challenge any subpoena requiring Nurse Mobley's attendance at trial. The Court finds the behavior of both Central Baptist and defense counsel severely troubling.⁷

Norton was the principal driving force behind defendant's criminal attempts to obstruct justice. Norton has admitted that defendant's intent was to influence the outcome of Poynter and other cases and preclude a jury verdict against the defendant healthcare corporations:

If she gives similar testimony that results in a large verdict like that against another hospital, that's adverse to the interest of the healthcare industry.

(Janet Norton depo. at 39).

⁷ A copy of the Court's Order is attached hereto and marked Exhibit 2.

Norton discussed with outside counsel defendant's efforts to coerce Herrington and its intended criminal conduct before moving forward. She was directed by defense counsel not to give any answer that touched on those communications.⁸

The "Investigation": Defendant's Representations Regarding It, Plaintiff's Discovery Efforts and Defendant's Objections

On February 19, 2003, Herrington reported within the scope of KRS 216B.165 deficient care provided to her grandfather, Ernest F. Skinner, who passed away at CBH a few days earlier. *Complaint* ¶¶ 83-84. Defendant represented that it would get back to her within a few days but did not. *Id.* ¶ 87.⁹ Instead, the next thing that happened was that defendant, while itself violating numerous criminal statutes, attempted to coerce Herrington to violate KRS 524.030 and abet its obstruction of justice as a condition of her continued employment at Central Baptist Hospital. Of course, she was compelled to reject this demand that she abet and engage in felony crimes as a condition of her continued employment and reiterated to defendant the report regarding the deficient care provided to Mr. Skinner. *Complaint, exhibit 6.*

Defendant responded that its lawyer had looked into Herrington's complaint and found that defendant had done nothing

⁸ Defendant's present counsel is also the counsel consulted by Norton in furtherance of defendant's criminal scheme.

⁹ KRS 216B.165(2) required that defendant respond to Herrington's report within seven (7) days.

wrong. More specifically, defendant answered by letter dated March 12, 2003,¹⁰ to Herrington's report, stating that her "criticisms" had been "investigated by legal counsel."¹¹ Defendant then disclosed that "said investigation revealed no evidence of any negligence, nor any indication of unethical behavior by members of CBH's staff[,]... relative to your concerns about the Emergency Room Nursing Staff, we again found no indication of any specific deficiencies in patient care from your letter."

The investigation was further put "at issue" in the pleadings. See Complaint ¶¶ 127-134. Most specifically, Herrington asserted that the "investigation" was deficient and inadequate, which defendant denied. Accordingly, plaintiff sought further information through discovery.

Plaintiff's Interrogatory No. 10 requested of defendant as follows:

Identify the persons interviewed or from whom information was otherwise gained in the investigation referred to in Exhibit 10 attached to the Complaint.

Defendant responded that "revelation of the identities of persons would violate attorney work product privilege and that would reveal the thought processes of counsel in a matter with

¹⁰ Exhibit 10 attached to the Complaint.

¹¹ Defendant has never made any explanation regarding why a lawyer was engaged to investigate an issue of deficient medical care; nor has defendant made any representation that the lawyer was qualified to make any medical judgments.

respect which litigation was anticipated." Defendant further added the boiler-plate that the information was "not reasonably calculated to lead to discovery of admissible evidence with respect thereto."

Plaintiff sought production of documents related to the investigation in her document request number 17 for "the documents that concern or support your assertion in Exhibit 10 attached to the Complaint that 'in regard to Mr. Skinner's admission, said investigation revealed no evidence of any negligence, nor any indication of unethical behavior by members of CBH's staff.'" Similarly, plaintiff sought production of "the documents that concern or support your assertion in Exhibit 10 attached to the Complaint that 'relative to your concerns about the Emergency Room Nursing Staff, we again found no indication of any specific deficiencies in patient care from your letter.'" Defendant objected to both asserting the work product doctrine, attorney-client privilege and its boiler plate objection that the information, which was directly relevant to allegations and denials in the Complaint, was irrelevant and could not lead to the discovery of admissible evidence.

Norton was asked a number of questions regarding this "investigation." She was directed not to respond based on the attorney-client privilege. The questions posed included:

Q: Did [the investigation conducted by outside counsel] reveal any problems? (Norton depo. at 59)

Q: Did the results of the investigation - or did the conclusion of the investigation by the Office of Inspector General¹² differ at all from the conclusions by the investigation by outside counsel that you had done? (Norton depo. at 59)

Q: Was anything revealed by this investigation that is not mentioned in this Mr. Jones letter? (Norton depo. at 60-61)

Q: Did the investigation referred to here by Mr. Jones letter yield any conclusions that differ from those reached by investigation conducted by the Office of Inspector General? (Norton depo. at 61)

Q: Mr. Jones reports that "we again found no indication of any specific deficiencies in patient care from your letter." Do you know if there were findings of any deficiencies? (Norton depo. at 61-62)

ARGUMENT

POINT 1

THE COMMUNICATIONS BETWEEN DEFENDANT'S GENERAL COUNSEL AND THE CORPORATION'S OUTSIDE COUNSEL ARE NOT PRIVILEGED BECAUSE OF THE CRIME-FRAUD EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE AND BECAUSE OF THE GENERAL COUNSEL'S INVOCATION OF THE "ADVICE OF COUNSEL" DEFENSE.

The attorney-client privilege does not apply where "the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have know to be a crime or fraud[.]" KRE 503(d)(1). Here, defendant's General Counsel, a lawyer,

¹² In view of defendant's multiple criminal violations and response, Herrington also made a complaint to the Office of the Inspector General regarding the matter.

consulted a lawyer in furtherance of defendant's criminal scheme to obstruct justice and violate at least KRS 524.020, 18 U.S.C. § 201(c)(2), and 18 U.S.C. § 1512(b)(2)(A). Because defendant's actions violate several criminal statutes and because defendant's General Counsel either knew or reasonably should have known that attempting to coerce a witness for the purpose of influencing a lawsuit is criminal, the crime-fraud exception precludes application of the attorney-client privilege to any and all communications between defendant's General Counsel and the outside lawyer consulted in furtherance of this scheme. Therefore, the deposition of defendant's General Counsel should be reconvened for further questioning regarding these communications and related matters.

Defendant informed Herrington that she would be terminated from her employment at Central Baptist Hospital if she did not act to withdraw from and withhold her testimony from cases where she had already been retained as an expert witness. Defendant did this knowing that Herrington had been identified as an expert witness in the Poynter case (and having reviewed her deposition), knowing that she had been similarly retained in a case against St. Joseph's Hospital pending in this Court, and in other matters. Put another way, defendant conditioned Herrington's continued employment on her agreeing to withdraw from and withhold her testimony from these and other cases.

This scenario is very succinctly and aptly described by Phillip Kubow, who is defendant's human resources manager at Central Baptist Hospital:

Q: And she - The choice was presented to her of either taking those steps of getting out of testifying as an expert witness or having her employment terminated?

A: Well, terminated from - how do define - if she didn't, she would in essence be resigning from her position, as that was a requirement for her to remain employed at Central Baptist.

Kubow depo. at 43-44.

...

Q: The reason why Amy Herrington is no longer employed at Central Baptist Hospital is that she did not agree to terminate her involvement in any and all matters in which she had been engaged as an expert witness and do whatever she had to do to keep from testifying as an expert witness; is that correct?

A: That is correct.

Kubow depo. at 67.

Defendant claims it had legitimate business reasons to take this action. Norton, its General Counsel and principal lawyer explained, that one was to influence the outcome of the cases in which Herrington was involved and hopefully preclude a verdict against a defendant healthcare corporation:

If she gives similar testimony that results in a large verdict like that against another hospital, that's adverse to the interest of the healthcare industry.

Norton deposition at 39.

It is respectfully submitted that defendant's General Counsel knew or should have known that defendant's actions were criminal in nature. We review some of the statutes that defendant has violated.

Defendant violated KRS 524.020(1), which provides, in pertinent part, as follows:

(1) A person is guilty of bribing a witness when he offers, confers or agrees to confer any pecuniary benefit¹³ upon a witness or a person he believes may be called as a witness in any official proceeding¹⁴ with intent to: (a) Influence the testimony of that person.

Defendant's offer of continued employment to Herrington was an offer of "pecuniary benefit." Defendant knew Herrington had been retained as an expert witness in a case pending before this Court, the Poynter case in Cincinnati and in other cases. Defendant knew that Herrington "may be called" as a witness at trial in the Poynter case, because Norton testified that defendant aimed to keep her from testifying in hopes of influencing the verdict. (Norton depo. at 39). Defendant likewise knew that Herrington "may be called" to testify at a

¹³ KRS 524.010(3) defines "pecuniary benefit" to mean "benefit in the form of money, property, commercial interests or anything else the primary significance of which is economic gain."

¹⁴ KRS 524.010(4) defines "official proceeding" to mean "a proceeding heard before any legislative, judicial, administrative or other governmental agency or official authorized to hear evidence under oath, including any referee, hearing examiner, commissioner, notary or other person taking testimony or depositions in any such proceedings."

deposition, because she explained that another basis for defendant's action was that Herrington would be testifying in deposition.¹⁵ Thus, defendant knew Herrington "may be called" to testify in an "official proceeding."

Defendant offered Herrington a "pecuniary benefit" knowing that she "may be called" to testify in an "official proceeding" with intent to "influence" her testimony. "Influence" is a transitive verb in this statute and its definition would include the following: "to affect,"¹⁶ "to produce an effect on,"¹⁷ "to affect the nature, development, or condition of."¹⁸ Defendant intended to cause the complete elimination of Herrington's testimony, which surely embraces intent to "influence" her testimony. Kubow, defendant's human resources manager at CBH, admitted that an employer who threatens an employee's job if she testifies in a case has tried to "influence" her testimony. (Kubow depo. at 74). Accordingly, Norton knew or should have known that defendant's actions of demanding that Herrington withdraw as an expert witness and withhold her testimony from an official proceeding upon pain of terminating her job was criminal and in violation of KRS 524.020. Accordingly, her

¹⁵ Norton depo. at 24. Todd Jones, defendant's risk manager at CBH, also affirmed his understanding that Herrington could be called as a witness in the cases where she had been retained as an expert witness. (Jones depo. at 11).

¹⁶ Black's Law Dictionary 700 (5th ed. 1979).

¹⁷ American Heritage Dictionary of the English Language (4th ed.) at <http://www.bartleby.com/61/28/I0132800.html> (February 28, 2003).

¹⁸ American Heritage Dictionary, *supra*, note 17.

discussions with counsel in furtherance of their criminal scheme are not privileged pursuant to the crime-fraud exception.

Defendant violated 18 U.S.C. § 1512(b)(2)(A), which provides, in pertinent part, as follows:

Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to - (2) cause or induce any person to - (A) withhold testimony ... from an official proceeding.¹⁹

An employer who threatens an employee's job in an attempt to deter the employee from testifying in a federal court proceeding engages in "criminal conduct in violation of 18 U.S.C. § 1512[.]" *McAndrew v. Lockheed Martin*, 206 F.3d 1031, 1034 (11th Cir. 2000)(*en banc*).²⁰ Accordingly, defendant knew or should have known that its conduct was criminal in nature, and the attorney-client privilege does not apply to Norton's communications with outside counsel in furtherance of this scheme.

Defendant's actions also violated 18 U.S.C. § 201(c)(2), which provides, in pertinent part, as follows:

Whoever directly or indirectly, ..., offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress,

¹⁹ An "official proceeding" under this statute includes a trial before a United States District Court.

²⁰ The employees who take overt actions in furtherance of this end also participate in a conspiracy in violation of 18 U.S.C. § 371. *Id.*

or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, of for or because of such person's absence therefrom.

Defendant directly offered a thing of value - continued employment - to Herrington in consideration for her absenting herself and not testifying in the Poynter case. This corrupt action it took, because of Norton's criminal concern that Herrington's testimony could result "in a large verdict ... against another hospital." (Norton depo. at 39). Norton knew or should have known that defendant's intended conduct would violate this criminal statute. Therefore, the crime-fraud exception precludes application of the attorney-client privilege to her communications with outside counsel.

Norton appeared to be raising the "advice of counsel" defense in her deposition. Her point may be that she neither knew nor should have known that defendant's actions were criminal, because defendant relied upon the advice of counsel to the contrary. Assertion of the "advice of counsel" defense waives the attorney-client privilege. Lawson, Kentucky Evidence Law § 5.05[10] at 363 (4th ed. 2003).

POINT 2

INFORMATION REGARDING THE "INVESTIGATION" UNDERTAKEN REGARDING THE DEFICIENT CARE REPORTED BY HERRINGTON IS NOT SHIELDED FROM DISCOVERY BY EITHER THE ATTORNEY-CLIENT PRIVILEGE OR THE ATTORNEY WORK-PRODUCT DOCTRINE WHERE (A) THE ATTORNEY-CLIENT PRIVILEGE DID NOT APPLY BECAUSE THE LAWYER WAS PERFORMING A BUSINESS RATHER

THAN A LEGAL FUNCTION; (B) THE ATTORNEY-CLIENT PRIVILEGE DID NOT APPLY BECAUSE DEFENDANT INTENDED TO DISCLOSE THE RESULTS OF THE INVESTIGATION TO HERRINGTON AS MANDATED BY KRS 216B.165(2); (C) DEFENDANT WAIVED THE ATTORNEY-CLIENT PRIVILEGE BY AFFIRMATIVELY DISCLOSING THE LAWYER'S COMMUNICATIONS REGARDING THE INVESTIGATION; (D) DEFENDANT IMPLIEDLY WAIVED THE ATTORNEY-CLIENT PRIVILEGE BY PLACING THE LAWYER'S INVESTIGATION AT ISSUE THROUGH ITS WRITTEN COMMUNICATION TO HERRINGTON, AND (E) THE WORK PRODUCT DOCTRINE DOES NOT APPLY TO A MANDATED INVESTIGATION AND MUST YIELD WHEN THE WORK PRODUCT IS AT ISSUE IN THE LITIGATION.

1. **The Attorney-Client Privilege Does Not Apply To Communications Made to a Lawyer Acting in a Non-lawyer Function.**

Defendant presents the frequently encountered scenario where "a sophisticated client [has involved] a lawyer in some fact-finding process and thus [attempts to] make privileged both the fact of that process and the information gathered." Epstein, The Attorney-Client Privilege and the Work-Product Doctrine 116 (ABA 3rd Ed. 1997). "The lawyer-client privilege is subjected to the rule of strict construction and give no greater application than is necessary to further its objectives." Lawson, Kentucky Evidence Law § 5.05[2] at 336 (4th ed. 2003). The burden is on defendant to substantiate its assertion of the privilege. *Lexington Public Library v. Clark, Ky.*, 90 S.W.3d 53, 62 (2002).

Involvement of a lawyer in a business process does not cloak the process with privilege. "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. "When the lawyer performs such acts, the lawyer is not necessarily 'acting as a lawyer.'" *Id.* "If the attorney is acting in some other role, as an ordinary businessman for example, the privilege may not be properly claimed." *Mission Nat. Ins. Co. v. Lilly*, 112 F.R.D. 160, 163 (D. Minn. 1986). Merely involving a lawyer does not cloak a business procedure with privilege as the Supreme Court has explained: "The privilege ... "is triggered only by a client's request for legal, as contrasted with business advice.'" *Lexington Public Library*, 90 S.W.3d at 60.

Defendant's investigation of Herrington's KRS 216B.165 report was an ordinary business process whose undertaking was compelled by KRS 216B.165(2). The "investigation" was a medical inquiry that defendant, a healthcare corporation, was compelled to undertake by law as a part of its business. This is a medical rather than a legal inquiry, and the lawyer was not acting as a lawyer but as a medical investigator. The privilege does not apply to communications to a lawyer when the lawyer is performing a non-lawyer function. *Lexington Public Library, supra; Mission Nat. Ins., supra; Epstein, supra.* Therefore, the privilege does not apply to communications to the lawyer relative to the investigation.

2. The Attorney-Client Does Not Apply Where The Client Intends to Make A Disclosure To A Third Person

The attorney-client privilege applies only to "confidential" communications, i.e., those "not intended to be disclosed to third persons[.]" KRE 503(a)(2)(5). Where an entity hires a lawyer with the intent that its communications to the lawyer be published to a third party, the communications are not privileged, because the client did not intend the process to be maintained in confidence. *In re Grand Jury 83-2 John Doe* No. 462 (Under Seal), 748 F.2d 871, 875 (4th Cir. 1984).

Courts have consistently refused to apply the privilege to information that the client intends shall be published or made known to others. *In re Grand Jury Proceedings*, 727 F.2d 1352, 1356 (4th Cir. 1984)(collecting cases). If a client communicates information to his attorney with the understanding that the information will be revealed to others, that information as well as the details underlying the data which was to be published will not enjoy the privilege. *United States v. Cote*, 456 F.2d 142, 145 (8th Cir. 1972).

The following illustrates these principles. *Grand Jury Proceedings* involved a lawyer subpoenaed by a grand jury to testify regarding conversations between him and three individuals, who had retained him for purposes of preparing a prospectus "to be used in the enlistment of investors in the

private placement." 727 F.2d at 1353-1354. The lawyer asserted the attorney-client privilege to bar such testimony.

The court held that "the privilege does not exist in this case because confidentiality was not intended." 727 F.2d at 1358. The court explained that "the significant fact is that the information given the [lawyer] was to assist in preparing such prospectus which was to be published to others and was not intended to be kept in confidence. That is the critical circumstance, to wit, the absence of any intent that the information was to be kept confidential." *Id.* Therefore, the court concluded that "all information given the [lawyer] by any of the joint venturers connected with the subject-matter of the proposed issuance of participations is without the protection of the attorney-client privilege." *Id.*

Defendant intended to disclose the results of the lawyer's investigation to Herrington, because it was required to do so by KRS 216B.165(2). Moreover, that defendant intended merely to disclose the results of the investigation does not shield the communications and documents relied upon to reach those results. *In re Grand Jury Proceedings, supra; Cote, supra.* Accordingly, neither the verbal or written communications made to the lawyer nor the documents provided to the lawyer to review were "confidential" communications, and the attorney-client privilege does not bar their discovery.

3. A Client Waives the Attorney-Client Privilege Where It Makes A Disclosure Inconsistent With Maintaining The Confidential Nature of the Attorney-Client Relationship.

"A client who discloses protected communications to persons outside the lawyer-client relationship ... waives protection of the privilege." Lawson, *supra*, § 5.05[10]. "Any disclosure inconsistent with maintaining the confidential nature of the attorney-client relationship waives the attorney-client privilege." *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982). "Any voluntary disclosure by the client to a third party waives the privilege not only as to the specific communication disclosed, but often as to all other communications relating to the same subject matter." *Id.*

In *Jones*, the clients touted their attorneys' tax opinion and published a portion of it in an effort to drum up clients for a tax shelter scheme. 696 F.2d at 1070. They tried unsuccessfully to quash a series of subpoenas seeking all documents pertaining to tax opinion and to compel their attorneys' testimony regarding their meetings with the client. The court ruled that the clients' publicizing of their attorneys' conclusions waived the privilege. 696 F.2d at 1073.

Defendant waived the attorney-client privilege by its written communication to Herrington of March 12, 2003, explaining how its lawyer had determined that it had done

nothing wrong. This is a "disclosure inconsistent with maintaining the confidential nature of the attorney-client relationship[.]" 696 F.2d at 1072. Furthermore, this "voluntary disclosure by the client to a third party waives the privilege not only as to the specific communication disclosed, but often as to all other communications relating to the same subject matter." *Id.* Defendant thus waived the attorney-client privilege as to all verbal or written communications made to the lawyer and all documents provided to the lawyer to review in the course of the investigation.

4. The Attorney-Client Privilege Is Impliedly Waived Where The Client Takes Action Putting the Substance Of The Communications In Issue.

"The client may waive the privilege by taking positions that place the substance of the communications in issue." Lawson, *supra*, § 5.05[10] at 363. "[T]he privilege may implicitly be waived when [a party] asserts a claim that in fairness requires examination of protected communications." *Id.*, quoting *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991).

Defendant impliedly waived the attorney-client privilege in its March 12 letter to Herrington "by taking positions [therein] that place the substance of the communications in issue." Lawson, *supra*, § 5.05[10] at 363. Defendant placed the lawyer's work product - the investigation - at issue by affirmatively

representing to Herrington that the lawyer had looked into her complaint and found it to be unsubstantiated. Accordingly, "fairness requires examination of protected communications." *Id.*

5. Where the Client Puts the Attorney's Work Product At Issue, The Work Product Doctrine Does Not Preclude Discovery.

Defendant hired a lawyer to conduct an investigation into Herrington's KRS 216B.165 report, which it intended and was required to disclose to Herrington. "The work-product doctrine is designed to protect an adversary system of justice[.]" *Morrow v. Brown Todd & Heyburn, Ky., 957 S.W.2d 722, 724 (1997)*. It protects discovery of materials "prepared in anticipation of litigation or for trial." *Id.* The information gathered here and produced by counsel were done for the purpose of investigating Herrington's report and were intended for disclosure. They were not prepared in anticipation of litigation but for a required investigation. Moreover, defendant intended to make and did make an affirmative disclosure regarding the process. The doctrine and none of its protected interests are not implicated in this case.

The Supreme Court further held in *Morrow* that the work product doctrine must yield where the lawyer's work product is at issue in subsequent litigation. Defendant has affirmatively represented to Herrington that, according to its lawyer's work

product, the care provided her grandfather was in all ways acceptable. The lawyer's work product is at issue in this case and, accordingly, the doctrine provides no barrier to discovery regarding the investigation.

CONCLUSION

For all the foregoing reasons, plaintiff's motion should be **SUSTAINED** in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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