

Item 10. DOCUMENTS RELATING TO EFFORTS TO ELIMINATE "OFF-BOOK ACCOUNTS."

Objections:

The Diocese objects to this Request on the grounds that the Request seeks documents that are not relevant, material or evidentiary.

Basis For Objections:

As discussed above, the existence of "off-book" accounts is not relevant. Most assuredly, the elimination of such accounts, is not.

III. DOCUMENTS ALLEGEDLY RELATING TO WHETHER DEFENDANT SMITH "CAUSED" THE DIOCESE TO HIRE THE ZGOZNIK ENTITIES (Items 11 Through 13 Of The Draft Subpoena).

Item 11. MINUTES OF THE FINANCE COUNCIL MEETINGS.

Objections:

The Diocese objects, in part, to this Request on the grounds that the Request seeks documents that are not relevant, material or evidentiary. The Diocese does not object to producing the portions of the Finance Council meeting minutes that reference the services of the Zgoznik entities.

Basis For Objections:

The Diocese has already produced both minutes and "notes" of the Finance Council that refer to or have a bearing on defendant Smith's compensation, defendant Zgoznik, and/or the Zgoznik entities.⁹ Defendant Smith provides no justification for requiring the production of any minutes other than the February 14, 2001 and November 7, 2001 minutes. (See Smith Motion at 11.) Relevant portions of the November 7th "notes" referred to in the Motion have now been

⁹ In some instances, no minutes could be located; although "notes" of the meeting were located. Unapproved "notes" that included relevant information were produced.

produced. In addition, the Diocese recently located the minutes from the February 14, 2001 meeting and will produce the portion of them that refer to the outsourcing of accounting services (although the focus of the minutes relates to the outsourcing of legal, not accounting, services).¹⁰ Defendant Smith has made no showing that the minutes of any other meeting are even remotely relevant to the issues in this case. Nor has he advanced any reason for requesting “unredacted” versions of the minutes. The minutes include highly confidential, and, in some instances, privileged information. Without the requisite showing, Mr. Smith’s Motion for Finance Council minutes should be denied.

Item 12. DOCUMENTS RELATING TO TONY LANG CONSULTANTS.

Objections:

The Diocese objects to this Request on the grounds that the Request seeks documents that are not relevant, material or evidentiary.

Basis For Objections:

Tony Lang Consultants provided strategic planning consulting services to the Diocese for which it was compensated. Defendant Smith does not assert otherwise. Indeed, the most he can muster in support of this request is his statement that the “council member was paid by the CDC for his analysis and report.” (Smith Motion at 11.) That fact provides no justification or support for defendant Smith’s request that all documents relating to those payments be produced. The Request should be denied.

¹⁰ There does not appear to be any dispute regarding the fact that the Diocese agreed to outsource certain aspects of the accounting function. Therefore, the decision to do so is not relevant to the charges against defendant Smith. Nonetheless, in order to expedite matters, the Diocese will produce those portions of the minutes that address that issue.

Item 13. DOCUMENTS FROM THE CENTER FOR PASTORAL LEADERSHIP.

As noted above, the Center for Pastoral Leadership questions how the signature of Brian Houlahan on purchase orders is relevant to this case. However, the Center previously produced all documents relating to work performed for it by the Zgoznic entities, including a June 10, 2003 letter from Anton Zgoznic to Brian Houlahan that is included in the draft subpoena (*see* CCD-DOJ 9736-9737).¹¹ Therefore, there are no additional documents to produce.

IV. DOCUMENTS RELATING TO "ADDITIONAL WORK" ALLEGEDLY PERFORMED BY DEFENDANT SMITH FOR CCA (Item 14 Of The Draft Subpoena).

Item 14. CCA DOCUMENTS.

Objections:

CCA objects, in part, to subparts a through c of Item 14 on the grounds that those subparts seek documents that are not relevant, material or evidentiary. CCA also objects to those subparts on the grounds that the Requests are unreasonable and oppressive. In addition, CCA objects to subparts a and b on the grounds that the Requests are not specific. The Diocese will produce those portions of the CCA Board Minutes that reference services provided by Joseph Smith or the Zgoznic Entities.

With respect to subpart d, CCA produced all documents in its possession, custody or control relating to the payments described in the Indictment at page 13, paragraph 37.

Basis For Objections:

Subparts a through c are no more than an unreasonable and oppressive fishing expedition. In essence, defendant Smith is seeking the production of all documents relating to meetings of

¹¹ If there were two letters from Zgoznic to Houlahan with the same date, a second letter has not been located. In addition, as shown on documents previously produced, some documents relating to CPL's use of the Zgoznic entities were no longer available at the time they were first requested.

CCA's Board of Directors, the Finance Council and staff for a four year period. The courts have uniformly held that such requests should be denied. *E.g., United States v. Morris*, 287 F.3d 985, 991 (10th Cir. 2002) (noting that "requests for an entire file are evidence of an impermissible fishing expedition" and holding that subpoena that lacked requisite specificity was properly quashed); *United States v. Loe* 248 F.3d 449, 466 (5th Cir. 2001) (same).

The sole reason advanced by defendant Smith for seeking the documents is that somewhere in them there supposedly might be evidence that he did additional work for CCA which would justify the circular transactions that resulted in his receipt of "additional compensation" from CCA. (Smith Motion at 13.) The only example he is able to advance are two trips — one to Chicago and one to Pittsburgh — that he took over a four year period. Even assuming he took those two trips, evidence of them would not support his theory. CCA should not be required to locate, review, and produce the mass of documents Smith wants based solely on his assertion that he took two trips on behalf of CCA.

V. DOCUMENTS RELATING TO "WORK" PERFORMED BY AN INSURANCE BROKERAGE FIRM FOR THE DIOCESE (Item 15 Of The Draft Subpoena).

Item 15. WILLIS CORROON DOCUMENTS.

Objections:

The Diocese objects, in part, to this Request on the grounds that it seeks documents that are not relevant, material or evidentiary. The Diocese also objects on the grounds that the Request is unreasonable and oppressive.

Basis For Objections:

Willis Corroon is an insurance brokerage firm through which defendant Smith obtained insurance for the Diocese and its employees. Smith is charged with accepting inappropriate

payments from the firm. (*See* Indictment, p. 14, ¶¶ 40-44.) The Diocese does not object to producing the Willis Corroon documents relating to those charges. Indeed, it already has.

Nonetheless, defendant Smith argues that he is entitled to (1) all invoices submitted by Willis Corroon prior to March 1997 and from January 2000 to the present and (2) all work product submitted to the Diocese for a 16 year time period. (Smith Motion at 13.) He provides no explanation as to how the production of the documents could possibly relate to whether he received payments from Willis Corroon. That is because there is none. The requested documents are neither relevant nor material.

Moreover, requiring the Diocese to search its records for any work done by Willis Corroon over a 16 year time period is unreasonable and oppressive. For this reason too, defendant Smith should not be permitted to serve this Request on the Diocese.

VI. DOCUMENTS ALLEGEDLY RELATING TO THE TAX CHARGES AGAINST DEFENDANT SMITH (Items 16 Through 18 Of The Draft Subpoena).

Among other charges, the indictment charges that defendant Smith filed false federal income tax returns in connection with income he failed to report and taxes he failed to pay. (*See* Indictment, pp. 27-34, Counts 19 through 22.) Nonetheless, Smith argues that he is entitled to totally unrelated documents, including: (1) documents relating to an IRS audit of the Catholic Universe Bulletin, a separately incorporated entity (Item 16), (2) personal bank records of Bishop Pilla (Item 17), and (3) documents relating to 32 Diocesan checks (Item 18). According to Smith, the documents supposedly will demonstrate a “recurring” problem with the reporting of income received by employees of CUB and/or the Diocese. But the charges against Smith have nothing to do with any problems the Diocese did, or did not, have regarding reporting an individual’s income. For this reason alone, the Motion should be denied as to each of the items. There are.

however, additional reasons why the Court should deny Smith's Motion with respect to Items 16 through 18. They are:

Item 16. AUDIT OF THE CATHOLIC UNIVERSE BULLETIN ("CUB").

Objections:

The CUB objects to this Request on the grounds that it seeks documents that are not relevant, material or evidentiary.

Basis For Objections:

Defendant Smith asserts that the IRS audit of the CUB determined that the CUB had "consistently failed to report additional income paid to individuals and entities" (Smith Motion at 14.) This is simply not true. The audit related to how reported income received by the CUB from sources ancillary to the publication of the CUB (such as the publication of cookbooks and directories) should be treated for federal income tax purposes. There was never an issue of any individual receiving income to which he or she was not entitled and/or failing to pay taxes on it. The documents are neither relevant nor material, and this Court should so hold.

Item 17. DOCUMENTS RELATING TO BISHOP PILLA'S ACCOUNT AT MCDONALD & COMPANY.

Objections:

Bishop objects to this Request on the grounds that it seeks documents that are not relevant, material or evidentiary.

Basis For Objections:

The McDonald & Company account is Bishop Pilla's personal account in which his savings were deposited. Nowhere in his Motion does defendant Smith assert otherwise. Rather, he tries to impugn Bishop Pilla by arguing that transactions relating to that personal account — transactions on which he actually advised the Bishop — were somehow untoward. They were not.

Moreover, defendant Smith's assertion that he is entitled to the documents because Bishop Pilla's "knowledge and credibility" will be at issue finds no support in the law. Indeed, he offers no legal support for his argument that he can use information relating to a witness's personal banking accounts for impeachment purposes. That is because there is none.

This Court should not permit Smith to delve into the personal financial affairs of a witness based solely on his argument that the witness's "credibility" is at issue. If it does, then every witness in every criminal case will be subject to having his or her financial affairs put at issue. That is not the law, and this Court should so hold.

Item 18. DOCUMENTS RELATING TO ALLEGED "ADDITIONAL COMPENSATION" PROVIDED TO BISHOP PILLA.

Objections:

The Diocese objects to this Request on the grounds that it seeks documents that are not relevant, material or evidentiary.

Basis For Objections:

Whether or not Bishop Pilla received "additional compensation" as the Bishop of the Diocese is not relevant to this case. He was paid a salary and reimbursed for expenses like all bishops and priests in the Catholic Church. His compensation bears no similarity to the transactions at issue here.

Moreover, of those documents requested and located to date, none provides support for defendant Smith's assertions.¹² Rather, the vast majority of checks supposedly made payable to "cash" were actually made payable to Bishop Pilla and related to reimbursement for expenses.

¹² As noted above (*see supra* n.3), the Diocese never used three-digit check numbers. Without any description other than "Cash", it has not been possible to locate the six transactions identified in the draft subpoena by check numbers 479, 327, 890, 188, 192, and 955. In addition, a few of the other checks listed in the draft subpoena have not been located to date.

Indeed, none of the documents shows that Bishop Pilla received any "compensation" as a result of the transactions.

The Ivanhoe Furniture transactions are equally irrelevant. Those transactions related to furnishing a house that was donated to the Diocese. When that house was sold, some of the furnishings were delivered to other Diocesan properties and to the Bishop's retirement home. Those transactions are irrelevant to the tax charges against Smith.

VII. THE DIOCESE'S INTERNAL INVESTIGATION
(Subparts a through c of Item 19 Of The Draft Subpoena).

Subparts a through c seek the production of various documents relating to the Diocese's Internal Investigation, including:

- a. Interview notes or memoranda concerning interviews conducted by the CDC or its agents in connection with the investigation regarding Mr. Smith and the Zgoznic Entities which began in or about January, 2004 (the "CDC Internal Investigation").
- b. Copies of all affidavits or written statements obtained by the CDC or its agents in connection with the CDC Internal Investigation, including a written statement provided by Gerald Arnold concerning the Zgoznic Entities.
- c. Copies of all notes, reports, memoranda or other documents reflecting the substance of all interviews of Joseph Smith conducted in connection with the CDC Internal Investigation.

These documents are protected by the work product doctrine and/or attorney/client privilege and therefore are not subject to production.

A. FACTUAL BACKGROUND.

In late December 2003 and early January 2004, three packages of information relating to alleged wrongful conduct by Joseph Smith and Anton Zgoznic were delivered to: (1) Andrej Lah, the general counsel of Catholic Cemeteries Association; (2) William Reidy, Jr., a member of the Finance Council of the Diocese; and (3) Robert Ducatman, a lawyer at Jones Day. The letter, along with attachments relating to the alleged wrongdoing, was sent anonymously. Jay Milano, an

attorney who, at the time, had a civil racketeering lawsuit pending against, among others, the Diocese and Bishop Pilla, also received the anonymous package and sent it to Mr. Ducatman.

The Diocese Finance Council initiated an internal investigation into the allegations soon after the receipt of the packages. ((Sozio Aff. ¶ 3) (Exhibit B).) The Diocese, through the Council, retained Jones Day to conduct the investigation and advise the Diocese, through reports to Bishop Pilla and the Council. (*Id.* ¶ 4.) Jones Day enlisted the services of Ernst and Young because forensic accounting services were necessary to advise the client on the full scope of the issue. (*Id.* ¶ 5.)

At the time the investigation began, it seemed likely that litigation would ensue, especially in view of the manner in which the information was received. (*Id.* ¶ 6.) While it was not clear at that early stage what form the litigation might take, the very nature of the allegations made litigation almost certain. (*Id.* ¶ 7.) The chief financial and legal officer for the Diocese was accused of engaging in illegal activities. In and of itself that made litigation seem likely. (*Id.*) Moreover, the investigation was undertaken in order to provide legal advice to the Diocese regarding the allegations in the letters. (*Id.* ¶ 8.)

B. THE LAW.

1. The Work Product Doctrine

The work product doctrine provides absolute protection to opinions and mental impressions prepared in anticipation of litigation. As the Supreme Court held, it protects documents prepared “with an eye toward litigation.” *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). The policy underlying the doctrine is that parties prepare for anticipated litigation with an expectation that they can develop legal theories, mental impressions and opinions “with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.” *Id.* at

510-11. The doctrine is designed to ensure that a party does not “perform its functions either without wits or on wits borrowed from the adversary.” *Id.* at 516 (Jackson, J., concurring).

In 2006, the Sixth Circuit adopted the broader “because of” test for determining whether documents were prepared “in anticipation of litigation.” *United States v. Roxworthy*, 457 F.3d 590, 593 (6th Cir. 2006). Under that test, a party must “‘have had a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable.’” *Id.* at 594 (quoting *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998)). Documents do not lose their work product protection merely because they are created to assist in business decisions. *Roxworthy*, 457 F.3d at 599. Rather, there must be a showing that they would have been created in “‘essentially similar form irrespective of the litigation.’” *Id.* (quoting *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998)).

2. Attorney-Client Privilege

The Sixth Circuit set forth the essential elements of the attorney-client privilege in *United States v. Goldfarb*, 328 F.2d 280 (6th Cir. 1964):

‘(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.’

Id. at 281 (quoting 8 J. Wigmore, Evidence in Trials at Common Law § 2292, at 554 (McNaughton rev. 1961)).

In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the Supreme Court recognized the importance of the privilege:

The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between

attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.

Id. at 389 (citation omitted).

Here, the attorney-client privilege protects the type of documents that defendant Smith is seeking because the interviews were done, or statements taken, in order to provide legal advice to a client.

C. THE REQUESTED DOCUMENTS ARE PROTECTED.

Defendant Smith advances two arguments to support his position that the internal investigation documents should be produced. Neither has merit. First, he asserts, in a conclusory fashion, that the information is not attorney work product “since the investigation would have been conducted whether or not the CDC anticipated litigation.” (Smith Motion at 17.) As demonstrated above, defendant Smith’s analysis is in error. The investigation was done in anticipation of litigation. And, as the Sixth Circuit has held, the documents do not lose their work product protection merely because they also assisted in decisions unrelated to the anticipated litigation. *Roxworthy*, 457 F.3d at 599. Thus, it is not enough to argue, as Smith does here, that there was a business purpose for the investigation. The Diocese had a subjective belief that litigation was a real possibility and that belief was objectively reasonable. That is the test, and the Diocese meets it.

Nor, as defendant Smith argues, has the Diocese waived the protection afforded the documents. The only case upon which he relies to support his argument is inapposite. At issue in *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 292-93 (6th Cir. 2002) was whether the production to the government of the very documents at issue constituted a waiver of the protection to which the documents would otherwise be entitled. The Sixth Circuit held that it did. *Id.* at 303-07. Here, none of the documents at issue have been

produced to the government or any other third party. Thus, unlike *In re Columbia*, there has been no waiver.

Moreover, defendant Smith's assertion that the indictment was based on the Diocese's internal investigation borders on the ridiculous. The government conducted its own investigation and reached its own conclusions. For defendant Smith to argue otherwise is unsupported by anything other than his own self-serving statements. His arguments should be rejected.¹³

VIII. DOCUMENTS FOR WHICH SMITH PROVIDES NO REASON FOR PRODUCTION (Items 20 And 21 Of The Draft Subpoena).

Items 20 and 21 are "add-ons" to the draft subpoena that are not mentioned in Smith's Motion. They too are irrelevant and immaterial.

Item 20. DOCUMENTS RELATING TO SALARIES OF BROTHER PATRICK SHEA AND JOHN MAIMONE.

Objections:

The Diocese objects to this Request on the grounds that it seeks documents that are not relevant, material or evidentiary.

Basis For Objections:

Defendant Smith provides no explanation whatsoever as to why the salaries of Brother Patrick Shea, general counsel for the Diocese, and John Maimone, chief financial officer of the Diocese, are relevant. Each of these individuals began his employment with the Diocese after defendant Smith left. Their compensation could not possibly have any bearing on the issues in this case. Defendant Smith's request for the documents should be denied.

¹³ The Diocese has already produced the documents supporting the claim on its employee crime policy for a loss caused by the Smith embezzlement/kick-back scheme. The Diocese does not object to producing the settlement agreement reflecting that the Diocese was paid on those claims.

**Item 21. FORM 1099S FOR KEVIN BURKE AND GERALD ARNOLD
RELATING TO NINTH STREET PLAZA.**

Objections:

The Diocese objects to this Request on the grounds that it seeks documents that are not relevant, material or evidentiary.

Basis For Objections:

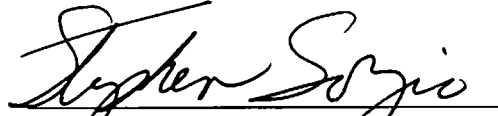
Once again, defendant Smith provides no explanation whatsoever as to why the Director's fees received by two of the directors of Ninth Street Plaza are relevant. There is one, and Smith should not be permitted to compel the production of the 1099s relating to those fees.

One final point is noted regarding the cumulative effect of the Requests. As to certain individual items, there is no objection on the grounds that the particular Request is unreasonable and oppressive. However, the cumulative effect of the individual requests is one of unreasonableness and oppression. This is especially true when, as here, the Diocese and related entities have produced thousands of pages of documents already. They should not be compelled to produce irrelevant documents as well.

CONCLUSION

For the foregoing reasons, defendant Smith's Motion to Compel Production should be denied.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Stephen Sozio", is written over a horizontal line.

Stephen G. Sozio (0032405)
Sandra E. Gammie (0034382)
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, OH 44114-1190
Ph: (216) 586-3939
Fx: (216) 579-0212

Attorneys for Nonparties
Catholic Diocese of Cleveland,
Bishop Anthony M. Pilla,
Catholic Cemeteries Association,
And Catholic Universe Bulletin

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Catholic Diocese of Cleveland's, Bishop Anthony M. Pilla's, Catholic Cemeteries Association's and Catholic Universe Bulletin's Opposition to Defendant Smith's Motion to Order Production was served by ordinary U.S. mail, postage prepaid, and was sent by e-mail, on this 19th day of March, 2007, to:

Robert J. Rotatori, Esq.
Rotatori, Bender, Gragel, Stoper
& Alexander Co. LPA
800 Leader Building
526 Superior Avenue, East
Cleveland, OH 44114

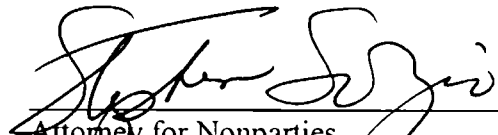
Attorney for Defendant Anton Zgoznik

Philip S. Kushner, Esq.
Kushner & Rendon Co., L.P.A.
BP Tower
200 Public Square, Suite 2860
Cleveland, OH 44114

Attorney for Defendant Joseph Smith

John M. Siegel, Esq.
Assistant United States Attorney
Office of the U.S. Attorney
Northern District of Ohio
United States Courthouse
801 West Superior Avenue, Suite 400
Cleveland, OH 44113-1852

Attorney for Plaintiff


Attorney for Nonparties
Catholic Diocese of Cleveland.
Bishop Anthony M. Pilla.
Catholic Cemeteries Association.
And Catholic Universe Bulletin