

1997

Jane Doe v. Leigh A. Maret, John Helfer, and Psychiatric Associates, Inc., John Does I-V : Reply Brief

Utah Court of Appeals

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UTAH SUPREME COURT

BRIEF

970254

IN THE UTAH SUPREME COURT

JANE DOE,

Plaintiff-Appellant,

vs.

LEIGH A. MARET, JOHN HELFER,
and PSYCHIATRIC ASSOCIATES,
INC., John Does I - V,

Defendants-Appellees.

No. 970254

950906300 MP

PRIORITY 10

APPELLANT'S REPLY BRIEF

Interlocutory Appeal From the Third Judicial District Court
The Honorable David S. Young, Presiding

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UTAH SUPREME COURT

NOV 4 - 1998

PAT BARTHOLOMEW
CLERK OF THE COURT

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ARGUMENT

POINT I. APPELLEE ERRS IN ASSERTING THERE IS ONLY ONE ISSUE ON APPEAL

As was set forth in Appellant's Petition for Permission to Appeal Interlocutory Order and in the Appellant's Brief, there are numerous issues presented for review in this case. Those issues include whether Appellant's attorney-client privilege with her attorneys in another case were "waived" by filing this case; whether Judge Young's specific finding that Rule 504, Utah Rules of Evidence, is applicable to this case and supported a "waiver" of the attorney-client privilege; whether Judge Young's specific indication that Appellee's counsel's desire to determine if he could impeach Appellant outweighed Appellant's attorney-client privilege; whether Appellant's attorney-client privilege ended at the conclusion of her former domestic lawsuit; and whether Judge Young's ruling violated Rule 504 and U.C.A. §78-24-8(2).

Appellee's Brief suggests that the "sole" issue is whether Appellant waived the attorney-client privilege by testifying in her deposition about communications with her former attorneys. While it is certainly understandable that Appellee would like to limit consideration by this Court to that "sole" issue, the issues set forth above by Appellant are absolutely relevant to this appeal, and the "sole" issue suggested by Appellee was not even one of the bases relied upon by Judge Young in granting the motion compelling Appellant's former attorneys to testify.

It is absolutely indisputable that Judge Young heavily relied on his belief that even the potential of impeaching Appellant justified the elimination of her attorney-client privilege. The entire transcript of the hearing in which Judge Young's rulings were made has been provided to this Court (R. 292-349). In the hearing, Judge Young indicated that "if she [appellant] says that the trial went thus and such way, and the lawyer says it didn't, that's pretty credible information and it can be brought into court." (R. 310, emphasis added). Judge Young continued:

And I don't understand how it can be now that she hasn't waived the privilege by filing this, by the nature of this lawsuit. For instance, if the lawyer were to testify that she didn't relinquish custody on the basis of this released information, that she did it on whatever other basis, then that would be very credible and important information. There is no other way to the defense to get that except through the testimony of the lawyer.

(Id., emphasis added). Although the undersigned pointed out to Judge Young that Appellant's veracity could be tested in a number of other ways including taking the depositions of her ex-husband, her ex-husband's attorney, other family members, obtaining the custody evaluation report, etc., Judge Young maintained that the possibility of Appellant's attorneys giving a different story than Appellant did was so "important" to the Appellee's efforts at impeachment that it justified doing away with the attorney-client privilege.

Judge Young stated: "Now, if there is any potential that the attorney would countermand that or claim that it occurred for another reason, where else would the defendants get that

information?" (R. 342). It is clear that Judge Young's main concern was that the defendant's (Appellee) "right to impeach" Appellant was more important than the attorney-client privilege. He further stated:

How can they [defendants] protect themselves in investigating this case in the two areas, both the release of the information and its effect on damages? If in fact the attorney would come forward and say--which they won't--but if the attorney would come forward and say, that really didn't have anything to do with it, she lost them because of a drug habit, or whatever else--that's out of, maybe, the evaluation. I am making that up, of course. I am not assuming that fact. But if that's so, why wouldn't they be entitled to discovery. Then after discovery, then you can file a motion for protective order on the basis that it has no bearing on the case, request in limine that it's not relevant.

(R. 323-24, emphasis added).

It is clear that Judge Young did not have any evidence that Appellant was lying or could be impeached, and that he believed the "possibility" of impeachment outweighed her attorney-client privilege. As set forth in Appellant's Brief, this is totally contradictory to Utah case law and the legislative mandate that the attorney-client privilege be preserved "inviolable."

It is also clear that Judge Young's belief that Appellant had "waived" the privilege was not as a result of any of the brief statements she made in her deposition about discussions with her former counsel. Rather, Judge Young indicated that the "waiver" occurred simply because Appellant had filed a lawsuit which had related issues to her earlier divorce case. Judge Young specifically indicated that "I don't understand how it can be now that she hasn't waived the privilege by filing this, by the nature

of this lawsuit." (R. 310, emphasis added). Nowhere in Judge Young's ruling did he indicate that a waiver had occurred because of anything Appellant said in her deposition. Appellee obviously wishes such had been the basis of Judge Young's ruling because Appellee dedicates almost her entire Brief to an argument that statements made by Appellant in her deposition waived the attorney-client privilege. However, that was not the basis of Judge Young's decision. It is interesting to note that even Appellee concedes such was not the basis of Judge Young's ruling as the final point of Appellee's Brief is titled: "That the Trial Court did not Express all its Reasons for Granting the Motion to Compel Does not Preclude This Court from Upholding the Decision on Other Grounds." In order to address Appellee's points in order, this argument will be discussed in more detail below.

**POINT II. THE STATEMENT OF FACTS IN APPELLEE'S
BRIEF IS ERRONEOUS, VIOLATIVE OF LAW,
AND SHOULD RESULT IN SANCTIONS**

In paragraph 9 of the "Statement of Facts" in Appellee's Brief, Appellee referred to Appellant's "Notice of Intent to Commence Malpractice Action" served on September 17, 1994, and quoted part of that Notice of Intent. The entire Notice of Intent was also attached to Appellee's Brief as Addendum B.

In enacting the Utah Health Care Malpractice Act (U.C.A. §78-14-1, et seq.) the Legislature made it abundantly clear how important confidentiality of the proceedings are. In U.C.A. §78-14-8, the Legislature mandated that medical malpractice actions must be initiated by serving a "Notice of Intent to Commence an

Action," and also indicated that such a notice "may be in letter or affidavit form executed by the plaintiff or his attorney." In discussing the prelitigation process, the Legislature also mandated that "proceedings conducted under authority of this section are confidential, privileged, and immune from civil process." (U.C.A. §78-14-12(1)(d), emphasis added). The Legislature also mandated that "the proceedings are confidential and closed to the public," (U.C.A. §78-14-13(5)(a)).

Because U.C.A. §78-14-12(2)(b) requires that a party's request for prelitigation panel review "shall include a copy of the Notice of Intent to Commence Action," the Prelitigation Panel always uses the Notice of Intent in the proceedings. Indeed, that Notice serves as the basis for the hearing, much as a Complaint does in civil actions before courts. The Legislature specifically indicated that notices of intent and all other evidence used in prelitigation proceedings are inadmissible:

Evidence of the proceedings conducted by the medical review panel and its results, opinions, findings, and determinations are not admissible as evidence in an action subsequently brought by the claimant in a court of competent jurisdiction.

U.C.A. §78-14-15(1). By quoting from Appellant's Notice of Intent and by attaching it as an exhibit to her Brief, Appellee has openly violated the Act's requirements that all evidence associated with the proceedings are inadmissible, and that all materials and evidence related to the hearing are "confidential, privileged, and immune from civil process."

Not only did Appellee originally release extremely

confidential materials which led to the filing of this case, she has now, for a second time, released documents which are "confidential, privileged, and immune from civil process." This Court should impose significant sanctions such as striking Appellee's entire brief and/or dismissing Appellee's opposition to this Appeal, and Appellant hereby requests such sanctions.

In paragraph 3 of the Statement of Facts, Appellee also makes the erroneous representation that the hearing before Commissioner Evans was "to determine custody of plaintiff's children." It is undisputed, however, that the hearing in which Appellant's medical records were divulged was held on January 19, 1994, in response to Appellant's "Application for Ex-Parte Protective Order" filed on January 3, 1994. While a wife's application for a protective order against her gun-toting husband would certainly involve temporary custody of the children during the period of the protective order, Appellant's ex-husband's Complaint for Divorce in which, for the first time, one of the parties actually sought legal custody of the children, was not even filed until January 21, 1994--two days after the hearing in question was held.

**POINT III. THE BASES USED FOR THE TRIAL
COURT'S ERRONEOUS RULING WERE IMPROPER**

As indicated above, almost the entirety of Appellee's Brief is dedicated to the argument that by testifying regarding a few of her conversations with her former attorneys, Appellant "waived" her attorney-client privilege. However, that is not the basis for Judge Young's ruling. The court's ruling specifically stated that "the court further finds that the issue of the attorney-client

privilege has been waived by the plaintiff, and that Rule 504 applies to this waiver." No other findings were made.

It is clear what Judge Young was basing his "waiver" argument on because he specified in the hearing that "I don't understand how it can be now that she hasn't waived the privilege by filing this, by the nature of this lawsuit." (R. 310). The Court did not make any findings or base its rulings on a "waiver" because of what Appellant said in her deposition. Although the bases which the Court did rely on will be addressed in this section of Appellant's Brief, Appellee's "waiver" argument regarding Appellant's deposition testimony will also be addressed below.

As was set forth at pages 15-16 of Appellant's first Brief, courts at every level, including the United States Supreme Court, have unequivocally held that the attorney-client privilege extends to subsequent litigation. This is so, even if such communications are directly related to the present suit. See, e.g., Zenith Radio Corp. v. United States, 764 F.2d 1577 (C.A. Fed. 1985), in which the Court of Appeals for the Federal Circuit held that "the attorney-client privilege promotes confidential relations that may well deal with the very suit in question." (Id. at 1580, quoting 4 Moore's Federal Practice, Section 26.60[6](2d ed. 1984)). The Court also emphasized that "a party does not automatically waive these privileges, which protect the formulation of legal opinions or legal strategy, simply by bringing suit." Id.

The filing of subsequent litigation does not waive an attorney-client privilege which existed in a prior case, even if it

is related to the second action. If the filing of a second action "waived" attorney-client privileges from previous actions, no one would ever dare file an action having previously been a party. The Utah Constitution's guarantee that courts "shall be open" and that a party may prosecute or defend "any civil cause to which he is a party" would be severely compromised. Judge Young's belief that a "waiver" occurred by filing a lawsuit with arguably related issues is simply wrong.

It is also clear from the quotes set forth above that Judge Young repeatedly indicated his belief that even without any proof whatsoever, the "possibility" that Appellant's testimony might differ from her counsel's testimony justified eliminating her attorney-client privilege. The undersigned has not been able to find any case in any jurisdiction which has even suggested such an approach. Even Appellee does not make any attempt in her Brief to justify that approach.

If the "possibility" of impeaching a person outweighed the attorney-client privilege, this would also make the above-referenced "open court's provision" of the Utah Constitution meaningless. No one would ever file more than one case in his or her lifetime because of the fear that "possible impeachment" might erase the attorney-client privilege from a previous case. The Legislature's mandate that the attorney-client privilege be "preserved inviolate" would likewise be meaningless.

This was all pointed out to Judge Young and he obviously recognized the problematic nature of this, but apparently felt he

could justify his decision by stating that after the attorneys' depositions, he "would invite from counsel for the plaintiff a motion in limine or a protective order." (R. 345). Repairing a violation of the attorney-client privilege in such an "after-the-fact" manner would violate Utah statutory and case law, and has never been approved by any court. If this important privilege is to be preserved "inviolate," it must be enforced before the privilege is violated.

Finally, Judge Young's ruling makes it clear that he was relying upon Rule 504, Utah Rules of Evidence, as the basis for his ruling. While Appellee argues throughout most of her Brief that Rule 507 is actually what Judge Young must have been relying on, Appellee does include two paragraphs in her Brief in an attempt to argue that Rule 504 might apply.

First, Appellee refers to the definition of "confidential" under Rule 504(a) which indicates that

A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

Appellee suggests that what Appellant said in her deposition is not "confidential" because "she voluntarily testified about them to third persons in her deposition." The issue is not whether Appellant's communications in her deposition are "confidential." The issue is whether what plaintiff discussed with her former divorce attorneys is confidential. Those communications certainly qualify as confidential because, as is evident, they were "not

intended to be disclosed to third-parties other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client." This is obvious from the fact that Appellant's former attorneys refused to testify at a deposition (which necessitated Appellee's Motion to Compel), and the fact Appellee also filed a Motion for a Protective Order to prevent those depositions from being held.

Subparagraph (b) of Rule 504 supports Appellant's position in this case by mandating that "a client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential information made for the purpose of facilitating the rendition of professional legal services" The "exceptions" to that general Rule are set forth in subparagraph (d) of the Rule and are listed as (1) "Furtherance of crime or fraud," (2) "Claimants through same deceased client," (3) "Breach of duty by lawyer or client," (4) "Document attested by lawyer" and (5) "Joint clients." Appellee's Brief refers only to the third of these exceptions which states that no privilege exists under the Rule "as to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer." Appellant has made no claim that her former lawyers breached a duty to her, and the lawyers certainly have made no claim that she breached a duty to them. Appellee's Brief makes the incredible leap that it is "likely" that the former attorneys may be on the jury verdict form if this case goes to trial (even though in more than three years of litigation, no one has even suggested putting them on the

jury verdict form). Appellee then makes another leap by stating that "implicit in plaintiff's claim for damages in this case is that her former attorney breached their duty to plaintiff." (Appellee's Brief at p.22, emphasis added). Such is not "implicit" in plaintiff's claim for damages, neither plaintiff nor her former attorneys have ever even hinted at such a breach of duty, and Appellee cannot force Appellant or her attorneys to "implicitly" make such a claim just to make Rule 504(d) apply. However, even if it did apply, it is clear Judge Young did not rely upon that portion of the Rule or even bring it up at any point in the hearing. Rule 504 simply does not apply to this case, and Judge Young erred in using it as the basis for his decision.

POINT IV. THE PRIVILEGE WAS NOT WAIVED UNDER RULE 507.

As indicated above, almost the entirety of Appellee's Brief argues that Rule 507, Utah Rules of Evidence, is applicable to this case and justifies the finding that Appellant "waived" her attorney-client privilege. Although that Rule was not used by the trial Court as a basis for its decision, Appellant will respond to Appellee's argument in the event this Court chooses to consider it. Rule 507 indicates as follows:

(a) A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or a predecessor while holder of the privilege voluntarily discloses or consents to the disclosure of any significant part of the matter or communication, or fails to take reasonable precautions against inadvertent disclosure. This rule does not apply if the disclosure is itself a privileged communication.

(b) Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if disclosure was

- (1) compelled erroneously or
- (2) made without opportunity to claim the privilege.

(Emphasis added).

Appellee does not contest that Appellant's conversations with her former attorneys are protected by the attorney-client privilege. Appellee does not contest that by statute, the privilege must be preserved "inviolable." Appellee only suggests that by talking about limited conversations with her divorce attorneys in her deposition, Appellant "waived" the privilege.

The first question is whether Appellant "voluntarily" and knowingly disclosed privileged information. Even if that hurdle is overcome, the above quoted Rule requires that the disclosure be of "significant" matters. Finally, the Court must look at whether "reasonable precautions" against inadvertent disclosure were made.

Although Appellee's Brief refers to bits and pieces of Appellant's deposition wherein she discussed her former attorneys, Appellee has not acknowledged to this Court the full picture of what happened at the deposition, what was said and objections which were made. Appellant's deposition began on September 19, 1996. At the end of that day, Appellant's deposition was not yet finished so the deposition was reconvened until October 17, 1996.

The first 160 pages of the deposition transcript reflect questioning by Philip S. Ferguson (counsel for defendant Helfer who has settled out of this case), and Terrence L. Rooney, counsel for Appellee. Not once during the questioning by those two defendants were questions asked regarding conversations between Appellant and

her former attorneys. Beginning on page 161 of the deposition transcript, Keith A. Kelly, counsel for defendant Psychiatric Associates, Inc. (which has also paid to settle out of this case), began questioning. Almost immediately upon Mr. Kelly beginning his questioning, the following exchange occurred:

Q. Did you talk to your attorney about the threat that he [Appellant's former husband] made to you?

MR. SCHWAB: Wait a minute, don't answer that. You have no right to know what she's talked to me about. I am instructing you not to answer.

(Appellant's deposition at pp.162-63).

Mr. Kelly then shifted his questioning to discuss the hearing on January 19, 1994, in which Appellant was unrepresented by counsel. The testimony occurred which is quoted on page 12 of Appellee's Brief. The Court will note that that questioning deals only with the creation of the attorney-client relationship and does not go into any substantive matters discussed between attorney and client. Appellant simply indicated that attorney Stuart Ralphs came up to her at the hearing and volunteered to help her, that she went out in the hall and talked with him, and that she told Mr. Ralphs that she did not have any idea her husband had the records prior to the hearing. Copies of the deposition transcript pages in question are attached hereto as Appendix "A." After this testimony, the following exchange took place in the deposition:

Q. Do you recall him [attorney Ralphs] saying anything else to you or you saying anything else to him?

MR. SCHWAB: Just a minute. The problem I have got with this, Keith, is you are clearly going into things that are prohibited by attorney-client privilege.

Id. at p. 164. A long discussion then occurred which Appellee has cited on page 13 of her Brief in which the attorney-client privilege and related issues were explained to Appellant. Appellant then indicated at the bottom of page of 165 of the deposition transcript that she needed to talk with her attorney (the undersigned) before going further. A recess was then taken.

After the recess, the undersigned went back on the record and indicated that he had explained the attorney-client privilege to Appellant. He then stated that "she [Appellant] has decided to assert the attorney-client privilege as to all conversations between her and her counsel." Id. at 166, emphasis added. Mr. Kelly then made the following statement:

MR. KELLY: You can assert the privilege or not assert the privilege as you choose, but what I am understanding you to say is if I ask any questions about communications she had with attorneys who helped her in her divorce action you will assert attorney-client privilege, is that correct?

MR. SCHWAB: That is correct. Although we respect your opinion, we disagree with it. I believe any conversations with an attorney, whether it be in the current litigation or previous litigation is still protected by the attorney-client privilege. If I am wrong, then I guess we will let the Judge tell me I am wrong but as for this deposition, we are asserting that privilege and she will not be talking about those conversations.

Id. at pp. 166-67. Mr. Kelly then indicated (p. 167, lines 9-15) that he felt it was important to ask the questions in order to make a record. The following statement was then made by the undersigned:

MR. SCHWAB: That's fine. Maybe to save some time, rather than having me object after each question, I will just state that in order not to waive the attorney-client privilege we don't feel that we can talk about any conversations between Crystal and her attorney, especially regarding the divorce litigation that you are talking about.

Id. at 167, emphasis added.

Appellee's Brief fails to even point out to the Court that this continuing objection was entered on the record. Indeed, Appellee represents to the Court after each alleged example of waiver that "no objection was made and no privilege was asserted." Appellant hopes that these representations were made because of Appellee's counsel's forgetting that the continuing objection had been entered, and not because of any intent to mislead this Court.

Appellee's Brief asserts that the next "waiver" of the attorney-client privilege occurred on page 184 of the deposition. That conversation is as follows and did not address the substantive issues being dealt with in this case:

- Q. And isn't it true that you authorized Ms. Dyer to accept service of that divorce complaint?
- A. Yes.
- Q. So prior to the time that she signed this document, you had met with her and you knew she was going to be your attorney?
- A. Yes.
- Q. And did she tell you that your husband was going to file a divorce complaint?
- A. I am sure she did, yes.
- Q. And what were the concerns that you had at that time in the divorce action?
- A. I didn't want to lose my kids. I told her that I wanted my children.
- Q. Did you care whether you got a divorce?
- A. No, I wanted a divorce but I didn't ask for the divorce.

Id. at 184-85, emphasis added. As indicated above, counsel for Appellant had specifically made a continuing objection to any questions regarding communications between Appellant and her former attorneys. Indicating that she had authorized Ms. Dyer to accept service of the divorce complaint and that Ms. Dyer had told

Appellant her husband was going to file a divorce complaint obviously deals with procedural "peripheral" matters for which there is no attorney-client privilege. Appellant's statement that "I told her I wanted my children" was not responsive to the question that Mr. Kelly had posed and the undersigned did not need to restate an objection because a continuing objection had already been noted.

Appellee's next alleged example of waiver occurred 12 pages later (p. 196) of Appellant's deposition. However, Appellee only quotes the answer in her Brief. The questions leading up to the answer are as follows:

- Q. And in your lawsuit, in your divorce lawsuit at that time and, in fact, throughout the time period from the time you answered the complaint through the end of September, you were seeking to keep your kids and keep them in your marital home, weren't you?
- A. Yes, I was.
- Q. For you to have possession of the home and be able to live there with your kids. Right?
- A. But I was also afraid of the fact that my husband was going to tell my children and I thought about that since the day that it happened, and I discussed it with my attorney and she told me if I ever gave up custody of my children there would probably be no way to get them back. So I was fighting with the pros and cons of protecting them from what he would say or knowing that I would never have my kids.

Id. pp. 195-196. As can be seen, the brief statement made by Appellant was in no way responsive to Mr. Kelly's question as to whether Appellant wanted to keep possession of her home and live with her children. Furthermore, because of the continuing objection previously stated, no objection needed to be made again.

Appellee's next alleged example of a "waiver" was discussed on

page 15 of her Brief. Because of the length of the quote in Appellee's Brief, the Court is simply referred to that quote. The Court will note from that quote that Appellant's answers were either not responsive to the question asked or that the questions simply involved Mr. Kelly's suggested scenarios which Appellant denied even occurred. In answering those scenarios, Appellant did not indicate what she actually told her attorneys, but simply told Mr. Kelly that the scenarios he was suggesting did not occur. Again, however, it is important to remember that a continuing objection had already entered into the record.

Appellee's final alleged "waiver" is discussed on page 16 of Appellee's Brief. It is obvious, however, that again, only peripheral issues were being discussed. In this case, it was the timing of the settlement:

Q. So it was just right before October 24, 1994 that you told your attorney that you would agree to give up custody and settle the divorce case?

A. No, I don't think so, I think we talked in his office.

Q. A day or two before the hearing on the 24th?

A. Yes.

This was simply an indication of timing as to when the decision to settle was made. Again, the continuing objection was still in place.

Appellee also fails to point out that after these exchanges, one other attempt by Mr. Kelly occurred to discuss communications between Appellant and her attorney:

Q. Did she [Appellant's former attorney] discuss with you that because of your protective order complaint that there might be an argument that you had waived or given up the privilege to hold those documents as being

private?

A. No.

MR. SCHWAB: Hold on just a second. I think in my mind you have crossed the line. I have been trying to be as lax as I could for the sake of moving this case forward letting you talk about what she and her attorney discussed as far as procedural matters. I believe the question crosses the line and gets into the merits of what they were discussing regarding the case and strategy. I believe that crosses the line. In addition to the attorney-client privilege, I don't think that is an appropriate question.

Q. (Mr. Kelly) Are you going to follow your counsel's advice on that point?

A. Yes.

Id. at 211. No further discussions regarding attorney-client communications were discussed beyond that point.

It is clear from viewing the entirety of the deposition transcript that Appellant did not intend to waive the attorney-client privilege. Both at the beginning of Mr. Kelly's questions and toward the end of Mr. Kelly's questions, Appellant specifically told him that she intended to follow her counsel's advice and not answer questions violative of the attorney-client privilege. Appellant's counsel did not need to object to every question because a continuing objection was stated before any such questions were answered. Most, if not all, of the statements made by Appellant after the continuing objection was entered were either nonresponsive to the question or only dealt with peripheral matters which were not "significant."

Even if Appellant's counsel would not have made the continuing objection, a party may object to the use of anything said in his or her deposition even up to the time of trial. Rule 32(c)(3)(B) specifies that objections are reserved until the time of trial

other than the form of questions and other exceptions not applicable to this case. This Court has specifically interpreted that Rule for the proposition that specific objections which a party might have made to testimony given in a deposition were not waived by failure to object at the time of the deposition, and could be asserted at the time of trial:

Under Rule 32(b) and (d)(3)(A), U.R.C.P., as amended 1972, defendant's asserted objections could have been made at the trial and they were not waived by failure to make them during the course of the deposition.

Redevelopment Agency of Salt Lake City v. Barrutia, 526 P.2d 47, 50 (Utah 1974). Appellant could object to the admissibility of any of the deposition questions up to the time of trial, but this is a moot point because the continuing objection was made at the beginning of Mr. Kelly's questioning.

**POINT V. CASE LAW REQUIRES PRESERVING
THE ATTORNEY-CLIENT PRIVILEGE IN THIS CASE.**

More than four decades ago, this Court explained that challenges to the attorney-client privilege needed to be reviewed on a case-by-case basis in order to determine the intent of the party claiming the privilege. In Evans v. Evans, 8 Utah 2d 26, 327 P.2d 260 (1958), this Court held that

The circumstances are to indicate whether by implication the communication was of a sort intended to be confidential. These circumstances will of course vary in individual cases, and the ruling must therefore depend much on the case in hand.

Id. at 261, emphasis added.

There can be no question in this case what Appellant intended. After discussing the matter with her counsel, Appellant indicated,

on the record, that she intended to follow her counsel's advice and not waive the attorney-client privilege. Her counsel repeated this intention and made a continuing objection before any of the alleged "waiver" statements were made. On at least two occasions after that in the deposition, Appellant again reaffirmed her intent not to waiver her privilege and to keep communications about substantive matters confidential. When Appellee later indicated a desire to take her former attorneys' depositions, Appellant immediately filed a Motion for a Protective Order and when Appellee filed a Motion to Compel, Appellant opposed that Motion.

More than 30 years after the Evans decision was issued, this Court again addressed the attorney-client privilege in the case of Gold Standard, Inc. v. American Barrick Resources Corp., 801 P.2d 909 (Utah 1990). In that case, the Court acknowledged that U.C.A. §78-24-8(2) provides:

An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him or his advice given regarding the communication in the course of his professional employment.

Id. at 911. The Court also made the important distinction between attorney-client discussions involving substantive matters and those involving "peripheral" issues. The Court explained that discussions involving the retention of attorneys, the reasons why an attorney is being engaged, etc. are to be distinguished from substantive discussions:

Retainer agreements are not generally protected by the attorney-client privilege. The items contained in them, describing the external trappings of the attorney-client relationship, are not confidential. See e.g., In re TV Securities Litigation, 89 F.R.D. 595, 603 (N.D. Tex.

1981) ("terms and conditions of an attorney's employment, the purpose for which an attorney has been engaged, and the steps which an attorney took or intended to take in discharging his obligation" not protected).

Id. at 911-12, emphasis added. Appellant invites the Court to look closely at the statements made in her deposition which Appellee asserts constitute a "waiver." Appellant strongly believes that most, if not all, of those statements involve such "external trappings of the attorney-client relationship." Those that may not fit into this category were nonresponsive to questions and even if they had been, a continuing objection had been entered before any of the statements were made.

In the case of Askew v. Hardman, 918 P.2d 469 (Utah 1996), this Court addressed the parameters of the related work product doctrine. The Court ruled: "We find the case-by-case approach more sound in determining whether documents in an insurance claim file were prepared in anticipation of litigation." Id. at 474.

Subsequent to all of these decisions, the United States Supreme Court recently strengthened the protection of the attorney-client privilege and warned against using "balancing tests" to weaken the privilege. In the landmark case of Swidler & Berlin v. U.S., 118 S. Ct. 2081 (1998), the Court addressed the well-publicized case of White House Counsel Vincent Foster, and whether independent counsel James Hamilton could breach the attorney-client privilege after Foster's death.

The Court began its analysis by emphasizing that "the attorney-client privilege is one of the oldest recognized privileges for confidential communications," and also that "the

privilege is intended to encourage full and frank communication between attorneys and their clients." Id. at 2084. The Independent Counsel in the Swidler case made the same arguments regarding possible conflicting testimony and perjury made by Appellee (and relied upon by the trial court) in this case:

The Independent Counsel suggests, however, that his proposed exception would have little to no effect on the client's willingness to confide in his attorney. He reasons that only clients intending to perjure themselves will be chilled by a rule of disclosure after death, as opposed to truthful clients or those asserting their Fifth Amendment privilege. This is because for the latter group, communications disclosed by the attorney after the client's death purportedly will reveal only information that the client himself would have revealed if alive.

The Independent Counsel assumes, incorrectly we believe, that the privilege is analogous to the Fifth Amendment's protection against self-incrimination. But as suggested above, the privilege serves much broader purposes. Clients consult with attorneys for a wide variety of reasons, only one of which involves possible criminal liability.

. . .
The contention that the attorney is being required to disclose only what the client could have been required to disclose is at odds with the basis for the privilege even during the client's lifetime. In related cases, we have said that the loss of evidence admittedly caused by the privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place.

Id. at 2086, emphasis added. The Court then made the following significant explanation:

A client may not know at the time he discloses information to his attorney whether it will later be relevant to a civil or a criminal matter, let alone whether it will be of substantial importance. Balancing ex post the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application. For just that reason we have rejected use of a balancing test in defining the contours of the privilege.

Id. at 2087, emphasis added. The Court then concluded as follows:

Finally, the Independent Counsel, relying on cases such as United States v. Nixon [citation omitted] and Branzburg v. Hayes [citation omitted], urges that privileges be strictly construed because they are inconsistent with the paramount judicial goal of truth seeking. But both Nixon and Branzburg dealt with the creation of privileges not recognized by the common law, whereas here we deal with one of the oldest recognized privileges in the law. And we are asked, not simply to "construe" the privilege, but to narrow it, contrary to the weight of the existing body of case law.

Id. at 2087-88, emphasis added. The Court then upheld the attorney-client privilege and reversed the Court of Appeals.

It is obvious from the Swidler case that the attorney-client privilege must not be "narrowed," even to accomplish the goal of seeking out truth. As the Court explained, balancing the importance of desired information against a client's interests is improper.

In this case, all of the conversations at issue with Appellant's former attorneys were performed after litigation had commenced and dealt with that litigation. The attorney-client privilege must continue even after a lawsuit ends (and even after the death of the client). In this case, the facts are even more compelling because the custody issues involved in the original divorce case are still very much alive. As indicated in the previous Brief filed with this Court, both Appellant and her ex-husband acknowledged in their depositions that custody of the children was still very much a contested, ongoing issue.

The reasons for Judge Young's ruling were clearly expressed in the ruling. However, the possibility of impeachment does not

outbalance or outweigh the attorney-client privilege. Judge Young relied on that and Rule 504 to support his decision. He did not rely upon Rule 507 and even if he did without stating so, it was not Appellant's intent to ever waive her privilege. This is evidenced by the fact that she repeatedly indicated her intent to preserve the privilege during her deposition and the fact that prior to any statements being made, a continuing objection was entered by her counsel. Even if it had not been, all objections are reserved until the time of trial and as is specifically pointed out in the Advisory Committee Note to Rule 507,

Once disclosure of privileged material has occurred, although confidentiality cannot be restored, the purpose of the privilege may still be served in some instances by preventing use of the privilege against the holder of the privilege.

(Emphasis added). For all of these reasons, Appellant urges this Court to reverse the order granting Appellee's Motion to Compel.

CONCLUSION

Utah statutory law specifically indicates that the attorney-client privilege must be "preserved inviolate" and that "an attorney cannot, without the consent of his client, be examined as to any communication made by the client to him or his advice given regarding the communication." Recent case law has emphasized the importance of this right, that it should not be narrowed, and that because of the "importance" of the privilege, it is improper to balance the importance of the information sought against the client's interests. This Court has previously held that the facts of each case should be reviewed to determine what the client

intended, and the facts of this case clearly indicate that Appellant and her counsel intended to preserve her attorney-client privilege. She indicated repeatedly what her intent was in the deposition, her counsel entered a continuing objection before any statements were made, and she moved for a protective order when her attorney's depositions were sought. Judge Young erred in his ruling, both for the reasons he specifically relied upon and for the reasons Appellee suggests he should have based the ruling on. For all of these reasons, the order granting Appellee's motion to compel Appellant's former attorneys to testify was improper, and should be reversed.

RESPECTFULLY SUBMITTED this 4th day of November, 1998.




Michael L. Schwab
Lloyd A. Hardcastle
Attorneys for Appellant

CERTIFICATE OF MAILING

I hereby certify that on the 4th day of November, 1998, I caused a true and correct copy of the foregoing document to be mailed, postage prepaid, to the following:

David G. Williams
Terrence L. Rooney
Snow, Christensen & Martineau
10 Exchange Place, Eleventh Floor
P.O. Box 45000
Salt Lake City, Utah 84145



ADDENDUM "A"

1 Q. Okay. And can you tell me as much as you
2 recall about the conversation, what he said to you and
3 you said to him.

4 A. He just told me that if I didn't give him
5 custody that he would tell the kids as they got older
6 what my past was, my mother and my brother, me. I cried
7 and asked him not to. He said to give him custody.

8 Q. Was there anything prior to the time that he
9 made that threat that he said to you or did it just come
10 out of the blue?

11 A. He just told me that.

12 Q. And other than crying and asking him not to,
13 did you say anything else about it?

14 A. No.

15 Q. Yet after that conversation you still went to
16 several hearings and attempted to get custody, didn't
17 you?

18 A. Yes, I did.

19 Q. In fact, you fought him for several months
20 over the issue of custody, didn't you?

21 A. Yes, I did.

22 Q. And did you talk to anyone about the threat
23 made to you?

24 A. I don't recall if I did. I don't recall.

25 Q. Did you talk to your attorney about the

1 threat that he made to you?

2 MR. SCHWAB: Wait a minute. Don't answer
3 that. You have no right to know what she's talked to me
4 about. I am instructing you not to answer.

5 Q. (Mr. Kelly) At the time that he made the
6 threat you had legal counsel, Utah Legal Aid. Correct?

7 A. Yes.

8 MR. SCHWAB: Are you talking about me or
9 Legal Aid?

10 MR. KELLY: I am talking about Legal Aid.

11 MR. SCHWAB: Okay.

12 [Exhibit No. 28 Marked for identification.]

13 Q. (Mr. Kelly) I am handing you what has been
14 marked as Exhibit 28. Have you seen this document
15 before?

16 A. I don't know if I have or not.

17 Q. You understood that your ex-husband, Steve
18 Norcross, filed a divorce complaint against you shortly
19 after the protective order hearing in January of 1994.
20 Correct?

21 A. Yes.

22 Q. And shortly after that hearing, as I
23 understand it, at the hearing Stewart Ralphs came up and
24 asked for a recess in the hearing. Correct?

25 A. Yes.

1 Q. And you went out into the hall and spoke with
2 him?

3 A. Yes.

4 Q. And what did you say to him and what did he
5 say to you at that time?

6 A. He just asked me, he said, "You didn't know
7 your husband had all those records?"

8 And I said, "No, I didn't have any idea."

9 And he said that he would go in and stand by
10 my side, or whatever on my behalf, and ask that they not
11 be read, and that they hold off until I can get an
12 attorney. And the judge said, "No," that it was already
13 started and they would have to let her finish.

14 Q. I want to continue to focus on that
15 conversation you had with Mr. Ralphs. How long did that
16 last?

17 A. A few minutes, two minutes, maybe a few
18 minutes.

19 Q. Do you recall him saying anything else to you
20 or you saying anything else to him?

21 MR. SCHWAB: Just a minute. The problem that
22 I have got with this, Keith, is you are clearly going
23 into things that are prohibited by attorney/client
24 privilege. My recollection of the law on this is that
25 the attorney cannot waive the attorney/client privilege

1 MR. SCHWAB: Let's take a break.

2 [Recess].

3 MR. SCHWAB: Back on the record. I have
4 explained my understanding of the attorney/client
5 privilege to my client, also I explained my
6 understanding of the potential of waiving that. There
7 are certainly some things she doesn't mind if you know
8 but as with any attorney/client privilege that there are
9 certainly things that she would rather be kept between
10 her and her attorney. For that reason she has decided
11 to assert the attorney/client privilege as to all
12 conversations between her and her counsel.

13 MR. KELLY: We could do it a couple of ways.
14 I think that by bringing this lawsuit and alleging what
15 she alleges as damages she has waived the privilege for
16 her attorneys in her divorce action because she is
17 alleging she made decisions, she was damaged by the
18 records coming out, and so I think it is clearly
19 relevant, and I can ask some questions. You can assert
20 the privilege or not assert the privilege as you choose,
21 but what I am understanding you to say is if I ask any
22 questions about communications she had with attorneys
23 who helped her in her divorce action you will assert
24 attorney/client privilege; is that correct?

25 MR. SCHWAB: That is correct. Although we

1 respect your opinion, we disagree with it. I believe any
2 conversations with an attorney, whether it be in the
3 current litigation or previous litigation, is still
4 protected by the attorney/client privilege. If I am
5 wrong, then I guess we will let the judge tell me I am
6 wrong but as for this deposition, we are asserting that
7 privilege and she will not be talking about those
8 conversations.

9 MR. KELLY: Well, for purposes of creating a
10 record to make it clear for the Court what kind of
11 questions I would be asking, I will ask the questions
12 and I assume you will object to them. So when I say
13 making a record, if the judge is going to rule on that
14 issue of the privilege, in the context of he would want
15 to know what kind of questions are going to be asked.

16 MR. SCHWAB: That's fine. Maybe to save some
17 time, rather than having me object after each question,
18 I will just state that in order not to waive the
19 attorney/client privilege we don't feel that we can talk
20 about any conversations between Crystal and her
21 attorney, especially regarding the divorce litigation
22 that you are talking about. So rather than objecting
23 after each question, you might want to read a list of
24 the questions that you would ask.

25 Q. (Mr. Kelly) Okay. We talked about the

1 your husband against you. Correct?

2 A. Yes.

3 Q. And it refers to an attorney named Susan
4 Dyer. It says, "Comes now Susan Dyer, and hereby
5 accepts service of the Complaint for Divorce and Summons
6 in the above entitled action but reserves the right to
7 answer or otherwise plead to said Complaint." Do you
8 see that?

9 A. Yes.

10 Q. And isn't it true that you authorized Ms.
11 Dyer to accept service of that divorce complaint?

12 A. Yes.

13 Q. So prior to the time that she signed this
14 document, you had met with her and you knew she was
15 going to be your attorney?

16 A. Yes.

17 Q. And did she tell you that your husband was
18 going to file a divorce complaint?

19 A. I am sure she did, yes.

20 Q. And what were the concerns that you had at
21 that time in the divorce action?

22 A. I didn't want to lose my kids. I told her I
23 wanted my children.

24 Q. Did you care whether you got a divorce?

25 A. No, I wanted a divorce but I didn't ask for

1 the divorce.

2 Q. And at that time is it accurate to say that
3 you were still having an intimate relationship with Mr.
4 Birmingham?

5 A. Yes.

6 Q. Was he living with you or--

7 A. No.

8 Q. But he came and stayed with you overnight I
9 assume; is that correct?

10 A. Yes.

11 Q. So you were-- in terms of the divorce at the
12 time that the complaint was filed, you were happy to
13 move on with life and get a divorce, it was just that
14 you wanted the kids?

15 A. Yes.

16 Q. And at that time, how old were your children?
17 How old was Cameron?

18 A. Five, I believe, and Stevie was three.

19 Q. And was Cameron in kindergarten or was he
20 still a preschooler at the time?

21 A. Preschool.

22 Q. I am sorry?

23 A. Preschool.

24 Q. And just to clarify it at this point on the
25 record, when was Cameron's birthday?

1 A. He didn't say he would tell them that day, he
2 said he would tell them when they understood.

3 Q. So, in any event, did he say anything else
4 that you recall during that discussion back in early
5 1994?

6 A. You asked me that and I said no.

7 Q. Okay.

8 MR. SCHWAB: Let's take a break for a minute.
9 I need to make a phone call.

10 [Recess].

11 EXAMINATION, continued:

12 Q. (Mr. Kelly) Okay. We were going through
13 some points on Exhibit 29 about the proceedings in your
14 divorce case and we were talking about September 29,
15 1994, service of some document requests and other
16 information. Were you doing things at this time to
17 assist your attorney in preparing for trial, such as
18 talking to potential witnesses, or trying to prepare
19 things that you could use to support your custody
20 arguments?

21 A. Probably, yes.

22 Q. And in your lawsuit, in your divorce lawsuit
23 at that time and, in fact, throughout the time period
24 from the time you answered the complaint through the end
25 of September, you were seeking to keep your kids and

1 keep them in your marital home, weren't you?

2 A. Yes, I was.

3 Q. For you to have possession of the home and be
4 able to live there with your kids. Right?

5 A. But I was also afraid of the fact that my
6 husband was going to tell my children and I thought
7 about that since the day that it happened, and I
8 discussed it with my attorney and she told me if I ever
9 gave up custody of my children there would probably be
10 no way to get them back. So I was fighting with the
11 pros and cons of protecting them from what he would say
12 or knowing that I would never have my kids.

13 Q. And as of the time that you, at least through
14 the end of September you were going forward to keep your
15 marital home and to keep the kids, and have custody of
16 the kids; is that right?

17 A. Yes.

18 Q. And during this time period he had temporary
19 visitation rights along with you having temporary
20 custody. Correct?

21 A. Yes, that's right.

22 Q. And during that period of time did he do
23 anything objectionable in regards to his dealings with
24 the children while he had visitation rights?

25 A. I don't believe so. There was week ends when

1 A. Yes.

2 Q. Did she discuss with you that because of your
3 protective order complaint that there might be an
4 argument that you had waived or given up the privilege
5 to hold those documents as being private?

6 A. No.

7 MR. SCHWAB: Hold on just a second. I think
8 in my mind you have crossed the line. I have been
9 trying to be as lax as I could for the sake of moving
10 this case forward letting you talk about what she and
11 her attorney discussed as far as procedural matters. I
12 believe the question crosses the line and gets into the
13 merits of what they were discussing regarding the case
14 and strategy. I believe that crosses the line. In
15 addition to the attorney/client privilege, I don't think
16 that's an appropriate question.

17 Q. (Mr. Kelly) Are you going to follow your
18 counsel's advice on that point?

19 A. Yes.

20 Q. And in looking at page 4 and page 5, I am
21 just going to read a couple of statements that are made
22 by the opposing attorney, the very last paragraph at the
23 bottom of page 4 of Exhibit 30, writes in "Rule
24 506(d)(1) states in the relevant part," and I think it
25 is referring to the Utah Rules of Evidence.