UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KEVIN LONG and LUDVIC PRESTO,	:	
Plaintiffs,	:	**MEMORANDUM AND ORDER**
-against-	:	05 Civ. 639 (GEL)(KNF)
MARUBENI AMERICA CORPORATION, et al.,	:	
Defendants.	:	

KEVIN NATHANIEL FOX
UNITED STATES MAGISTRATE JUDGE

INTRODUCTION

In this civil rights action, the defendants seek an order from the Court directing the plaintiffs to disclose 25 e-mail messages that are identified at entry Nos. 1-25 in the plaintiffs' privilege log. The plaintiffs oppose the defendants' application. They maintain that the attorney-client communication privilege, the work-product doctrine, the joint client doctrine and the inadvertent disclosure doctrine, either alone or in combination, shield the 25 e-mail messages from disclosure.

BACKGROUND

While employed by Marubeni America Corporation ("MAC"), the plaintiffs, Kevin Long ("Long") and Ludvic Presto ("Presto"), used MAC computers, that were issued to them to perform their respective work assignments, to send and receive e-mail messages to each other and to their attorney. In doing so, the plaintiffs used private password-protected e-mail accounts.

During the time the plaintiffs were employed by MAC, MAC's Employee Handbook, which Long, in his capacity as senior vice president and general manager, human resources, helped prepare, cautioned its employees that "all communications and information transmitted by, received from, created or stored in [MAC's automated systems] (whether through word processing programs, database programs, e-mail, the internet or otherwise) are company records" and "MAC's property." The Handbook advised MAC employees to use MAC's automated systems for "job-related purposes," since "use of the systems for personal purposes are (sic) prohibited." The Handbook advised further, that MAC had the right to monitor its automated systems and that its employees "have no right of personal privacy in any matter stored in, created, received, or sent over the e-mail, voice mail, word processing, and /or internet systems provided" by MAC.

Unbeknownst to Long and Presto, MAC issued computers had an automatic administrative function that stored temporary internet files in a separate folder that was accessible only to authorized MAC employees. Retained within the folder were residual images of the plaintiffs' e-mail messages.

In the course of assembling documents for disclosure to the plaintiffs, MAC discovered approximately 3000 temporary internet files on the computers it had assigned to the plaintiffs. These files appeared to contain communications that implicated the attorney-client communication privilege. MAC segregated that material and advised the plaintiffs of its discovery. Thereafter, the Court directed the defendants to permit the plaintiffs to examine the 3000 files so that they might determine whether, in their view, any privileged communications resided in the 3000 files. If, after review, the plaintiffs determined that privileged

communications were within the files, they were directed to: (a) prepare a privilege log; and (b) serve that log on the defendants.

The plaintiffs complied with the Court's directive and produced a privilege log with 25 entries. As noted above, the plaintiffs allege that the 25 items noted in the log may be withheld from disclosure to the defendants because of the attorney-client communication privilege, the work-product doctrine, the joint client doctrine and/or the inadvertent disclosure doctrine.

For their part, the defendants maintain that: 1) no attorney-client communication privilege attached to 25 items because the plaintiffs had no reasonable expectation of privacy when they used MAC's computers and internet access to send e-mail messages, in contravention of MAC's Electronic Communications Policy ("ECP"), as published in the MAC Employee Handbook; 2) the plaintiffs' e-mail communications with each other are not protected by the work-product doctrine; 3) the inadvertent disclosure doctrine does not apply to the material at issue; and 4) the joint client doctrine was unilaterally waived by Long. To facilitate the resolution of this dispute, the Court reviewed, in camera, the 25 items identified in the privilege log.

DISCUSSION

Attorney-Client Privilege

"The attorney-client privilege is one of the oldest recognized privileges for confidential communications." Swidler & Berlin v. United States, 524 U.S. 399, 403, 118 S. Ct. 2081, 2084 (1998). The privilege, designed to facilitate openness and full disclosure between the attorney and the client, shields from discovery advice given by the attorney as well as communications from the client to the attorney. See Upjohn Co. v. United States, 449 U.S. 383, 101 S. Ct. 677 (1981). It permits a client to both refuse to disclose and prevent others from disclosing

confidential communications between himself and his legal representatives, made in pursuance of or in the facilitation of the provision of legal services to the client. See Mui v. Union of Needletrades, No. 97 Civ. 7270, 1998 WL 915901, at *3 (S.D.N.Y. Dec. 30, 1998); Arcuri v. Trump Taj Mahal Associates, 154 F.R.D. 97, 101 (D.N.J. 1994).

"When the same attorney represents the interests of two or more [persons] on the same matter, those represented are viewed as joint clients for purposes of [the attorney-client communication] privilege." In re the Regents of the University of California, 101 F.3d 1386, 1389 (Fed. Cir. 1996). The burden of establishing that all the elements of the attorney-client communication privilege exist, rests with the party asserting the privilege. See United States v. Schwimmer, 892 F.2d 237, 244 (2d Cir. 1989). In the case at bar, that burden is on the plaintiffs.

Based on the Court's in camera review of the 25 e-mail messages that are identified in the plaintiffs' privilege log, the Court finds that, except for the items noted at entry Nos. 1, 6, 7, 8, 9, 13, 15, 18, 20 and 24 in the log, all of the items noted in the plaintiffs' privilege log are communications that were exchanged by a client(s) with its attorney, for the purpose of seeking or obtaining legal advice, or exchanged by clients who are sharing an attorney, and those communications were made at the behest of the attorney, in connection with the attorney's provision of legal advice to the clients. Nothing in the record before the Court establishes that the parties to the communication that is identified at entry No. 1 on the log had an attorney-client relationship – as opposed to a social or other relationship – at the time the communication was made. Therefore, it is not possible for the Court to conclude that the subject communication is within the attorney-client communication privilege. The items identified at entry Nos. 8 and 9 are communications either between the plaintiffs or between a plaintiff and a person who is

neither the plaintiffs' attorney nor a party plaintiff. As a consequence, the items noted at entry Nos. 8 and 9 in the log are not attorney-client communications and, thus, do not come within the ambit of the attorney-client communication privilege. With respect to the items noted at entry Nos. 6, 7, 13, 15, 18, 20 and 24, the plaintiffs do not contend that those items may be withheld from disclosure based on the attorney-client communication privilege.

Although the Court finds that 15 of the e-mail messages noted in the plaintiffs' privilege log are attorney-client communications or attorney-client-related communication, as explained above, for the reasons that follow, the Court is not persuaded that the plaintiffs have established that these communications were confidential. Confidentiality is an aspect of a communication that must be shown to exist to bring the communication within the attorney-client communication privilege. When the confidentiality element is not shown to exist, the assertion of the attorney-client privilege to safeguard a communication from disclosure, is improper.

In the instant case, the plaintiffs elected to use the MAC computers assigned to them to prosecute their employer's work. The plaintiffs contend they used their private password-protected e-mail accounts to communicate with their attorney, and with each other, to protect the confidentiality of their communications. However, when the plaintiffs determined to use MAC's computers to communicate, they did so cognizant that MAC's ECP was in effect and that under MAC's ECP: (a) use of MAC's automated systems for personal purposes was prohibited; (b) MAC employees "have no right of personal privacy in any matter stored in, created, or sent over the e-mail, voice mail, word processing, and/or internet systems provided" by MAC; and (c) MAC had the right to monitor all data flowing through its automated systems.

The record before the Court establishes that Long helped prepare the MAC Employee Handbook that contains MAC's ECP. The record also shows that MAC sent all employees annual reminders about its ECP. Therefore, the Court is convinced that Long and Presto knew or should have known of MAC's ECP. Furthermore, the frequency with which those reminders were distributed to all MAC employees makes incredible any claim by Presto, who held the position senior vice president and general manager, internal audit, that he was ignorant of the ECP. The ECP's admonishment to MAC's employees that they would not enjoy privacy when using MAC's computers or automated systems is clear and unambiguous. The plaintiffs disregarded the admonishment voluntarily and, as a consequence, have stripped from the e-mail messages referenced above the confidential cloak with which they claim those communications were covered. Accordingly, the 15 relevant e-mail messages identified in the plaintiffs' privilege log are not shielded from disclosure by virtue of the attorney-client communication privilege.

Work-Product Doctrine

The work-product doctrine is set forth in Rule 26 of the Federal Rules of Civil Procedure:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Fed. R. Civ. P. 26(b)(3).

The work-product doctrine "is intended to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy with an eye toward litigation, free from

unnecessary intrusion by his adversaries." United States v. Adlman, 134 F.3d 1194, 1196 (2d Cir. 1998) (internal quotation marks omitted). "Where a document was created because of anticipated litigation, and would not have been prepared in substantially similar form but for the prospect of that litigation, it falls within Rule 26(b)(3)." Id. at 1195. However, the work-product doctrine's protection may be waived. The "voluntary disclosure of work product to an adversary waives the privilege as to other parties." In re Steinhardt Partners, L.P., 9 F.3d 230, 235 (2d Cir. 1993).

In the case at bar, the Court finds that, with the exception of the items identified at entry Nos. 1, 8 and 9 in the plaintiffs' privilege log, the e-mail messages noted in the log constitute work product, since they are communications concerning legal strategies that were exchanged by the plaintiffs, at the direction of their attorney, or were exchanged by the plaintiffs with their attorney in anticipation of the litigation in which the parties are now engaged. However, as explained above, by deliberately using their MAC issued computers and MAC provided internet access to exchange work product, knowing -- or in a circumstance where they should have known -- that MAC monitors its automated systems and, therefore, could gain access to the e-mail messages, the plaintiffs voluntarily disclosed work product to all MAC employees authorized by MAC to monitor its automated systems and to police them for ECP violations. In doing so, the plaintiffs waived the protection the work-product doctrine would typically provide to the electronic communications that are at issue here.

Inadvertent Disclosure

"As a general rule, the voluntary production of a privileged document waives any claim of privilege with respect to that document." United States v. Rigas, 281 F. Supp. 2d 733, 737

(S.D.N.Y. 2003). In order for the inadvertent disclosure doctrine to apply, the party asserting the doctrine must be the party that made the disclosure. Here, the plaintiffs did not "disclose" the e-mail messages to the defendants during the pretrial discovery phase of the litigation. Rather, MAC discovered these communications while reviewing MAC computers to fulfill MAC's disclosure obligations in this litigation and, thereafter, "disclosed" them to the plaintiffs. Moreover, the plaintiffs did not use their MAC assigned computers and their MAC provided internet access accidentally or inadvertently to exchange the pertinent e-mail messages; they did so voluntarily, intentionally and repeatedly.

Under the Federal Rules of Civil Procedure, a party "may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defenses of any party." Fed. R. Civ. P. 26(b)(1). Since the plaintiffs used MAC's computers and automated systems to exchange e-mail messages with their attorney and each other that the Court has determined may not be withheld from disclosure based on privilege or recognized doctrines, MAC is entitled to review the 25 e-mail messages on the plaintiffs' privilege log.

CONCLUSION

For the reasons set forth above, MAC's application for an order directing the plaintiffs to disclose 25 e-mail messages identified as entry Nos. 1-25 in the plaintiffs' privilege log, dated August 25, 2006, is granted.

Dated: New York, New York
October 19, 2006

SO ORDERED:

KEVIN NATHANIEL FOX
UNITED STATES MAGISTRATE JUDGE

Sent copies via facsimile to:

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James R. Williams, Esq.