

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA
CIRCUIT CIVIL DIVISION

Case No. 50-2018-CA-004190-XXXX-MB

GEORGE W. SCHAEFFER, an
individual; GEORGE W. SCHAEFFER AS
TRUSTEE OF THE GEORGE W.
SCHAEFFER LIVING TRUST DATED
DECEMBER 16, 2008, AS AMENDED;
and GWS 2, INC., a Florida corporation,

Plaintiffs,

v.

DOWLING & HALES, LLC,

Defendant/Third Party Plaintiff,

v.

PEOPLE'S TRUST INSURANCE COMPANY,

Third Party Defendant.

**ORDER ON PLAINTIFFS' OBJECTION
TO NOTICES OF PRODUCTION FROM NON-PARTIES**

THIS MATTER came before the Court for hearing on March 21, 2019, as to Plaintiffs' Objection to Defendant's Notices of Production from Non-Parties (the "Objection"), and after receipt and review of the parties' supplemental submissions regarding the Objection, and being otherwise fully advised in the premises, the Court finds and concludes as follows:

1. The issue presented by Plaintiffs' Objection is whether the accountant-client privilege (recognized in Florida) applies to communications between George W. Schaeffer ("Schaeffer") and his California accountants, which occurred while Schaeffer was a resident of

California.

2. In the proposed subpoenas directed to Plaintiff Schaeffer's California accountants (Vinesh Nathu and PricewaterhouseCoopers), Dowling Hales seeks the following records:

All communications with George W. Schaeffer, **between January 1, 2010 and January 25, 2014**, relating to, concerning, or regarding the value of People's Trust Holdings, LLC, People's Trust Insurance Company, People's Trust MGA, LLC, GS Two, LLC, or GS Deerfield, LLC.

All communications with George W. Schaeffer, **between January 1, 2010 and January 25, 2014**, relating to, concerning, or regarding the value of George W. Schaeffer's interest in (whether directly or through any affiliated persons or entities) People's Trust Holdings, LLC, People's Trust Insurance Company, People's Trust MGA, LLC, GS Two, LLC, or GS Deerfield, LLC.

All documents sent by George W. Schaeffer, **between January 1, 2010 and January 25, 2014**, relating to, concerning, or regarding the value of People's Trust Holdings, LLC, People's Trust Insurance Company, People's Trust MGA, LLC, GS Two, LLC, or GS Deerfield, LLC.

All documents sent by George W. Schaeffer, **between January 1, 2010 and January 25, 2014**, relating to, concerning, or regarding the value of George W. Schaeffer's interest in (whether directly or through any affiliated persons or entities) People's Trust Holdings, LLC, People's Trust Insurance Company, People's Trust MGA, LLC, GS Two, LLC, or GS Deerfield, LLC.

See Exhibits 1 and 2 to Plaintiffs' Objection (emphases added).

3. Not all jurisdictions recognize an account-client privilege. For example, Florida recognizes the privilege; California does not recognize an accountant-client privilege. *See* Cal. Evid. Code §§ 930-1063 (titled "Chapter 4. Particular Privileges"); *see also Platypus Wear, Inc. v. K.D. Co., Inc.*, 905 F. Supp. 808, 813 (S.D. Cal. 1995) ("California law contains no accountant-client privilege.").

4. At all relevant times for purposes of the proposed subpoenas directed to the California accountants, Schaeffer resided in California. *See* Complaint, ¶ 14 (noting that Mike Gold passed away unexpectedly on January 26, 2014); *see* Deposition of Vinesh Nathu at 167:17 to 168:3, attached as Exhibit 1 to Dowling Hales' Response dated 3/18/2019 (noting that Schaeffer moved to Florida after Mike Gold passed away).

5. The proposed subpoenas to Schaeffer's accountants seek records only until January 25, 2014 – the day before Mike Gold passed away. *See* Exhibits 1 and 2 to Plaintiffs' Objection.

6. As to the other Plaintiffs:

George W. Schaeffer as Trustee of the George W. Schaeffer Living Trust Dated December 16, 2008, as amended. This is a trust "validly existing under California law." *See* Complaint, ¶ 3.

GWS 2, Inc. is a Florida corporation established on July 16, 2014, which is after the final date of records sought in the proposed subpoenas.

7. Plaintiffs bear the threshold burden to establish that an accountant-client privilege applies. *See Cone v. Culverhouse*, 687 So. 2d 888, 892 (Fla. 2d DCA 1997); *see also Florida Sheriffs' Self- Ins. Fund v. Escambia County*, 585 So. 2d 461, 463 (Fla. 1st DCA 1991). Only after Plaintiffs meet that burden, does the burden shift to Dowling Hales to prove that an exception or waiver applies.

8. Florida has adopted the "interest analysis methodology" for determining choice of law questions. *Marion Power Shovel Co. v. Hargis*, 698 So. 2d 1246, 1247 (Fla. 3rd DCA 1997) (*citing Aetna Cas. & Sur. Co. v. Huntington Nat'l Bank*, 587 So. 2d 483, 485 (Fla. 4th DCA 1991)). Applying this analysis to the instant question of the applicability of an evidentiary privilege, the

Restatement 2nd Conflict of Laws, § 139, states:

Evidence that is not privileged under the local law of the state which has the most significant relationship with the communication will be admitted, even though it would be privileged under the local law of the forum, unless the admission of such evidence would be contrary to the strong public policy of the forum.

Id. “The evidence will not, however, be admitted in those *rare* instances where its admission would be contrary to the strong public policy of the forum.” Restatement (Second) of Conflict of Laws § 139, Comment on Subsection (1) (emphasis added).

9. The Second Restatement provides the following Illustration, in order to further explain Subsection (1):

In state X, A, a business man doing business in X, gives certain information to B, an accountant, which is not privileged under X local law. The information would, however, be privileged under the local law of state Y, and in the trial of an action brought in Y, A claims that evidence of his conversation with B should be excluded. The evidence will be received.

Restatement (Second) of Conflict of Laws § 139, Comment on Subsection (1), Illustration 1.

10. As stated in *Aetna Casualty and Surety Company v. Huntington National Bank*, 587 So.2d 483, 485 (Fla. 4th DCA 1991), “[t]he first step in conflict of laws analysis is to ascertain the nature of the problem involved: e.g. torts, contracts, property, divorce, etc.” “The next step in choice of law analysis is to determine the forum’s choice of law rule.” *Id.* “The next step is to determine which state’s interest is most significant.” *Id.*

11. In *Aetna Casualty and Surety Company*, the Fourth District Court of Appeal recognized:

In *Bishop v. Florida Specialty Paint Co.*, 389 So.2d 999 (Fla.1980), the court abandoned the rigid *lex loci delictus* test and adopted in its place the “significant relationships test” of sections 145-146,

Restatement (Second) of Conflict of Laws. Under this test, “the rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.”

Aetna Casualty and Surety Company, 587 So.2d at 485.

12. There does not appear to be a Florida state case precisely on point with respect to Florida's adoption of Section 139(1) of the Restatement (Second) of Conflict of Laws. Nonetheless, while *Aetna Casualty and Surety Company* dealt with sections 145-146, Restatement (Second) of Conflict of Laws, the Court does not find that the substantive analysis of the issue *sub judice* is materially different.

13. As noted in *Anas v. Becker*, 141 F.R.D. 530, 532 (M.D. Fla. 1992):

The Court notes that the Florida courts have consistently applied the Restatement (Second) of Conflict of Laws in other tort cases where a choice of law issue has arisen. *See, Bishop v. Florida Specialty Paint Co.*, 389 So.2d 999 (Fla.1980); *Proprietors Ins. Co. v. Valsecchi*, 435 So.2d 290 (Fla. 3d DCA 1983); *Hertz Corp. v. Piccolo*, 453 So.2d 12 (Fla.1984); *Stallworth v. Hospitality Rentals, Inc.*, 515 So.2d 413 (Fla. 1st DCA 1987), *Jones v. Cook*, 587 So.2d 570 (Fla. 1st DCA 1991).

Other federal courts have also depended upon Section 139 of the Restatement to resolve choice of law questions relating to privileges. *See, Mazzella v. Philadelphia Newspapers, Inc.*, 479 F.Supp. 523 (E.D.N.Y.1979); *Independent Petrochemical v. Aetna Casualty and Sur. Co.*, 117 F.R.D. 292 (D.D.C.1987); *Bamco 18 v. Reeves*, 685 F.Supp. 414 (S.D.N.Y.1988).

Anas v. Becker, 141 F.R.D. at 532.

14. The Court notes that the illustration referred to above in the Restatement (Second) of Conflict of Laws § 139, Comment on Subsection (1), Illustration 1, is nearly identical to the situation in the present case, as demonstrated by inserting the relevant party and State names in

place of X, Y, A, and B:

In state [California], [George Schaeffer], a business man doing business in [California], gives certain information to [Vinesh Nathu/ PricewaterhouseCoopers], an accountant, which is not privileged under [California] local law. The information would, however, be privileged under the local law of state [Florida], and in the trial of an action brought in [Florida], [George Schaeffer] claims that evidence of his conversation with [Vinesh Nathu/ PricewaterhouseCoopers] should be excluded. The evidence will be received.

15. The Court concludes that under the circumstances present here, it is appropriate to apply the privilege law of the state with the most significant relationship to the communication, which in this instance is California. This conclusion is expressly approved by the Second Restatement and is not inconsistent with Florida law in applying its choice of law rules.

16. The Court also notes that this conclusion is consistent with the trend that has been followed in the federal courts sitting in diversity and in numerous other states and jurisdictions that have either adopted Section 139 or applied it in ruling on choice of law issues in dealing with privilege issues:

Colorado: *People v. Thompson*, 950 P.2d 608, 611 (Colo.App.1997) (concluding that section 139 provided the appropriate framework for analyzing the issue of marital privilege);

Delaware: *3Com Corp. v. Diamond II Holdings, Inc.*, 2010 WL 2280734, *5 (Del. Ch.2010 May 31, 2010) (not reported) (applying section 139 to an attorney-client privilege issue);

District of Columbia: *Independent Petrochemical Corp. v. Aetna Cas. and Sur. Co.*, 117 F.R.D. 292, 295–296 (D.D.C.1987) (because the District of Columbia typically applies an “interest analysis” approach and relies on the Second Restatement for other choice of law matters it would likely adopt section 139 for privilege matters);

Illinois: *Allianz Ins. Co. v. Guidant Corporation*, 869 N.E.2d 1042, 1048–1049 (Ill.App.2007) (section 139 governs issue of attorney-

client privilege); *Sterling Finance Management, L.P. v. UBS PaineWebber, Inc.*, 782 N.E.2d 895, 903–904 (Ill.App.2002) (same);

Iowa: *State v. Eldrenkamp*, 541 N.W.2d 877 (Iowa 1995) (looking to section 139 for guidance on privilege issue);

Kentucky: *Saleba v. Schrand*, 300 S.W.3d 177, 181–183 (Ky.2009) (applying section 139 to privilege issue);

Maine: *State v. Lipham*, 910 A.2d 388, 392 n. 3 (Me.2006) (considering section 139 when assessing choice of law issue regarding marital privilege);

Ohio: *Woefling v. Great–West Life Assur. Co.*, 285 N.E.2d 61, 221 n. 2 (Ohio App.1972) (finding that Illinois physician-patient privilege controlled and citing to § 139);

Minnesota: *State v. Heaney*, 689 N.W.2d 168, 175–177 (Minn.2004) (applying the most significant relationship approach of section 139 to privilege choice of law analysis);

New York: *Brandman v. Cross & Brown Co. of Florida, Inc.*, 479 N.Y.S.2d 435, 436–437 (N.Y.Sup.1984) (referencing section 139 and stating that the attorney-client privilege is substantive for purposes of choice of law and New York courts will apply the law of the state with the more significant contacts); *see also Mazella v. Philadelphia Newspapers, Inc.*, 479 F.Supp. 523 (D.C.N.Y.1979) (Neaher, J.) (applying New York choice of law principles; considering section 139 and applying Pennsylvania privilege law because the communication was centered in Pennsylvania);

Pennsylvania: *James Talcott, Inc. v. C.I.T. Corp.*, 14 Pa. D & C.3d 204, 206 (Pa.Com.Pl.1980) (referencing section 139 and applying the accountant-client privilege law of the state with the most significant relationship to the communication) (**Exhibit 2**, attached hereto); *see also Samuelson v. Susen*, 576 F.2d 546, 551 (3d Cir. 1978) (Pennsylvania courts have adopted the “interest analysis” approach to conflict questions and therefore would apply the privilege law of the state with the most significant relationship to the privileged communication—particularly when there was no connection between the communication and the forum);

Puerto Rico: *Mitsui & Co. (U.S.A.) Inc. v. Puerto Rico Water Resources Authority*, 79 F.R.D. 72 (D.C. Puerto Rico 1978)

(considering relevant case law and section 139 of the Restatement; concluding that New York law governed the issue of accountant privilege because New York was the state with the most significant relationship to the privileged communication);

Texas: *Alez v. State*, 45 S.W.3d 101, 103–106 (Tex.Crim.App.2001) (applying section 139 to privileged communication issue);

Washington: *State v. Donahue*, 18 P.3d 608, 611 (Wash.App.Div.2001) (applying section 139 to physician-patient privilege); and,

Wisconsin: *State v. Kennedy*, 396 N.W.2d 765, 769–770 (Wis.App.1986) (relying on section 139 of the Restatement (Second) and concluding that Wisconsin's physician- patient privilege controlled).

17. The appropriate law to be applied here then will be determined by which state has “the most significant relationship with the communication,” the answer to which is addressed in the Restatement comments as follows:

e. State of most significant relationship. The state which has the most significant relationship with a communication will usually be the state where the communication took place, which, as used in the rule of this Section, is the state where an oral interchange between persons occurred, where a written statement was received or where an inspection was made of a person or thing. The communication may take place in a state different from that whose local law governs the rights and liabilities of the parties. So in a case involving an issue in contract that is governed by the local law of state X under the rule of s187, a question of privilege may arise with respect to a communication that took place in state Y.

18. Based on the above, the Court concludes that California is the State with the most significant relationship to the accountant-client communications at issue and thus that no accountant-client privilege applies to such communications.

19. As such, the Court concludes that Plaintiffs' Objection based on accountant-client privilege should be overruled. In so concluding, the Court refers to the comments to section 139

in more detail:

Rationale. There can be little reason why the forum should exclude evidence that is not privileged under the local law of the state which has the most significant relationship with the communication, even though this evidence is privileged under the local law of the forum. Admitting such evidence cannot defeat the expectations of the parties since, if they relied on any law at all, they would have relied on the local law of the state of most significant relationship. This state has a substantial interest in determining whether evidence of the communication should be privileged. If this state has not chosen to make certain evidence privileged, its interests obviously will not be infringed if this evidence is admitted by the forum. Admission of this evidence, if relevant, will usually be in the best interests of the forum since such admission will assist the forum in arriving at the true facts and thus in making a correct disposition of the case.

20. Since California does not recognize an accountant-client privilege, any communications to or from Schaeffer and Vinesh Nathu/ PricewaterhouseCoopers would not be subject to protection from disclosure on that ground.

21. Finally, the Court finds and concludes all other grounds raised by Plaintiffs to be without merit sufficient to preclude the requested discovery.

Based on the foregoing, it is thereby

ORDERED and ADJUDGED as follows:

A. The Plaintiffs' Objection to Defendant's Notices of Production from Non-Parties is OVERRULED and, as such, Dowling Hales is hereby authorized to issue its proposed subpoenas to George Schaeffer's California accountants.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida this Monday, May 20, 2019.



THE 15TH JUDICIAL CIRCUIT
FOR THE STATE OF FLORIDA
COURT OF APPEALS
WEST PALM BEACH, FLORIDA

HOWARD K. COATES, JR.
CIRCUIT JUDGE

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