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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION**

**UNITED STATES OF AMERICA,
Plaintiff,**

vs.

**HENRY T. NICHOLAS, III and
WILLIAM J. RUEHLE et al.
Defendants.**

Case No.: SACR 08-00139-CJC

**ORDER SUPPRESSING PRIVILEGED
COMMUNICATIONS**

INTRODUCTION

The California Rules of Professional Conduct protect clients, promote public confidence in the legal profession, and ensure the fair administration of justice. The most fundamental of these rules is a lawyer's duty of undivided loyalty to his client. A lawyer must do everything legally possible to protect a client. A lawyer can never assume a position adverse to the client or disclose client confidences without the client's knowing,

1 intelligent, and voluntary consent in writing. Unfortunately, in this case, a law firm
2 breached its duty of loyalty to a client in several respects.

3
4 In May 2006, Irell & Manella LLP (“Irell”) undertook three separate, but
5 inextricably related, representations of Broadcom Corporation (“Broadcom”) and its
6 Chief Financial Officer, Defendant William J. Ruehle. More specifically, Irell
7 represented Broadcom in connection with the company’s internal investigation of its
8 stock option granting practices. At the same time, Irell also represented Mr. Ruehle in
9 connection with two shareholder lawsuits filed against him regarding those same stock
10 option granting practices. Prior to undertaking these representations of clients with
11 adverse interests, Irell failed to obtain Mr. Ruehle’s informed written consent.

12
13 In June of 2006, Irell lawyers met with Mr. Ruehle at his office to discuss the stock
14 option granting practices at Broadcom. During this meeting, Mr. Ruehle told the Irell
15 lawyers about Broadcom’s stock option granting practices and his role in them. Before
16 questioning Mr. Ruehle, however, the Irell lawyers never disclosed to him that they were
17 representing only Broadcom at the meeting, not him individually, and that whatever he
18 said to them could be used against him by Broadcom or disclosed by the company to
19 third parties. Subsequently, Broadcom directed Irell to disclose statements Mr. Ruehle
20 made to the Irell lawyers about Broadcom’s stock option granting practices to
21 Broadcom’s outside auditors, Ernst & Young, as well as to the Securities and Exchange
22 Commission (“SEC”) and the United States Attorney’s Office (the “Government”). Prior
23 to making these disclosures, Irell never obtained Mr. Ruehle’s consent.

24
25 The Government now argues that it can use Mr. Ruehle’s statements to the Irell
26 lawyers against him at the trial in this criminal case. The Government is mistaken. Mr.
27 Ruehle’s statements to the Irell lawyers are privileged attorney-client communications.
28 Mr. Ruehle reasonably believed that the Irell lawyers were meeting with him as his

1 personal lawyers, not just Broadcom's lawyers. Mr. Ruehle had a legitimate expectation
2 that whatever he said to the Irell lawyers would be maintained in confidence. He was
3 never told, nor did he ever contemplate, that his statements to the Irell lawyers would be
4 disclosed to third parties, especially not the Government in connection with criminal
5 charges against him. Irell had no right to disclose Mr. Ruehle's statements, and Irell
6 breached its duty of loyalty when it did so. Accordingly, the Court must suppress all
7 evidence reflecting Mr. Ruehle's statements to the Irell lawyers regarding stock option
8 granting practices at Broadcom.

9
10 But the Court has a further obligation in this case. The Court must also ensure the
11 fair administration of justice and promote the public's confidence in the legal profession.
12 By failing to comply with its duties under the Rules of Professional Conduct, Irell
13 compromised these important principles. The Court simply cannot overlook Irell's
14 ethical misconduct in this regard and must refer Irell to the State Bar for appropriate
15 discipline.

16
17 **BACKGROUND**

18
19 Both Broadcom and Mr. Ruehle had long-standing relationships with Irell.¹
20 Beginning in 2002, Irell represented both Broadcom and Mr. Ruehle personally in several
21 securities-related actions ("Warrants Litigation"). (Ex. A.)² Irell represented Mr. Ruehle
22 in a deposition taken in connection with the Warrants Litigation. (Tr. 36:12-16 Feb. 24,
23 2009.) In the course of this representation, Irell informed Mr. Ruehle in writing of the
24 potential for conflicts inherent in dual representation and obtained Mr. Ruehle's informed

25
26 ¹ In fact, Broadcom sold 225,000 shares of Broadcom stock to Irell in 1997, before its initial public
27 offering ("IPO"). The aggregate purchase price for this stock was \$1,050,000 or \$4.67 per share. (Ex.
28 1.) It is not clear if or when Irell sold its Broadcom stock, but in the first six months after the IPO,
Broadcom's share price increased dramatically, and at various times traded at over \$70 per share.

² Mr. Ruehle presented many exhibits, some of which are privileged. All privileged exhibits are
identified by letters, and all non-privileged exhibits are identified by numbers.

1 written consent to proceed with the representation. (Exs. A, B.) The Warrants Litigation
2 concluded at the end of 2005. (Ex. E.)
3

4 In the spring of 2006, after a series of articles related to the stock option granting
5 practices both at Broadcom and other corporations, Broadcom was aware that it might be
6 investigated by the Government or sued on the basis of its stock option granting
7 practices. (Tr. 8:10-13, Feb. 25, 2009.) In mid-May 2006, Broadcom retained Irell to
8 investigate its stock option granting practices on behalf of the corporation. (Tr. vol. 2,
9 4:19-21, Feb. 23, 2009.) Shortly thereafter, on May 25, 2006, a group of shareholders
10 filed a derivative action against Mr. Ruehle and other current and former officers of
11 Broadcom (“Derivative Action”) concerning the corporation’s stock option granting
12 practices. (Ex. 18.) On May 26, 2006, an amended complaint was filed in *Jin v.*
13 *Broadcom Corp., et al.* (“Jin Action”), naming Mr. Ruehle personally and asserting
14 substantially similar claims regarding stock option practices at Broadcom. (Ex. 14.) In
15 addition to its representation of Broadcom in connection with the internal investigation,
16 Irell accepted individual representation of Mr. Ruehle in both the Jin Action and the
17 Derivative Action, accepting service on his behalf and appearing as counsel of record
18 until September 2006.³ (Tr. vol. 2, 26:15-27:25, Feb. 23, 2009.) During the entire period
19 of these representations, Irell never obtained Mr. Ruehle’s informed written consent to its
20 dual representation of him and the company as required by Rule 3-310(C) of the Rules of
21 Professional Conduct. (*Id.* 36:5-11.)
22

23 In late May of 2006, Mr. Ruehle received several emails regarding Irell’s
24 representation of him and Broadcom in connection with stock option practices at the
25 company. (Exs. F-K.) On May 30, 2006 at 5:28 p.m., David Dull, General Counsel of
26

27
28 ³ The parties vigorously dispute when the attorney-client relationship between Mr. Ruehle and Irell was formed, but did not dispute that Irell was Mr. Ruehle’s personal counsel in both the Derivative Action and the Jin Action until September 2006. (Tr. vol. 2, 32:7-12, Feb. 23, 2009.)

1 Broadcom, sent an email to several people at Broadcom, including Mr. Ruehle, and on
2 which David Siegel, an Irell litigation partner, was copied. (Ex. G.) The email provided
3 information about the nature of the Jin Action and the Derivative Action and assessed the
4 relative strengths and weaknesses of the judge assigned to the case. (*Id.*) Confirming
5 Mr. Ruehle's understanding that Irell would represent Broadcom's officers individually
6 as they had in past litigation, Mr. Dull directed "anyone who has any concerns" to
7 "contact me or any of the Irell lawyers." (*Id.*) Four minutes later, at 5:32 p.m. on May
8 30, 2006, Kenneth R. Heitz, a litigation partner at Irell, sent Mr. Ruehle an email, on
9 which Mr. Siegel, Mr. Dull, and Daniel P. Lefler, another Irell litigation partner, were
10 copied. (Ex. F.) In the email, Mr. Heitz updated Mr. Ruehle about the progress of Irell's
11 interviews of other witnesses with knowledge of the stock option granting practices at
12 Broadcom and requested a time to discuss these issues with Mr. Ruehle. (*Id.*)

13
14 On May 31, 2006, the day before his first interview with the Irell lawyers, Mr.
15 Ruehle received three emails from Mr. Heitz. (Exs. I-K.) The first, on which Mr. Lefler
16 and Mr. Siegel were copied, updated Mr. Ruehle on the Irell lawyer's progress in their
17 interviews of witnesses with knowledge of the stock option granting practices at
18 Broadcom. (Ex. I.) The next, asked Mr. Ruehle to review his personal records for
19 information related to a stock option grant in 2000 and advised him of the relevance of
20 such information to Irell's investigation. (Ex. J.) In the final email Mr. Ruehle received
21 from Mr. Heitz on May 31, 2006, Mr. Heitz provided a further update on Irell's fact-
22 gathering with respect to Broadcom's stock option granting practices. (Ex. K.)

23
24 On June 1, 2006, Mr. Heitz and Mr. Lefler met with Mr. Ruehle and interviewed
25 him regarding Broadcom's stock option granting practices. (Tr. vol. 2, 9:15-20, Feb. 23,
26 2009.) The Irell lawyers did not tell Mr. Ruehle that they were not his lawyers. (*Id.*
27 15:5-10.) The Irell lawyers did not suggest that Mr. Ruehle might want to consult with
28 his own lawyer before speaking with them. (*Id.* 17:21-23.) After their meeting, Mr.

1 Heitz had subsequent conversations with Mr. Ruehle in June 2006 about Broadcom's
2 stock option granting practices and never disclosed to Mr. Ruehle in any of these
3 conversations that his statements to him would be disclosed to third parties. (*Id.* 33:7-
4 25.)

5
6 On June 13, 2006, the SEC commenced its investigation of the stock option
7 granting practices at Broadcom. Throughout June and July 2006, Mr. Ruehle continued
8 to receive legal advice from Irell. (Exs. L-O.) On June 13, 2006, Mr. Ruehle sent an
9 email to Mr. Siegel, on which he copied Mr. Dull, seeking legal advice regarding the
10 SEC's investigation. (Ex. L.) On the same day, Mr. Lefler sent an email to Mr. Ruehle
11 asking him to consent to Irell's acceptance of process on his behalf in the Jin Action.
12 (Ex. M.) On June 28, 2006, Mr. Ruehle received an email from Mr. Siegel, on which
13 Mr. Heitz was copied, that offered detailed strategic advice regarding the SEC
14 investigation. (Ex. N.) Finally, on July 25, 2006, Mr. Dull forwarded an email to
15 Broadcom's board of directors from Mr. Lefler that detailed Irell's strategy for the
16 Derivative Action and the Jin Action. (Ex. O.) Mr. Lefler's memorandum assessed the
17 merits of the actions, considered the strengths and weaknesses of the judge assigned to
18 the case, and outlined the specific litigation tactics Irell planned to employ in these
19 actions. (*Id.*)

20
21 In August of 2006, at Broadcom's direction, Irell disclosed the substance of Mr.
22 Ruehle's interviews with Mr. Heitz and Mr. Lefler to Broadcom's outside auditors, Ernst
23 & Young. (Tr. vol. 2, 38:18-23, Feb. 23, 2009.) Thereafter, again at Broadcom's
24 direction, Irell disclosed the same information to the SEC and the United States
25 Attorney's Office in connection with their investigations of stock option granting
26 practices at Broadcom. (*Id.* 40:9-19.) The Government's interviews of Mr. Heitz and
27 Mr. Lefler regarding their conversations with Mr. Ruehle in June 2006 were summarized
28

1 in FBI Form FD-302 memoranda. (Exs. Q, R.) Ruehle did not consent to any of these
2 disclosures. (Tr. vol. 2, 40:9-19, Feb. 23, 2009.)
3

4 Mr. Ruehle first learned that the Government intended to use his statements to Irell
5 against him when the FBI Form FD-302 memoranda were produced to him in December
6 2008 in connection with the Government's criminal case. Mr. Ruehle promptly objected
7 and asserted that his conversations with Irell were privileged communications. Mr.
8 Ruehle previously litigated the issue in the Derivative Action before a Special Master,
9 who found Mr. Ruehle's communications were, in fact, privileged.⁴ Nonetheless, the
10 Government contended that Mr. Ruehle's assertion of the privilege was not well taken
11 and filed an *ex parte* application for an evidentiary hearing in this Court to determine the
12 applicability of the privilege. The Court held an evidentiary hearing on February 23, 24,
13 and 25, 2009 to determine whether Mr. Ruehle's statements to the Irell lawyers were
14 subject to the attorney-client privilege.
15

16 ANALYSIS

17

18 A. Mr. Ruehle's Statements to the Irell Lawyers are Privileged Attorney- 19 Client Communications

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21 The attorney-client privilege protects "[c]onfidential disclosures by a client to an
22 attorney made in order to obtain legal assistance." *Fisher v. United States*, 425 U.S. 391,
23 403 (1976). To sustain a claim of privilege, the party seeking to assert the privilege must
24 first establish the existence of an attorney-client relationship. *Id.* Determining whether
25 an attorney-client relationship exists depends on the reasonable expectations of the client.
26 *Sky Valley Ltd. P'ship v. ATX Sky Valley, Ltd.*, 150 F.R.D. 648, 652 (N.D. Cal. 1993).
27

28 ⁴ The Special Master's order has not yet been reviewed by a district judge and the Derivative Action has
been stayed pending resolution of the criminal charges against Mr. Ruehle.

1 The existence of an attorney-client relationship “hinges upon the client’s belief that he is
2 consulting a lawyer in that capacity and his manifested intention to seek professional
3 legal advice.” *United States v. Evans*, 113 F.3d 1457, 1465 (7th Cir. 1997). To
4 determine the reasonable expectations of a client, courts look to “circumstantial evidence,
5 taking into account all kinds of indirect evidence and contextual considerations that
6 appear relevant to determining whether it would have been reasonable for the person to
7 have inferred that she was the client of the lawyer.” *Sky Valley*, 150 F.R.D. at 652.
8 Second, the party seeking to assert the privilege must demonstrate that the
9 communication was made in order to obtain legal advice. When a lawyer consults with a
10 client for purposes of “fact-finding” in order to provide legal advice, the discussion
11 between the lawyer and client qualifies as one undertaken for the purpose of seeking legal
12 advice. *United States v. Rowe*, 96 F.3d 1294, 1297 (9th Cir. 1996). “Although some
13 commentators . . . continue to distinguish between fact-finding and lawyering, federal
14 judges cannot.” *Id.* at 1296. As the Supreme Court of the United States observed, “the
15 privilege exists to protect not only the giving of professional advice to those who can act
16 on it but also the giving of information to the lawyer to enable him to give sound and
17 informed advice. The first step in the resolution of any legal problem is ascertaining the
18 factual background and sifting through the facts with an eye to the legally relevant.”
19 *Upjohn Co. v. United States*, 449 U.S. 383, 390-91 (1981) (internal citations omitted).
20 Finally, in order for the privilege to apply, the communication must be intended to remain
21 confidential. CAL. EVID. CODE § 952. Under California law, communications made in
22 the course of an attorney-client relationship are presumed confidential. CAL. EVID. CODE
23 § 917(a).

24
25 There is no serious question in this case that when Mr. Ruehle met with the Irell
26 lawyers on June 1, 2006, Mr. Ruehle reasonably believed that an attorney-client
27 relationship existed, he was communicating with his attorneys in the context of this
28 relationship for the purpose of obtaining legal advice, and that any information he

1 provided to Irell would remain confidential. Mr. Ruehle testified that he understood Irell
2 would be representing him in both the Jin Action and the Derivative Action. (Tr. 65:1-10
3 Feb. 25, 2009.) Prior to his initial meeting with the Irell lawyers, Mr. Ruehle received an
4 email from Broadcom's General Counsel, Mr. Dull, on which an Irell litigation partner
5 was copied, confirming that Irell would be representing him personally in both litigations.
6 (Ex. G.) In the days leading up to their June 1, 2006 interview, the Irell lawyers
7 frequently updated Mr. Ruehle on the progress of their investigation of the stock option
8 practices at Broadcom. (Exs. F, I, K.) But more than mere progress reports, Mr. Heitz
9 discussed his strategy for defending the corporation and its directors and summarized the
10 fact-finding that would be necessary to support that strategy. (Exs. F, I, J.) In these
11 emails, which were sent to Mr. Ruehle individually as opposed to the entire board of
12 directors, Mr. Heitz asked Mr. Ruehle to review and obtain specific information and
13 advised him how this information would be relevant to preparing a defense. (*Id.*) The
14 evidence establishes that Mr. Ruehle had a reasonable belief that an attorney-client
15 relationship existed prior to his initial interview with the Irell lawyers on June 1, 2006.

16
17 Second, Mr. Ruehle testified that he believed that the interviews were being
18 conducted to gather information in preparation for the litigations and for the purpose of
19 obtaining legal advice. (Tr. 71:4-8, Feb. 25, 2009.) Mr. Ruehle was first asked by the
20 Irell lawyers to schedule a meeting with them in an email that he received 4 minutes after
21 he received an email from Mr. Dull informing Mr. Ruehle that Irell would be
22 representing him personally in the pending litigations. (Exs. F, G.) Mr. Heitz and Mr.
23 Lefler requested a time to discuss Broadcom's stock option granting practices, the exact
24 same subject matter of the two pending civil lawsuits in which Irell represented Mr.
25 Ruehle individually. (Tr. vol. 2, 9:15-20, Feb. 23, 2009.) Mr. Ruehle was never advised
26 that he should have another lawyer present at the meeting to represent his interests. (*Id.*
27 15:5-10, 17:21-23.) Based on these communications, Mr. Ruehle reasonably understood
28 the Irell lawyers to be gathering facts and information for his defense against the claims

