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Environmental Quality
Board

**WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA**

**DD OIL COMPANY,
A WEST VIRGINIA CORPORATION,**

Appellant,

v.

Appeal No. 22-01-EQB

**STATE OF WEST VIRGINIA, EX REL.,
HAROLD D. WARD, CABINET SECRETARY,
WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,**

Appellee.

**APPELLEE'S MOTION IN LIMINE AND
MOTION TO STRIKE FROM THE RECORD**

The Appellee, Harold D. Ward, Cabinet Secretary, West Virginia Department of Environmental Protection ("WVDEP"), by counsel, hereby moves the Board for entry of an Order excluding the Appellant, DD Oil Company, from introducing evidence regarding privileged communications between WVDEP and its counsel, and further striking from the record any material regarding such communications. WVDEP so moves pursuant to Rule 1.6 and 3.7 of the West Virginia Rules of Professional Responsibility, Rules 103 and 501 of the West Virginia Rules of Evidence, and Rule 12 of the West Virginia Rules of Civil Procedure. In support of its motion, WVDEP states as follows:

FACTUAL BACKGROUND

On August 13, 2021, in the course of and anticipation of adverse litigation against the Appellant, WVDEP counsel Jeffrey O. Dye sent an e-mail to Derek M. Haught, at the time an employee of WVDEP.¹ Two hours later, during normal business hours and for unknown reasons,

¹ As of the date of filing, Mr. Haught is no longer employed by WVDEP.

Mr. Haught forwarded the e-mail in its entirety from his personal e-mail account to Hugh Dale, currently listed as the Appellant's corporate director, at Mr. Dale's individual corporate e-mail. (See Exhibit 10 to the Notice of Appeal). At that time, Mr. Dale was engaged in adverse litigation against WVDEP regarding the same subject matter.

This was not the first time Mr. Haught had similarly forwarded internal communications to Mr. Dale regarding the same subject matter. Three minutes earlier, Mr. Haught forwarded another internal e-mail from Scott Rodeheaver, a WVDEP employee directly involved in the matter.² This e-mail was also sent from Mr. Haught's personal account. (See Exhibit 9 to the Notice of Appeal.)

Neither of these e-mails was directed to anyone but Mr. Dale. The body of each e-mail consisted only of the abbreviation "FYI".

ATTORNEY-CLIENT PRIVILEGE

In West Virginia, in order to assert an attorney-client privilege, three main elements must be present: (1) both parties must contemplate that the attorney-client relationship does or will exist; (2) the advice must be sought by the client from the attorney in his capacity as a legal adviser; (3) the communication between the attorney and client must be intended to be confidential. Syl. pt. 2, *State v. Burton*, 163 W.Va. 40, 254 S.E.2d 129 (1979).

Mr. Dye is employed full-time as counsel for WVDEP. He represented WVDEP at all times in adverse litigation against the Appellant regarding the same subject matter, was currently in the process of doing so, and intended to do so in the future. All communications regarding the subject matter were legal advice, were intended to be confidential, and were not prepared in the anticipation that a WVDEP employee would covertly and unilaterally share them with the other

² This motion does not address Mr. Haught's actions regarding this e-mail.

side. Mr. Haught forwarded the e-mail during normal work hours but used his personal e-mail account, suggesting that he knew that the e-mails were intended for internal viewing only and thus did not intend for other WVDEP employees to know he had shared them with Mr. Dale.

The attorney-client privilege “is the oldest of the privileges for confidential communications known to the common law.” *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677 (1981) (citing 8 J. Wigmore, Evidence § 2290 (J. McNaughton rev.1961)). Its aim 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.” *Upjohn* at U.S. 389, 101 S.Ct. 677; *Hunt v. Blackburn*, 128 U.S. 464, 470, 9 S.Ct. 125, 32 L.Ed. 488 (1888).

It is well-established that the attorney-client privilege attaches to corporations as well as to individuals. *Upjohn* at 449 U.S. 390, 101 S.Ct. 683. Corporations regularly and necessarily consult their attorneys to find out how to obey the law. *Id.* at 449 U.S. 392, 101 S.Ct. 684.

Notwithstanding Mr. Haught's intentions and actions, he lacked authority of any kind to waive attorney-client privilege on behalf of WVDEP. The power to waive attorney-client privilege rests with a corporation's management and is normally exercised by its officers and directors. Syl. pt. (b), *Commodity Futures Trading Com'n v. Weintraub*, 105 U.S. 343, 105 S.Ct. 1986 (1985). Mr. Haught was at no time, and by no person, considered an officer or a director of WVDEP. He could therefore not waive privilege on WVDEP's behalf.

Finally, the fact that Mr. Haught is no longer employed by WVDEP does not dissolve the attorney-client privilege or entitle him to waive it on WVDEP's behalf and testify about the e-mail or its subject matter now. In *U.S. v. Chen*, 99 F.3d 1495 (1996), an employee stole files from her employer and provided them to a third party after leaving employment. The Circuit

Court held that a former employee of a corporation cannot waive privilege on her previous employer's behalf.

The e-mail at issue is governed by the attorney-client privilege and Mr. Haught had no authority to waive this privilege by leaking the e-mail. Any evidence regarding the e-mail must therefore be excluded as privileged.

STRIKING PRIVILEGED INFORMATION FROM THE RECORD

On May 20, 2022, WVDEP received the Appellant's Response to WVDEP's Request for Statutory Discovery. At this time, Mr. Haught and Mr. Dye were formally listed as witnesses expected to testify "on [their] knowledge of the allegations contained within the Appeal from Order and Annulment Review[.]" Mr. Haught and Mr. Dye will presumably be expected to lay a foundation for the admission of, and testify regarding, Exhibit 10. It is thus confirmed that the Appellant is likely to seek the admission of the subject e-mail at the evidentiary hearing, and that a motion in limine is necessary to protect the privileged relationship between attorney and client.

While the West Virginia Rules of Civil Procedure are not imported wholesale into hearings before the Board, they are to be used as appropriate to manage hearings and assure fairness. 46 CSR 4.6.13. Pursuant to Rule 12(f) of the West Virginia Rules of Civil Procedure, the Board may order that "any redundant, immaterial, impertinent, or scandalous matter" be stricken from a pleading. Under Rule 10, an exhibit is considered part of a pleading.

Exhibit 10 consists entirely of the privileged e-mail at issue. If the Board grants WVDEP's motion to exclude evidence relating to privileged information as discussed above, it is logical and proper to contemporaneously strike Exhibit 10 to the Notice of Appeal from the record. When and if the Board's ultimate decision in this matter is subjected to judicial review,

the reviewing tribunal will rely on the record to make its decision, and privileged information should not be part of that review.


CONCLUSION AND PRAYER FOR RELIEF

The e-mail at issue was prepared by WVDEP counsel as legal advice with the expectation that it would remain confidential. Nonetheless, Mr. Haught used his personal account to covertly share the e-mail with an adverse litigant without permission or authority to waive attorney-client privilege. The e-mail and its subject matter are therefore privileged attorney-client communications and must be excluded from evidence.

In the event of judicial review, the reviewing tribunal will use the record in its consideration of the case. Therefore, if the Board grants WVDEP's motion in limine, it is additionally proper to strike the privileged communication from the Notice of Appeal and the record of the case.

Accordingly, WVDEP moves the Board for entry of an Order excluding the Appellant from introducing evidence regarding privileged communications between WVDEP and its counsel, and further striking from the record any material regarding such communications, along with such other relief as is deemed just and appropriate.

Respectfully Submitted,
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By Counsel



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and complete copy of the attached Appellee's Motion in Limine and Motion to Strike was served on the following persons by electronic mail on May 20, 2022, with hard copies served by United States Postal Service mail, first class, on the same date.

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