STATE OF NORTH CAROLINA MECKLENBURG COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 18 CVS 12279
MICHAEL J. KELLEY, Plaintiff, v. CHARLOTTE RADIOLOGY, P.A., Defendant.	**ORDER ON MOTION TO COMPEL PRODUCTION OF DOCUMENTS WITHHELD AS PRIVILEGED**

1. In this discovery dispute, Defendant Charlotte Radiology, P.A. ("Charlotte Radiology") seeks to compel the production of 231 documents being withheld by Plaintiff Michael J. Kelley ("Kelley") on the basis of attorney-client privilege, common-interest privilege, and work-product immunity. After a thorough *in camera* review of the disputed documents, the Court **GRANTS in part** and **DENIES in part** the motion to compel, for the reasons discussed below.

I. BACKGROUND

2. An earlier opinion describes the allegations in Kelley's amended complaint. *See Kelley v. Charlotte Radiology, P.A.*, 2019 NCBC LEXIS 15, at *16 (N.C. Super. Ct. Feb. 27, 2019) (ECF No. 51). In short, Kelley is a former employee and shareholder of Charlotte Radiology. In 2017, Kelley took his first steps toward retirement, continuing to work for Charlotte Radiology but in a reduced role. During the transition, Charlotte Radiology informed Kelley that, as a result of his new role, he could no longer be a shareholder—a decision Kelley now disputes. In this action, Kelley alleges that Charlotte Radiology wrongfully barred him from participating in

a refinance transaction that resulted in substantial payments to its shareholders. (*See* Am. Compl. ¶¶ 5, 23–28, ECF No. 22.)

3. It appears that Kelley first learned of the refinance transaction at some point in 2017. In the fall of that year, Kelley sought to participate in the transaction. He was turned away. Kelley and four other radiologists who had retired from or taken on a reduced role at Charlotte Radiology then retained counsel at Nexsen Pruet, PLLC ("Nexsen Pruet") to evaluate potential legal claims. That effort did not lead to litigation, and shortly after, Kelley began his own individual search for counsel. Kelley eventually hired his current counsel—J. Daniel Bishop ("Bishop") of Erwin, Bishop, Capitano & Moss, P.A.—and filed this suit in June 2018.

4. These events produced hundreds of e-mail communications and related documents that Kelley claims are privileged and not subject to disclosure. Kelley's initial privilege log, served in October 2018, listed 421 documents. (*See* Mem. in Supp. Mot. Compel Ex. C, ECF No. 40.3.) After negotiations between counsel, Kelley agreed to produce about half of the documents, with a revised log, on the condition that doing so would not effect a subject matter waiver of privilege. (Mem. in Supp. Mot. Compel 1, ECF No. 39 ["Mem. in Supp."].) The parties were unable to reach an agreement as to the other half, and Charlotte Radiology submitted an e-mail summary of the discovery dispute in December 2018, as required by Business Court Rule 10.9(b). Kelley further revised his privilege log in the interim. (Mem. in Supp. Ex. A, ECF No. 40.1 ["Kelley Privilege Log"].)

5. Around the same time, Charlotte Radiology served subpoenas on Kelley's son, Ryan Kelley ("Ryan"), and Kelley's friend, Lance Stell ("Stell"). (Stipulation & Order Concerning Privilege Dispute Resolution Process & Mediation Schedule 2, ECF No. 36 ["Stipulation"].) Kelley objected on the ground that Ryan and Stell each possessed privileged documents, including some duplicates of documents identified in Kelley's privilege log. The parties were unable to resolve their differences as to either subpoena.

6. On December 14, 2018, the parties proposed a stipulated schedule for resolving all of these disputes at one time. (ECF No. 34.) The parties agreed that, rather than requiring Kelley to move to quash the subpoenas, Ryan and Stell would produce the relevant documents in their possession and would simultaneously assert any privilege claims. (Stipulation 2–3.) Charlotte Radiology then filed a single motion to compel addressing both Kelley's revised privilege log and the non-party privilege disputes. (ECF No. 38.)

7. The motion seeks to compel the production of 231 documents, each of which Kelley claims he has properly withheld due to attorney-client privilege, common-interest privilege, or work-product immunity. Of these documents, 190 are identified in Kelley's revised privilege log, 40 were identified by Ryan, and only one was identified by Stell. (Kelley Privilege Log; Mem. in Supp. Ex. B, ECF No. 40.2 ["Non-Party Privilege Log"].)

8. The motion has been fully briefed, and the Court held a hearing on February 22, 2019. (ECF No. 41.) With the parties' consent, the Court has also conducted an

in camera review of the disputed documents. (ECF No. 42.) The motion is now ripe for decision.

II.
ANALYSIS

9. Although Kelley asserts multiple grounds for withholding most of the disputed documents, he contends that the "simplest ground" is work-product immunity. (Resp. to Def.'s Mot. Compel 3, ECF No. 43 ["Opp'n"].) According to Kelley, almost all of the documents were created in anticipation of litigation, rendering them immune from discovery under Rule 26(b)(3) of the North Carolina Rules of Civil Procedure. Charlotte Radiology, on the other hand, argues that most, if not all, of the documents as described in the privilege log are not work product. (*See* Mem. in Supp. 6–7.) It further argues that the documents are not subject to the attorney-client privilege because Kelley has waived any privilege. (*See* Mem. in Supp. 11.) As discussed below, the Court decides these issues after a full *in camera* review.

A. General Principles

10. "The attorney-client privilege is one of the oldest recognized privileges for confidential communications." *Dickson v. Rucho*, 366 N.C. 332, 340, 737 S.E.2d 362, 368 (2013) (quoting *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998)). "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." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). As a result, "[w]hen the relationship of attorney and client exists, all confidential communications made by the client to his attorney on the faith of such relationship

are privileged and may not be disclosed." *Dickson*, 366 N.C. at 340, 737 S.E.2d at 369 (citing *In re Investigation of the Death of Miller*, 357 N.C. 316, 328, 584 S.E.2d 772, 782 (2003)).

11. The privilege must be strictly construed, though, because it "may result in the exclusion of evidence which is otherwise relevant and material." *Evans v. United Servs. Auto. Ass'n*, 142 N.C. App. 18, 31, 541 S.E.2d 782, 790 (2001). The party asserting privilege has the burden to demonstrate that:

> (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated and (5) the client has not waived the privilege.

State v. Murvin, 304 N.C. 523, 531, 284 S.E.2d 289, 294 (1981). "If any one of these five elements is not present in any portion of an attorney-client communication, that portion of the communication is not privileged." *In re Miller*, 357 N.C. at 335, 548 S.E.2d at 786.

12. "The general rule is that, when an attorney and client communicate in the presence of a third party, the communications are not privileged because they 'are not confidential and because that person's presence constitutes a waiver.'" *Technetics Grp. Daytona, Inc. v. N2 Biomedical, LLC*, 2018 NCBC LEXIS 116, at *6 (N.C. Super. Ct. Nov. 8, 2018) (citing *Berens v. Berens*, 247 N.C. App. 12, 20, 785 S.E.2d 733, 740 (2016)). There are exceptions, of course. The privilege is not lost if the third party is an agent of the client or the attorney. *See Murvin*, 304 N.C. at 531, 284 S.E.2d at

294; *Berens*, 247 N.C. App. at 20–22, 785 S.E.2d at 740–41. The privilege is also maintained when the third parties are co-clients who are each represented by the same attorney. *See Sessions v. Sloane*, 248 N.C. App. 370, 383, 789 S.E.2d 844, 854–55 (2016).

13. The work-product doctrine is also relevant here. Its purpose is "to maintain the adversarial trial process and to ensure that attorneys are properly prepared for trial by encouraging written preparation." *Evans*, 142 N.C. App. at 28–29, 541 S.E.2d at 789. "Allowing discovery of work product could have a 'demoralizing' effect on the legal profession" by making an attorney's preparations "freely accessible to opposing counsel." *Id.* at 29, 541 S.E.2d at 789 (quoting *Hickman v. Taylor*, 329 U.S. 495, 511 (1947)). "It is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Wachovia Bank, N.A. v. Clean River Corp.*, 178 N.C. App. 528, 533, 631 S.E.2d 879, 883 (2006) (citation omitted).

14. To achieve that purpose, Rule 26(b)(3) protects "documents and tangible things" that were "prepared in anticipation of litigation or for trial by or for another party or by or for that other party's consultant, surety, indemnitor, insurer, or agent . . . ." N.C. R. Civ. P. 26(b)(3). "[T]he phrase 'in anticipation of litigation' encompasses a concept without sharply defined boundaries." *Evans*, 142 N.C. App. at 29, 541 S.E.2d at 789. It may include not only documents prepared after a party secures an attorney but also those "prepared under circumstances in which a reasonable person might anticipate a possibility of litigation." *Willis v. Duke Power Co.*, 291 N.C. 19,

35, 229 S.E.2d 191, 201 (1976). "The test is 'whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.'" *In re Summons Issued to Ernst & Young, LLP*, 191 N.C. App. 668, 678, 663 S.E.2d 921, 928 (2008) (quoting *Cook v. Wake Cty. Hosp. Sys.*, 125 N.C. App. 618, 624, 482 S.E.2d 546, 551 (1997)). This immunity should be narrowly construed, consistent with its purpose to "safeguard the lawyer's work in developing his client's case." *Evans*, 142 N.C. App. at 29, 541 S.E.2d at 789 (quoting *Suggs v. Whitaker*, 152 F.R.D. 501, 505 (M.D.N.C. 1993)).

15. The moving party may be entitled to discovery of documents otherwise protected by work-product immunity if it can show "substantial need of the materials in the preparation of the case" and also that it "is unable without undue hardship to obtain the substantial equivalent of the materials by other means." N.C. R. Civ. P. 26(b)(3). In no circumstance, though, may the Court "permit disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney." *Id.*

B. Discussion

16. With these principles in mind, and before turning to the documents at issue, the Court addresses three key disputes between the parties. Charlotte Radiology argues, and Kelley disagrees, that the Court should compel production of some or all of the disputed documents due to procedural deficiencies in the privilege logs, waiver of the attorney-client privilege resulting from Kelley's disclosure of confidential

communications to third parties, and a broader waiver of the attorney-client privilege as to the subject matter of the disclosed communications.

1. Procedural Deficiencies

17. At the outset, Charlotte Radiology argues that Kelley should be required to produce many of the disputed documents, regardless of the merits as to privilege, because the descriptions in his privilege log are "obtuse and uninformative." (Mem. in Supp. 4.) The Court disagrees. Kelley's privilege log provides the date of each communication, the sender and recipients, a short description of the subject matter, and the type of privilege asserted. (*See* Kelley Privilege Log.) This is all the Case Management Order requires, (ECF No. 21), and it is the type of information courts usually find adequate for this purpose. *See, e.g.*, *Vaughan v. Celanese Ams. Corp.*, 2006 U.S. Dist. LEXIS 89888, at *10–11 (W.D.N.C. Dec. 11, 2006); *Viacom, Inc. v. Sumitomo Corp. (In re Copper Mkt. Antitrust Litig.)*, 200 F.R.D. 213, 223 (S.D.N.Y. 2001).

18. Some of Kelley's subject-matter descriptions of individual e-mails are shorter than others, but they are not inadequate. Kelley organized the disputed e-mails by thread, with discrete entries for each individual e-mail in the thread. As is often the case with e-mail communications, each thread has only one or two significant e-mails, followed by a series of terse or perfunctory responses. Kelley elected to give detailed descriptions of the key e-mails in each thread but not to reiterate those descriptions for every other e-mail in the same thread. Because all of the listed e-mails are grouped and identified by thread, it is possible to view each

description in the context of the thread as a whole. This is a reasonable and efficient approach.

19. Even if Kelley's privilege log were inadequate, the appropriate remedy in this case would be to conduct an *in camera* review, not to strike the privilege log. *See, e.g.*, *In re McDonald*, 2014 Bankr. LEXIS 3780, at *16–17 (Bankr. M.D.N.C. Sept. 3, 2014); *Tatum v. R.J. Reynolds Tobacco Co.*, 247 F.R.D. 488, 499 (M.D.N.C. 2008). It appears that Kelley made a good-faith effort to describe the disputed documents and to revise his privilege log in response to Charlotte Radiology's concerns. The Court's *in camera* review of the disputed documents cures any remaining deficiency in the log.

20. Charlotte Radiology also argues that Kelley forfeited his right to assert work-product immunity as to 70 or so documents because he did not list that ground in his original privilege log. (*See* Mem. in Supp. 5.) Again, the Court disagrees. It is true that a belated assertion of immunity can result in its forfeiture. This usually occurs when a party asserts one ground for withholding documents, waits to see the other side's motion to compel (or to see how the court decides the motion), and then asserts a different ground in an effort to get a second bite at the apple. *See, e.g.*, *Rynd v. Nationwide Mut. Fire Ins. Co.*, 2010 U.S. Dist. LEXIS 136626, at *9–11 (M.D. Fla. Dec. 14, 2010). That type of gamesmanship is obviously prejudicial. *See, e.g.*, *Gen. Elec. Co. v. Johnson*, 2007 U.S. Dist. LEXIS 8275, at *21–24 (D.D.C. Feb. 5, 2007). Here, however, Kelley revised his privilege log to assert an additional ground before Charlotte Radiology filed its motion to compel. Charlotte Radiology was on notice of

Kelley's work-product claims when it filed its motion, and there does not appear to be any resulting prejudice. The Court concludes that Kelley has not forfeited any claim of work-product immunity.

2. Communications Involving Third Parties

21. Kelley invokes the attorney-client privilege as a basis to withhold numerous communications with counsel. These include communications with attorneys from Nexsen Pruet during 2017, when Kelley and several fellow radiologists were investigating potential claims against Charlotte Radiology. They also include communications with Kelley's current counsel, Bishop, in the months before Kelley filed this lawsuit in June 2018. Charlotte Radiology argues that Kelley waived any attorney-client privilege by sharing these communications with his son (Ryan), his wife (Loretta), and other third parties.

22. The first issue is whether Kelley's disclosure of privileged communications to members of his family resulted in a waiver. Ryan seems to have been involved from the outset of Kelley's investigation of potential claims against Charlotte Radiology, and Kelley states that he asked Ryan to "attend meetings with counsel to facilitate imparting of information and understanding of advice received." (Opp'n 8.) When litigation became imminent, Kelley consulted Loretta, his wife of more than 50 years, about whether to proceed. (*See* Opp'n 8.) Kelley now argues that these disclosures did not result in any waiver because Ryan and Loretta were his agents. (*See* Opp'n 7–11.)

23. After careful review, the Court cannot conclude that Ryan served as Kelley's agent while participating in these communications. Kelley bears the burden of persuasion on this point. *See Safety Test & Equip. Co. v. Am. Safety Util. Corp.*, 2014 NCBC LEXIS 40, at *5–8 (N.C. Super. Ct. Sept. 2, 2014); *see also Evans*, 142 N.C. App. at 32, 541 S.E.2d at 791. The record does not establish that Ryan had authority to act on Kelley's behalf, an essential element of agency. *See Berens*, 247 N.C. App. at 21, 785 S.E.2d at 740; *Peace River Elec. Coop. v. Ward Transformer Co.*, 116 N.C. App. 493, 504, 449 S.E.2d 202, 210 (1994). Rather, Ryan acted as an advisor and used his personal connections to help his father find an attorney to take on the case. (*See* M. J. Kelley Aff. ¶¶ 8, 15, ECF No. 44 ["Kelley Aff."].)

24. In support of his position, Kelley analogizes this case to *Berens*. The analogy doesn't hold. *Berens* addressed a privilege dispute in the context of "contentious divorce and child custody proceedings." 247 N.C. App. at 21, 785 S.E.2d at 741. The defendant consulted a close friend, who was also a former attorney. *See id.* at 22, 785 S.E.2d at 741. The friend attended meetings with counsel and received access to communications with counsel, along with other case-related materials. *See id.* at 14, 785 S.E.2d at 736. She also executed a confidentiality agreement with the defendant, giving her the "express authority" of the defendant "to act as . . . agent." *Id.* at 22, 785 S.E.2d at 741. Based on all this evidence, the Court of Appeals held that the friend was "acting as an agent for purposes of assisting [the defendant] in communications with legal counsel," akin to an accountant, psychologist, appraiser, or similarly skilled intermediary. *Id.*

25. The evidence here is strikingly different. Ryan is not an attorney, and there is no evidence that he brought specialized knowledge that would assist with communications with counsel. Rather, in his affidavit, Kelley states that he "thought [Ryan] could help me recall and impart relevant information to counsel and to hear and help me to reflect on and understand legal advice received." (Kelley Aff. ¶ 10.) Kelley also states that "Ryan's participation facilitated and focused the information furnished to" counsel in addition to helping Kelley "improve [his] grasp of legal analysis and advice received." (Kelley Aff. ¶ 12.) This is not evidence that Ryan served as an agent with authority to handle communications with counsel on his father's behalf. Rather, he was a sounding board—someone who could provide moral support and advice to Kelley.

26. It is understandable that someone contemplating litigation would seek advice from a close family member, and our courts have acknowledged that "the cases discussing whether the [attorney-client] privilege exists when relatives or friends of the client are present during the communications are in conflict." *Murvin*, 304 N.C. at 531, 284 S.E.2d at 294. But this Court must construe the privilege narrowly. The law does not protect attorney-client communications made in the presence of a third party simply because the third party is helpful and can be trusted not to share the communications with others. *See id.* (holding that presence of aunt and friend during consultation with attorney waived the privilege because "[t]he presence of neither the aunt nor the friend was necessary for the protection of" the client's interests). Ryan's

role here, though valued by his father, was not that of agent, nor was it necessary for the protection of his father's interests.

27. The record also includes a confidentiality agreement that Kelley, Ryan, and Loretta purportedly executed to memorialize an agency relationship. (*See* Kelley Aff. Ex. 1.) This agreement does not alter the analysis. The document in evidence is not signed. Moreover, it was created after Charlotte Radiology filed its motion. If no agency relationship existed at the time of the communications, this written agreement could not create such a relationship after the fact. As discussed, Kelley's affidavit and the other evidence confirms that Ryan was not acting as an agent in late 2017 and early 2018 during consultations with counsel.

28. Based on this record, the Court concludes that Ryan was not acting as an agent for his father when participating in communications as counsel, and his presence therefore destroyed the privilege that otherwise would have attached to those communications.

29. The Court need not address whether this same analysis would apply to communications shared with Loretta. It appears that all of the communications disclosed to Loretta were also shared with Ryan. As a result, because the disclosure to Ryan destroyed the privilege, there is no need to address the effect of sharing the communications with Loretta.

30. Kelley's second argument against waiver of privilege is that certain e-mails are protected by the joint-client privilege,[1] another "exception to the general rule that

[1] On his privilege log, Kelley asserts the common-interest privilege as the basis for withholding these e-mails. However, Kelley appears to acknowledge in his briefing that the

the attorney-client privilege is waived when the client discloses privileged information to a third party." *Sessions*, 248 N.C. App. at 383, 789 S.E.2d at 855. When he initially contemplated legal action against Charlotte Radiology, Kelley joined with four other radiologists who were either retired or in the process of retiring from the practice: Andrew Beloni ("Beloni"), Edward Kouri ("Kouri"), Joel Wissing ("Wissing"), and James Zuger ("Zuger"), although Kouri later decided not to pursue the matter. The radiologists consulted attorneys James C. Smith ("Smith") and Grainger Pierce Jr. ("Pierce") of Nexsen Pruet. Kelley contends that the e-mails exchanged among the radiologists, Smith, and Pierce are privileged and protected from disclosure.

31. Joint-client privilege applies when more than one client hires the same counsel to represent them in the same matter. *See Teleglobe Commc'ns Corp. v. BCE, Inc. (In re Teleglobe Commc'ns Corp.)*, 493 F.3d 345, 362 (3d Cir. 2007). In a joint-client relationship, the privilege between one client and his or her attorney is extended to encompass co-clients. *See id.* at 363 ("When co-clients and their common attorneys communicate with one another, those communications are 'in confidence' for privilege purposes."). The justification for this privilege is simple: "individuals with a common interest in the litigation should be able to freely communicate with

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Court should instead apply the joint-client privilege to protect the communications exchanged in this "tripartite relationship." (*See* Mem. in Supp. 7–8; Opp'n 11.) The Court agrees, and therefore analyzes these e-mails under the joint-client privilege. *See SCR-Tech LLC v. Evonik Energy Servs. LLC*, 2013 NCBC LEXIS 38, at *11 (N.C. Super. Ct. Aug. 13, 2013); *see also Raymond v. N.C. Police Benevolent Ass'n*, 365 N.C. 94, 99, 721 S.E.2d 923, 926–27 (2011).

their attorney, and with each other, to more effectively defend or prosecute their claims." *Raymond*, 365 N.C. at 99, 721 S.E.2d at 926.

32. It is undisputed that the radiologists are joint clients who may invoke this privilege to protect communications that would otherwise be properly withheld from disclosure under the attorney-client privilege. *See Falls v. Goldman Sachs Tr. Co., N.A.*, 2017 U.S Dist. LEXIS 207007, at *38–39 (E.D.N.C. Dec. 18, 2017). The wrinkle here is that many of the e-mails exchanged between the joint-client radiologists were also shared with Ryan and with Zuger's son-in-law, Devin Bosch ("Bosch"). Charlotte Radiology argues that Ryan and Bosch's presence during these communications waives any privilege, just as including third parties waives the privilege in a single attorney-client relationship. (*See* Mem. in Supp. 11; Reply Mem. in Supp. Mot. Compel 7–9, ECF No. 50 ["Reply"].)

33. Kelley does not respond to this point, nor does Kelley defend Bosch's presence on the communications. There is no claim that Bosch acted as Kelley's agent or as the agent of one of the other joint clients—Kelley simply notes that Zuger asked Bosch to attend the radiologists' initial meeting with the attorneys. (*See* Kelley Aff. ¶ 10.) The Court has already concluded that Ryan is not Kelley's agent for purposes of preserving privileged communications, and without further evidence to the contrary, both men appear to be third parties with whom confidential attorney-client information was shared. Any applicable joint-client privilege has therefore been waived as to communications involving Ryan or Bosch.[2]

[2] There is some question about whether one co-client's waiver of privilege is a waiver as to all co-clients. *See Teleglobe*, 493 F.3d at 363. That question isn't at issue here for two reasons.

34. It bears noting that these waivers of the attorney-client privilege do not affect Kelley's ability to invoke work-product immunity. To be sure, federal courts have found that disclosure of a document to third parties can waive work-product immunity when "the disclosure substantially increase[s] the opportunities for potential adversaries to obtain information." *United States v. Stewart*, 287 F. Supp. 2d 461, 468 (S.D.N.Y. 2003). But the Court need not reach that question because Charlotte Radiology does not argue that Kelley waived work-product immunity. Rather, it contends only that "[t]he documents are simply not work product"—an argument the Court addresses as part of its *in camera* review below. (Reply 5.)

3. Subject-Matter Waiver

35. It is well established that "[a] waiver of certain communications can waive the attorney-client privilege not only as to the particular communication but to other communications relating to that same subject matter." *Morris v. Scenera Research, LLC*, 2011 NCBC LEXIS 34, at *32 (N.C. Super. Ct. Aug. 26, 2011). Charlotte Radiology contends that the "cavalier attitude that Kelley has displayed toward maintaining confidentiality" weighs in favor of a broad subject-matter waiver here. (Mem. in Supp. 12.)

36. First, Charlotte Radiology highlights Kelley's repeated disclosures of confidential information to Ryan, Bosch, and others. Although courts have found that an intentional disclosure to third parties can result in a subject-matter waiver, "[t]he

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The first is that Bosch was invited to attend the attorney consultations with the full knowledge of, and apparently without objection from, all of the radiologists. The second is that Kelley knowingly shared the communications with Ryan, resulting in a waiver as to Kelley even if it might not prevent the others from asserting privilege in the future.

modern trend decidedly favors a balanced approach" based on principles of fairness. *Technetics*, 2018 NCBC LEXIS 116, at *17; *compare United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982)*, with Wi-LAN, Inc. v. LG Elecs., Inc.*, 684 F.3d 1364, 1373 (Fed. Cir. 2012). In this circumstance, fairness dictates that any waiver be confined to the individually disclosed communications, all of which were made outside the context of litigation. Kelley did not share communications with third parties in order to "gain adversarial advantage in judicial proceedings," but instead to confide in close friends and family members while deciding whether to pursue litigation. *XYZ Corp. v. United States (In re Keeper of the Records)*, 348 F.3d 16, 24 (1st Cir. 2003). It does not appear that Kelley has attempted to use the privilege as both a sword and a shield during this litigation. A broad subject-matter waiver would be punitive and is therefore inappropriate. *See Technetics*, 2018 NCBC LEXIS 116, at *17.

37. Second, Charlotte Radiology points to Kelley's use of the company's e-mail system. It is undisputed that Kelley used his Charlotte Radiology e-mail address to send and receive some privileged attorney-client communications. Charlotte Radiology has been able to access many of these e-mails through its own discovery efforts, and several have been made part of the record for this motion.

38. The Court agrees with Charlotte Radiology that Kelley's use of its e-mail system was a waiver. This question turns on whether the employee "had a reasonable expectation of privacy and confidentiality in his email communications with his personal attorney." *Mason v. ILS Techs., LLC*, 2008 U.S. Dist. LEXIS 28905, at *10 (W.D.N.C. Feb. 29, 2008). It is debatable whether an employee ever has an

expectation of privacy when using his employer's e-mail system to communicate about a legal dispute *against the employer*. Kelley plainly had no such expectation of privacy because he was on notice that the e-mail system was monitored. Kelley acknowledged receiving a copy of Charlotte Radiology's Employee Handbook and Code of Conduct, which stated that the company would monitor employee e-mails. (Mem. in Supp. Ex. F ¶¶ 5–6, Exs. A, B, ECF No. 40.6.) He cannot now claim an objectively reasonable expectation of privacy given that "his employer's policy put him on notice that it would be overseeing his Internet use." *United States v. Hamilton*, 701 F.3d 404, 408–09 (4th Cir. 2012) (citation and quotation marks omitted); *see also Mason*, 2008 U.S. Dist. LEXIS 28905, at *10. It is clear that any attorney-client privilege has been waived as to the individual e-mails Kelley sent and received using Charlotte Radiology's e-mail system.

39. This does not warrant a subject-matter waiver, however. Charlotte Radiology did not cite, and the Court has not found, case law where an employee's use of an employer's e-mail system extended beyond the individual e-mails to effect a broad waiver of all communications on the same subject matter. Moreover, the disclosure was inadvertent, extrajudicial, and was not made for the purpose of gaining an advantage in litigation—in fact, the use of Charlotte Radiology's e-mail system distinctly disadvantaged Kelley. *See Technetics*, 2018 NCBC LEXIS 116, at *18. In these circumstances, the waiver of privilege is limited to the communications made using Charlotte Radiology's e-mail system.

C. *In Camera* Review

40. Next, the Court turns to its *in camera* review of the disputed documents. These items consist largely of e-mail communications exchanged during an eight-month period before this action was filed. One group of e-mails involves discussions between Kelley and Bishop, his attorney of record in this litigation. A second group of e-mails were exchanged between Kelley, four other co-client radiologists, and their attorneys at Nexsen Pruet regarding potential legal claims against Charlotte Radiology. There are also a number of other documents that Kelley created and forwarded to his attorneys. Finally, the non-party privilege log contains some e-mails already listed on Kelley's log along with several additional e-mails, most of which were sent during this litigation.

41. Due to the volume of documents in dispute, the Court discusses the e-mails by thread, rather than individually, where applicable. Each of the twenty-seven threads arises from one base e-mail, which is often followed by comment or discussion between Kelley and other recipients. As a result, the protected communications at the beginning of a thread sometimes appear separately within other communications in the ongoing thread that do not themselves warrant the same protection. E-mails that are part of a thread but are not themselves protected from discovery should be produced with the protected information redacted, as outlined below.[3] The Court begins with Kelley's privilege log.

[3] A number of disputed documents consist of an e-mail in which Kelley forwards a communication or other document protected by work-product immunity to Ryan or others. These communications transmit the work product but otherwise contain no additional substantive text or comment. Production of these communications, with all work product

Thread 1: Documents 1–8

42. Thread 1 is an exchange of e-mails between Kelley and Bishop. Document 8 is an e-mail from Kelley asking specific questions about the substance of the complaint and the litigation process. Bishop answers these questions in document 6. It is clear that both e-mails were prepared in anticipation of litigation, and disclosure of either could reveal Bishop's mental impressions or legal theories. Each is therefore protected work product.

43. Document 7 is a draft complaint that was an e-mail attachment. Draft pleadings are routinely found to be work product. *See Charter Oak Fire Ins. Co. v. Am. Capital, Ltd.*, 2015 U.S. Dist. LEXIS 43109, at *20 (D. Md. Apr. 1, 2015); *BNP Paribas v. Bank of N.Y. Tr. Co., N.A.*, 2013 U.S. Dist. LEXIS 79180, at *21 (S.D.N.Y. June 5, 2013). Thus, this document is protected work product.

44. Documents 2 and 3 are draft engagement agreements that were also e-mail attachments. There is little North Carolina law on the status of engagement agreements, but federal courts generally find that agreements outlining the general nature of the representation rather than the specific work that the attorney will perform are not protected by the attorney-client privilege or the work-product doctrine. *See JP Morgan Chase Bank, N.A. v. PT Indah Kiat Pulp & Paper Corp.*, 2011 U.S. Dist. LEXIS 147176, at *11–12 (N.D. Ill. Dec. 22, 2011); *Wachovia Fin.*

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redacted, would not provide information beyond what is described in the privilege log. Accordingly, requiring the production of such non-substantive e-mail forwards would be pointless (while necessitating wasteful efforts to redact the relevant substance), and the Court declines to do so. *See, e.g.*, *Chevron Corp. v. Salazar*, 2011 U.S. Dist. LEXIS 92628, at *4 n.2 (S.D.N.Y. Aug. 16, 2011).

Servs., Inc. v. Birdman, 2010 U.S. Dist. LEXIS 152291, at *17 (S.D. Fla. Sept. 27, 2010); *Newmarkets Partners, LLC v. Sal. Oppenheim Jr. & Cie. S.C.A.*, 258 F.R.D. 95, 103–04 (S.D.N.Y. 2009); *see also Hoot Winc, LLC v. RSM McGladrey Fin. Process Outsourcing, LLC*, 2009 U.S. Dist. LEXIS 103045, at *5 (S.D. Cal. Nov. 4, 2009) ("[T]he Ninth Circuit has repeatedly held retainer agreements are not protected by the attorney-client privilege or work product doctrine."). The documents at issue here broadly outline terms governing the typical attorney-client relationship but do not address the substance of Bishop's work in representing Kelley with any specificity. Documents 2 and 3 must be produced.

45. Documents 1, 4, and 5 are not work product. These e-mails are responses about meeting times or about the engagement letter that do not speak to the substance of the legal claims. These e-mails were also disclosed to Ryan, and any attorney-client privilege that would otherwise apply has been waived. Accordingly, Kelley must produce documents 1, 4, and 5 with redactions for the work product discussed above.

Thread 2: Documents 9–11

46. Thread 2 contains three e-mails between Kelley and Bishop, all of which discuss Kelley's employment contract with Charlotte Radiology and how Kelley's actions in reliance on those provisions may affect his recovery in this case. The e-mails were sent because the contract is part of the pending litigation, and they reflect Bishop's legal opinions. Documents 9, 10, and 11 are therefore work product and immune from discovery.

Non-Thread E-mails: Documents 12–17

47. These documents are not part of an e-mail thread but instead comprise a series of communications between Kelley and Bishop in which Kelley transmits factual information about his claim for Bishop's use in preparing the case. In document 17, Kelley lists a number of substantive legal questions for Bishop's review. Document 16 is an e-mail from Kelley to Ryan that forwards the list of questions but otherwise contains no substantive information about the litigation. Documents 12 and 13 contain relevant dates, timelines, and excerpts of documents related to the case. The contents of each e-mail demonstrate that Kelley prepared the communication to assist Bishop in his representation. These documents speak directly to Bishop's work in developing the case and are not subject to disclosure. Documents 12, 13, 16, and 17 are all protected work product.

48. The other two documents in this group are neither work product nor privileged attorney-client communications. Document 14 is Kelley's curriculum vitae. Document 15 appears to reflect a technical difficulty with the e-mail system (thus doubtful in its relevance, but not privileged or immune). Documents 14 and 15 must be produced. In addition, each e-mail includes Ryan as a recipient, and therefore any attorney-client privilege has been waived.

Thread 3: Documents 18–32

49. Document 30 is the key e-mail in thread 3. In this e-mail, Bishop forwards to Kelley a letter that Bishop received from a Charlotte Radiology employee. Bishop analyzes the letter's impact on Kelley's case based on relevant case law. Documents

24 and 27 transmit this e-mail to Ryan and Loretta without substantive comment. Bishop's analysis was clearly prepared in anticipation of litigation, and its disclosure would expose Bishop's opinions, mental impressions, and strategy. Documents 24, 27, and 30 are immune from discovery.

50. The letter that is the subject of Bishop's analysis is contained in three of the entries (Documents 25, 28, 31). This letter is already in Charlotte Radiology's possession, having been written by one of its employees. There are no notes or other comments from Bishop on the letter attachment. Accordingly, the letter itself is not protected work product and documents 25, 28, and 31 must be produced.

51. The rest of the e-mails in the thread do not contain information of substance. Some of the e-mails arrange a meeting, (Documents 18, 20, 22), and six entries consist of an embedded image of the Charlotte Radiology logo (Documents 19, 21, 23, 26, 29, 32). It is doubtful whether these documents are relevant, but relevance is not at issue. Any attorney-client privilege that would otherwise apply to the communications has been waived because Ryan is included, at various points, as a recipient or later received the e-mails as forwarded from Kelley. As a result, documents 18–23, 26, 29, and 32 are not protected.

52. Kelley's privilege log reflects that some of the non-protected documents have already been produced to Charlotte Radiology with redactions. (*See* Documents 20, 21, 24–26.) To the extent that these documents redact only the privileged information in document 30, this production is sufficient. Otherwise, documents 18–23, 26, 29,

and 32 must be produced with redactions limited to the protected work product in document 30 (and documents 24 and 27), as needed.

Thread 4: Documents 33–37

53. This is another series of e-mails between Kelley and Bishop in which Bishop provides analysis of Kelley's case. Documents 33, 36, and 37 contain questions and answers about letters from Charlotte Radiology's attorneys and Kelley's employment contract. Document 34 is an attachment with the text of a court opinion that Bishop discusses in his analysis. In document 35, Kelley forwards Bishop's analysis to Ryan, with no additional text beyond the forwarded communication. These communications contain Bishop's mental impressions and, consequently, are immune from discovery under the work-product doctrine.

Thread 5: Documents 38–48

54. In document 47, Bishop answers a series of substantive questions from Kelley about the contracts underlying his claims. Documents 46 and 48 are attachments of the contracts with Bishop's annotations. Documents 42 and 43 contain Bishop's request for case-related information from Kelley and Kelley's response. And documents 39, 40, and 44 are comments and questions between Kelley and Bishop related to pre-litigation activities. Each communication contains information relevant to Bishop's strategy. In documents 38, 41, and 45, Kelley forwards some of these communications to Ryan, and often Loretta, with no additional text. All of the documents in this thread are work product and immune from discovery.

Thread 6: Documents 49–52

55. The e-mails in thread 6 relate to a draft letter that Bishop prepared to send to Charlotte Radiology on Kelley's behalf. Document 52 consists of Kelley's substantive feedback about the draft letter and also includes the text of Bishop's initial e-mail, which describes his strategy in preparing the letter. In document 51, Kelley forwards the text of document 52 to Loretta and Ryan with no additional text. Disclosure of these communications would expose Bishop's mental impressions and litigation strategy, and these two documents are therefore protected work product.

56. The other two e-mails in this thread are communications between only Kelley and Ryan. These e-mails discuss whether certain Charlotte Radiology employees should receive the draft letter. There is no substantive legal analysis or factual information relevant to Kelley's representation. As a result, the Court sees no basis to shield these communications from discovery under the work-product doctrine. Although Kelley's log asserts attorney-client privilege as a basis for withholding these two documents, no attorney is included on either communication. Documents 49 and 50 must be produced with appropriate redactions for work product appearing elsewhere in the thread.

Thread 7: Documents 53–55 and Thread 8: Documents 56–59

57. Thread 7 consists of three e-mails. Document 55 includes the text of an e-mail from Kelley to Ryan that discloses information about Charlotte Radiology's refinance transaction that Kelley purportedly learned from an anonymous source. Kelley forwards this e-mail to Bishop in document 55 and then to Stell in document

53. The third e-mail, document 54, includes additional conversation between Kelley and Ryan on the same topic. After careful consideration, the Court concludes that these e-mails are not subject to work-product immunity. The e-mails do not request or reveal the advice of counsel but instead include Kelley's understanding of information learned from an unknown third party. Nor is there any indication that Kelley compiled the information at Bishop's request. In fact, Kelley sent the information to Bishop only after first sending it to Ryan. Documents 53, 54, and 55 must be produced.

58. The e-mails in thread 8, however, contain protected work product. These e-mails include an exchange, in document 59, between Kelley and Bishop relating to documents received from Charlotte Radiology. The Court is persuaded that this exchange relates to the giving and receiving of legal advice, the disclosure of which could reveal the mental impressions of counsel. Documents 56, 57, and 58 are forwards without additional comment. Each document in this thread is protected by work-product immunity.

Thread 8:[4] Documents 63–73

59. This thread contains three e-mails protected by the work-product doctrine. In documents 68 and 69, Bishop offers legal advice in response to an inquiry from Kelley. In document 73, Bishop summarizes a telephone call he had with Charlotte Radiology's General Counsel and provides additional legal analysis. These three

[4] Kelley's privilege log mistakenly refers to both this thread and the previous thread as "Thread 8." The Court uses the same designation in this Order for purposes of continuity.

e-mails contain Bishop's litigation-related advice and are immune from discovery as work product.

60. The remaining documents are purely logistical e-mails addressing dates and times for future conference calls. These communications are not work product, and any attorney-client privilege has been waived because Ryan is a recipient on each e-mail. Documents 63–67 and 70–72 must be produced with appropriate redactions.

Thread 9: Documents 74, 75, 78–87

61. Thread 9 is a group of e-mails exchanged among Kelley, the joint-client radiologists affiliated with Charlotte Radiology, and their attorneys at Nexsen Pruet. This thread stems from document 87, which is an e-mail from attorney Smith to the radiologists. The e-mail advises each radiologist on his potential legal claims against Charlotte Radiology. Kelley forwards Smith's e-mail to Ryan without comment in document 86. Accordingly, documents 86 and 87 are work product and shall not be produced.

62. Documents 74, 75, and 78–85 are e-mails reflecting the radiologists' reactions to Smith's e-mail. These e-mails do not discuss Smith's underlying analysis, nor do they appear to be intended for Smith's review. Disclosure would not reveal Smith's mental impressions or legal analysis. Accordingly, the Court concludes that these e-mails were not created in anticipation of litigation and are not protected by work-product immunity.

63. In addition, all of these communications, except for document 74, were disclosed to Ryan and Bosch. These disclosures waived the joint-client privilege as to

these communications. Document 74 remains subject to the joint-client privilege because it is a communication from Wissing to Kelley, Zuger, and Beloni, it was sent in the course of receiving legal advice from the joint clients' attorneys, and it does not appear to have been shared with Ryan or Bosch. Document 74 shall not be produced. Documents 75 and 78–85, however, must be produced with redactions covering all work product contained in the earlier thread.

Thread 10: Documents 76, 90, 99–101

64. In thread 10, Kelley and Beloni exchange factual information related to the case and discuss plans for their next steps with Smith and Pierce. Document 101 is an e-mail from Beloni to Smith and Pierce containing the minutes of certain Charlotte Radiology board meetings along with additional commentary, all of which appears to have been requested by Smith and Pierce. In document 100, Kelley asks Beloni for his opinion on a litigation plan that Kelley intends to present to the attorneys. Documents 76 and 99 are forwards from Kelley to Ryan of these e-mails with no additional communication. These communications, all prepared in anticipation of litigation, are protected work product.

65. Document 90 is an e-mail from Beloni to Kelley adding further information about the same subject. It does not appear to have been shared with any third party. The joint-client privilege applies to this communication, and it shall not be produced.

Thread 11: Documents 77, 88, 89, 91–94

66. Thread 11 is another group of e-mails exchanged among the radiologists. Kelley initiated this thread (Document 94) by e-mailing attorneys at Nexsen Pruet a

request as to how the radiologists wished to proceed with the representation. This e-mail copies Zuger, Beloni, and Wissing, along with Bosch and Ryan. It seeks legal advice, contributes to a potential case strategy, and may reveal the mental impression or strategy of the attorneys at Nexsen Pruet. In document 77, Kelley forwards document 94 to Ryan with no additional comment. Both are protected work product.

67. Three of the subsequent e-mails in the thread between Beloni and Kelley are protected by the joint-client privilege. In documents 88, 89, and 91, Kelley and Beloni discuss the scope of their representation and potential next steps. Because these e-mails were not shared with any third party, the joint-client privilege applies.

68. Document 93, however, is an e-mail from Bosch to Kelley that falls outside the joint-client representation. Document 92 is an e-mail between two joint clients—from Zuger to Kelley—but is not a communication facilitating legal advice and is therefore not privileged. Thus, Kelley must produce documents 92 and 93 with any work product therein redacted.

Thread 12: Documents 95–98 and Thread 13: Documents 102–11

69. Threads 12 and 13 are closely related and include discussion of advice received from attorneys at Nexsen Pruet about their evaluation of potential claims against Charlotte Radiology. In documents 107 and 111, Smith addresses how the radiologists' potential claims may affect their relationships with Charlotte Radiology and what the radiologists may recover in litigation. In documents 96, 97, 106, and 108, Kelley forwards one of these e-mails to the radiologists and Ryan with no additional substantive comment. Documents 109 and 110 are short, non-substantive

responses from Kelley thanking Smith for his e-mail. Document 98 is a draft response by Kelley, for which he requests input from the other radiologists. Document 95 is Zuger's feedback on Kelley's draft. These e-mails include the receipt and discussion of legal advice about potential litigation and are protected work product.

70. The remaining e-mails in the thread, documents 102–05, are all from Zuger. These e-mails contain Zuger's thoughts about certain matters related to Charlotte Radiology's business. They do not appear to have been prepared for review by Smith or Pierce, and they do not reveal Smith or Pierce's mental impressions or strategy. The Court concludes that these e-mails are not protected work product. To the extent that these e-mails would have been protected by the joint-client privilege, the protection was waived by including Ryan or being shared with Bosch. Each of these communications must be produced with appropriate redactions of the work product discussed above.

Thread 14: Documents 114, 115 and Non-Thread E-mails: Documents 112, 113, and 152–57

71. Each of these documents contains case-related information that either Kelley, Wissing, or Beloni prepared in response to questions from attorneys at Nexsen Pruet. Document 115 is a draft factual summary prepared by Kelley, to which he adds more information in document 113. Documents 153, 155, and 157 are similar drafts by Wissing, and Beloni sends his own factual summary in document 112. The remaining e-mails are forwards of this material that contain either an additional short description of the work product or no additional substantive content at all.

Because Kelley, Wissing, and Beloni prepared these communications at Nexsen Pruet's request and for use in analyzing their claims, all of these documents are protected work product.

Thread 15: Documents 116–19

72. Documents 116 and 118 comprise an e-mail exchange between Kelley and Beloni (with the other radiologists copied) in which the two discuss factual information that Beloni learned about the refinance transaction and its effect on the business. These e-mails are not work product; rather, they are a discussion of ongoing circumstances at Charlotte Radiology and do not run the risk of exposing Nexsen Pruet's work in evaluating potential legal claims. Further, the communications were not made in the course of giving or seeking legal advice as required to warrant protection by the joint-client privilege. Documents 117 and 119 are image attachments embedded in the e-mails. All four documents must be produced.

Thread 16: Documents 120–22

73. Document 122 is an e-mail from Smith to Kelley asking case-related questions. This communication is clearly attorney work product.

74. Documents 120 and 121, however, are logistical e-mails from Kelley and Zuger about potential dates for a meeting. They are not protected by the work-product doctrine, nor are they protected by the joint-client privilege. These e-mails must be produced with appropriate redactions of the work product in document 122.

Thread 17: Documents 123–26

75. These four documents relate to the radiologists' engagement letter with Nexsen Pruet. Documents 124 and 126 are copies of the letter, which broadly outlines the requirements for billing, retainer, and termination, among other general aspects of an attorney-client relationship. This type of general engagement letter is not protected work product. *See, e.g.*, *Newmarkets Partners*, 258 F.R.D. at 103–04. Neither are the two e-mails (Documents 123 and 125) from Smith and Kelley about the letter, which do not contain substantive advice or opinions about the case. Each of these communications must be produced.

Thread 18: Documents 158–72

76. Document 172 is an e-mail from Kelley to himself summarizing the facts underlying his claims. It appears that Kelley prepared this document before retaining an attorney but in anticipation of doing so. Given the timing and other related context, the Court concludes that this document was prepared in anticipation of litigation. It is protected work product. Three other e-mails simply forward the text of document 172 to attorneys at Nexsen Pruet or the other radiologists without substantive comment. (Documents 165, 169, 170.)

77. In document 164, Kelley forwards the e-mail to Ryan, along with an additional communication. The additional text was not prepared for review by attorneys at Nexsen Pruet or at their direction. The Court does not believe it would risk revealing their mental impressions, legal theories, or strategy. It is therefore

not work product and must be produced with appropriate redactions of the work product contained in document 172.

78. Document 163 is an e-mail from Kouri to Kelley and the other radiologists correcting his personal information as outlined in Kelley's summary. This information is a substantive addition to Kelley's summary and discusses the potential path towards legal action against Charlotte Radiology. Document 163 is protected work product.

79. The other e-mails appear to be largely irrelevant. Several address the logistics of setting up a meeting. (Documents 158–62, 171.) Three e-mails are automated messages from a mail delivery subsystem. (Documents 166–68.) Relevance is not at issue, and these documents are not subject to work-product immunity or attorney-client privilege. Accordingly, these communications must be produced with appropriate redactions.

Non-Thread E-mails: Documents 127–48, 150, 151

80. In this group of e-mails, Kelley sends Nexsen Pruet four documents summarizing background material and events that preceded Kelley's decision to seek legal advice, as Kelley explains in an e-mail to the attorneys in document 136. These documents summarize Kelley's anticipated salary continuation and stock payout (Document 128), early meetings with the joint-client radiologists (Document 131), Kelley's calculation of the value added through his work at Charlotte Radiology (Document 133), and a meeting between Kelley and Charlotte Radiology's president, Bob Mittl (Document 135).

81. Three of these documents appear to have been created by Kelley for his personal use in resolving his dispute with Charlotte Radiology. Kelley's notes on his meeting with Mittl summarize his early efforts to gather information about the refinance transaction and to present his case to his employers; in fact, the document demonstrates that the meeting was part of an ongoing discussion among Charlotte Radiology leadership. The calculations of Kelley's value added to the company and of his salary continuation and stock payout appear to have been prepared and used to press Kelley's case to his employer and not as part of an attorney's litigation preparation. At a minimum, Kelley hasn't carried his burden to show otherwise. Each of these documents is, therefore, not work product because Kelley did not prepare them "specifically because of" litigation. *Dickson*, 366 N.C. at 349, 737 S.E.2d at 374 (citation and quotation marks omitted).

82. Document 131, however, is immune. This document is Kelley's summary of a phone call and meeting with the joint-client radiologists. This document outlines the radiologists' discussion of their knowledge of the refinance transaction. Based on the entirety of the document and the context surrounding its preparation, it appears to the Court that it was prepared because the radiologists anticipated litigation.

83. Accordingly, document 131 is immune from discovery, along with duplicates of the document, e-mails forwarding the document without additional comment, and duplicates of those e-mails (Documents 130, 141–44). The remaining summaries (Documents 128, 133, 135), all duplicates or e-mails forwarding them (Documents

127, 129, 132, 134, 137–40, 145–48, 150, 151), and Kelley's e-mail to Nexsen Pruet explaining the summaries (Document 136) must be produced.

Non-Thread E-mail: Document 149

84. Document 149 is an e-mail from Zuger to Kelley that simply says "thank you." This is in response to an earlier e-mail, embedded in document 149, that Kelley had prepared and sent to Smith. Kelley's embedded e-mail contains a discussion of legal strategy and is clearly protected work product. Given that there is nothing substantive about document 149 other than the work product, it would be pointless to require its production with redactions. Accordingly, document 149 shall not be produced.

Non-Thread Items: Documents 173–93

85. The last group of entries on Kelley's privilege log are a set of documents, not e-mails. Several consist of Kelley's handwritten notes, while others are pre-existing documents that Kelley later annotated.

86. Document 174 is a set of annotated calendars. Document 175 is a description of Kelley's relationship with certain key players in the events preceding litigation. It is signed by Kelley and dated July 29, 2018. Document 177 is a timeline of relevant events with other commentary. Based on their context and content, all three documents were prepared for an attorney's use in analyzing and evaluating Kelley's case. These documents are protected work product.

87. After careful review, the Court concludes that the other documents in this set are not protected work product. Documents 173 and 176 are Kelley's handwritten

notes. Most of the other documents are minutes of Charlotte Radiology board meetings or communications from Charlotte Radiology, all with Kelley's handwritten annotations. It is Kelley's burden to establish that these documents were prepared in anticipation of litigation. *See Wachovia Bank*, 178 N.C. App. at 531, 631 S.E.2d at 882. He has not explained, however, the context in which these documents were created. The Court cannot tell from the documents themselves when they were created, whether an attorney requested them, or whether Kelley created them for his personal use as a record of an ongoing dispute with his employer. As a result, Kelley has not carried his burden to show that these documents are immune from discovery. Documents 173, 176, and 178–93 must be produced.

Non-Party Privilege Log

88. Thread 19 marks the first set of documents contained in the non-party privilege log. In total, the non-party privilege log includes 164 documents, including e-mails in eight threads and a number of other non-thread documents. Nearly all of the e-mails were exchanged during the course of this litigation, in contrast to the pre-litigation communications contained in Kelley's privilege log. This is an important distinction. With litigation having commenced, it is far more likely that any given communication between attorney and client was prepared and sent specifically because of the litigation.

89. In thread 19, for example, Kelley and Bishop ask and answer questions about a draft version of Kelley's amended complaint. Likewise, threads 20 and 21 contain e-mails in which Kelley and Bishop discuss ongoing discovery matters and

the exchange of information between Bishop and counsel for Charlotte Radiology. Threads 23, 24, and 26 involve exchanges about Kelley's e-mail account and other discovery-related matters. Documents 20 and 21, which fall outside the threads, are similar. These e-mails directly relate to the litigation process and contain Bishop's mental impressions on various issues. All are work product.

90. In thread 22 (and separate documents 8 and 11), Kelley seeks Bishop's advice on a business interest owned by Kelley that is related to his employment with Charlotte Radiology. Bishop advises Kelley about the potential impact on this litigation. These emails are protected work product.

91. The e-mails between Bishop and Kelley in thread 25 address Kelley's legal claims. These communications directly reflect Bishop's legal analysis and implicate his mental impressions of the case. They are work product.

92. The non-party privilege log also contains several other items that are not part of any e-mail thread. Documents 4, 12, and 22 contain advice related to the litigation process, and in documents 23, 35, 36, and 37, Kelley sends Bishop factual information. In documents 24, 25, and 26, Kelley inquires about the impact of litigation on his ability to pursue work opportunities. Documents 27 and 28 also contain a discussion of the pending litigation. In context, and based on a careful review, the Court concludes that each of these communications was made because of this litigation and is protected work product.

93. All but six of the remaining items on the non-party privilege log overlap with communications on Kelley's log that have already been addressed. In documents 38,

39, and 41, Ryan forwards litigation-related e-mails to Steve Scalia ("Scalia"), Ryan's former business partner and family friend. (Kelley Aff. ¶ 8.) Scalia makes a non-substantive comment in response in document 40. Each e-mail forward includes a thread containing information that the Court has already designated as immune from discovery under the work product doctrine. The forwards themselves do not include additional text or substantive comment. These documents need not be produced.

94. The two final unaddressed entries on the non-party log were not supplied to the Court *in camera*, but their text appears in communications discussed above. In the description of the first entry, the log explains that it is the "thread precursor" to document 55. The Court has previously concluded that document 55 is not protected by work product immunity. As a result, this entry must be produced. Conversely, the description of the second entry notes that the item is a forward of document 101, which the Court has decided is protected work product. This entry is also therefore immune from discovery.

D. Substantial Need Exception

95. Even if a communication has been deemed protected work product, a party may be able to show that it has "substantial need of the materials in the preparation of the case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." N.C. R. Civ. P. 26(b)(3); *see also Evans*, 142 N.C. App. at 28, 541 S.E.2d at 789. Charlotte Radiology argues that it should be able to claim this exception because it has demonstrated the requisite

"substantial need" to access the e-mails exchanged between the joint-client radiologists.

96. This need, Charlotte Radiology asserts, is based in the impeachment value of the radiologists' e-mails. (*See* Reply 4–5.) The use of a document to impeach an opposing party can, in some circumstances, demonstrate substantial need. *See, e.g.*, *Suggs*, 152 F.R.D. at 507–08. But to meet this standard, "a party must present more than speculative or conclusory statements that the reports will contain invaluable impeachment material." *Id.* at 508. Charlotte Radiology has not done so here. It merely notes that the radiologists' communications are relevant to Kelley's current litigation, and could expose additional admissions. (*See* Reply 5.) These kinds of conclusory statements do not demonstrate a substantial need for the protected material.

97. Charlotte Radiology appears to argue in addition that it requires this work product in order to determine whether Ryan "improperly influenced Kelley's position or recollection." (Reply 5.) But Charlotte Radiology does not illustrate how this rises to the level of a "substantial need" to obtain the radiologists' e-mails. Further, any evidence Charlotte Radiology seeks on this point can likely be obtained through deposition testimony because the facts contained within work product remain discoverable even when the document itself is protected. *See Nat'l Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 n.5 (4th Cir. 1992).

98. Accordingly, Charlotte Radiology has not demonstrated a substantial need for those e-mails between the radiologists that are protected by the work-product doctrine, and Kelley shall not be compelled to produce them.

III.
CONCLUSION

99. For all these reasons, the Court **GRANTS** the motion in part and **DENIES** the motion in part. The Court **ORDERS** Kelley to produce all non-protected documents as outlined herein no later than 14 days after entry of this Order.

100. The Court further **ORDERS** that the parties shall propose amended case management deadlines (via e-mail) to the law clerk assigned to this case no later than 14 days after entry of this Order.

SO ORDERED, this the 15th day of May, 2019.

/s/ Adam M. Conrad
Adam M. Conrad
Special Superior Court Judge
for Complex Business Cases