

JUN 7 2022

**BEFORE THE WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD**

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Surface Mine Board

**DD OIL COMPANY,  
a West Virginia Corporation,**

**Appellant,**

**Appeal No.: 22-01-EQB**

**v.**

**STATE OF WEST VIRGINIA, EX REL.,  
HAROLD D. WARD, Cabinet Secretary,  
West Virginia Department of  
Environmental Protection,**

**Appellee.**

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

COMES NOW the Appellant, DD Oil Company, by counsel, J. Morgan Leach, Esq., Ryan J. Umina, Esq., and Beth L. Umina, Esq., and hereby provides the following Response to Appellee's Motion in Limine and Motion to Strike from the Record, and in support thereof, states as follows:

At the outset, it is important to note that Derek Haught was an inspection officer for the West Virginia Department of Environmental Protection ("WVDEP") at the time of the disclosure that appellees seek to strike from the record. Although Mr. Haught has since left the WVDEP, at all times relevant to herein, he was employed as the inspector for the geographic area responsible for DD Oil Company's wells at the time that the email in question was disclosed to DD Oil Company. Regardless of the email address used to convey the voluntary disclosure, Mr. Haught's disclosure was voluntary.

The next point of inquiry is to determine whether the disclosed materials were: (1) attorney-client privileged material, and (2) if considered privileged material, whether Mr. Haught

had the authority to waive such privileges through his voluntary disclosure. It has long been held by the United States Supreme Court that this analysis must be conducted on a case-by-case basis *to ensure that attorney-client privilege is not being used to impinge on the production of relevant evidence.* See *United States v. Nixon*, 418 U.S. 683, 710, 94 S.Ct. 3090, 3108-09, 41 L.Ed.2d 1039 (1974); *Bausch & Lomb Inc. v. Alcon Laboratories, Inc.*, 173 F.R.D. 367, 372 (W.D.N.Y. 1995) (emphasis added). Courts have ruled that such privilege should not be expansively construed. *Id.* Here, in determining whether or not Ex. 10 is privileged, we must look at the exact language of the disclosure. *Id.*

In this regard, the United States Supreme Court has held, “the protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing.” *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981). Because Ex. 10 does not contain advice received from the attorney, but rather, exposes underlying *facts* of the matter, the WVDEP’s argument that it is privileged necessarily fails. Here, Ex. 10 clearly discloses the fact that WVDEP personnel had discussed the status of DD Oil’s permits with its fracking company. Such facts are highly relevant to DD Oil’s contention that WVDEP acted improperly through its communications with its service contractors. This communication delayed DD Oil’s ability to perform its permitted well work within the time period permitted by its license, despite the fact that the WVDEP’s injunction had already been denied by the Circuit Court. As such, Ex. 10 contains factual, relevant evidence that would not have otherwise been disclosed under the guise of attorney-client privilege.

On the other hand, if the Board considers the communications contained within Ex. 10 as privileged attorney-client communications, Mr. Haught’s voluntary communications to DD Oil Company *waived* the attorney-client privilege.

The attorney-client privilege exists to protect confidential communications, to assure the client that any statements he makes in seeking legal advice will be kept strictly confidential between him and his attorney; in effect, to protect the attorney-client relationship. *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980). However, any voluntary disclosure by the holder of such a privilege is inconsistent with the confidential relationship and thus waives the privilege. *Id.*

Here, it is clear that Mr. Haught was an inspector for the WVDEP and was communicating with Mr. Dye, as his attorney. The attorney-client relationship between Mr. Haught and Mr. Dye conferred the authority of voluntary waiver of such privilege upon Mr. Haught.

The WVDEP does not argue that Mr. Haught's disclosure to DD Oil was involuntary nor that he was not a client of Mr. Dye. The WVDEP only argues that Mr. Haught was not an officer or director of the WVDEP and lacked authority to waive the privilege—an argument that has no bearing on the inquiry.

Each and every client of any attorney may waive attorney-client privilege, for the client holds the privilege. Should the WVDEP argue that Mr. Haught was not a client, then the subject motions must be denied because without his status as a client, attorney-client privilege cannot exist. As such, the disclosure by Mr. Haught as a client of Mr. Dye should be considered voluntary and consequently, constitutes a waiver of any intent to maintain confidentiality of such communication.

Finally, the WVDEP's argument that Mr. Haught is unable to testify regarding the email or its subject matter is inconsistent with the law. As discussed in *Upjohn Co.*, attorney-client privilege does not extend to protect the underlying facts of a case. Further, this case is

distinguishable from *U.S. v. Chen* insomuch as Mr. Haught did not steal files from a former employee after leaving employment. To the contrary, Mr. Haught voluntarily disclosed an email from his attorney regarding the communications that were made to DD Oil's service company while employed by the WVDEP. Therefore, the WVDEP's arguments are inapplicable to the instant facts. Accordingly, Mr. Haught must be permitted to testify regarding Ex. 10 and its contents.

**WHEREFORE**, DD Oil respectfully requests that the Appellee's Motion in Limine and Motion to Strike from the Record be DENIED along with any other relief the Board considers appropriate.

Respectfully submitted,  
Appellant by Counsel

**/s/ J. Morgan Leach**

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**CERTIFICATE OF SERVICE**

I, J. Morgan Leach, hereby certify that I have served a true and correct copy of the forgoing **APPELLANT'S RESPONSE TO APPELLEE'S MOTION IN LIMINE AND MOTION TO STRIKE FROM THE RECORD** by email and USPS First Class mail upon the following this 31st day of May, 2022.

Scott Driver, Esq.  
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**/s/ J. Morgan Leach  
J. MORGAN LEACH, ESQ.**