

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**SUSAN GAFFNEY, in her official capacity )  
As Inspector General, U.S. Department of )  
Housing and Urban Development, )**

**Petitioner, )**

**v. )**

**Misc. No. 98-92 (SS)**

**THE HAMILTON SECURITIES GROUP, )  
INC. and HAMILTON SECURITIES )  
ADVISORY SERVICES, INC., )**

**Respondents. )**

**RESPONDENTS' EXCEPTION TO RECOMMENDATION OF THE  
SPECIAL MASTERS REGARDING CERTAIN PRIVILEGED DOCUMENTS**

By letter dated April 26, 1999, the Special Masters finalized their rulings on Hamilton's privilege claims. See Attachment A. Hamilton takes exception with the Special Masters' ruling on one category of documents, which involves 17 of the 119 documents considered by the Special Masters. The 17 documents<sup>1</sup> contain (or describe) confidential communications between Hamilton and its counsel, Holland & Knight, in the course of obtaining legal advice solely for the benefit of Hamilton. These documents are privileged, and therefore not proper subjects for production, because they involve the provision of legal advice to Hamilton that is discreet from that body of work that Hamilton or Holland & Knight was doing directly in response to a contract with HUD.

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<sup>1</sup> The documents at issue, Nos. 54, 62, 63, 64, 65, 75, 84, 96, 98, 99, 100, 101, 107, 109, 110, 111 and 125 are attached hereto as Attachment B, under seal, for the Court's *in camera* review. Hamilton is filing simultaneously a motion to seal Attachment B and a proposed Order pursuant to Rule 106(j).

The fact that Holland & Knight was providing legal advice on some issues responsive to Hamilton's contracts with HUD (and those documents have been produced) does not act as a waiver of the attorney-client privilege existing between Hamilton and Holland & Knight on other matters.

After reviewing the 17 disputed documents *in camera*, the Special Masters initially agreed with Hamilton that the documents (or portions of the documents) clearly contained or described communications of a confidential nature between Hamilton and Holland & Knight for purposes of securing legal advice.<sup>2</sup> Hamilton had informed the Special Masters that certain Holland & Knight attorneys provided legal advice to HUD and Hamilton on various aspects of the loan sale program, but other Holland & Knight attorneys provided distinct, confidential legal advice to Hamilton. See Attachment C. The OIG argued that no privilege should exist because Holland & Knight had represented HUD and Hamilton jointly, and the OIG provided documentation regarding that joint representation. The Special Masters then rejected Hamilton's privilege claim "[b]ecause the law firm and its lawyers were advisors to both Petitioners and Respondents." See Attachment A. This ruling is erroneous.

The Special Masters' preliminary ruling-- sustaining Hamilton's privilege claim for the 17 "Holland & Knight documents" or portions thereof -- properly recognized the distinction between Holland & Knight's work for HUD (which often involved Hamilton)

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<sup>2</sup> Only Document No. 54 cannot be characterized as completely unrelated to Hamilton's or Holland & Knight's substantive work for HUD because it references work that Holland & Knight did as a subcontractor to Hamilton on a contract for HUD, but Document No. 54 also contains privileged entries relating to the distinct work performed by Richard Moorhouse and others for Hamilton that should be redacted (as the Special Masters initially determined before changing their opinion on April 26<sup>th</sup>).

and its work exclusively for Hamilton. Controlling precedent dictates that Hamilton should not be deprived of its legitimate expectations of attorney-client privilege merely because its attorneys also provided legal services to HUD and Hamilton on other matters of common interest. Hamilton's individual privilege is not waived even if one could argue successfully that its attorneys were conflicted or potentially conflicted and should have declined the representation or undertaken it only with full disclosure to both clients.

During the course of Hamilton's work on HUD's loan sales program, Hamilton sought and received confidential legal advice from attorneys at Holland & Knight, including a government contracts expert, Richard L. Moorhouse.<sup>3</sup> Specifically, Holland & Knight provided confidential legal advice to Hamilton regarding (a) an inter-company transfer of contracts, (b) legal/contractual issues between Hamilton and a subcontractor to Hamilton, (c) government contracting advice regarding Hamilton's dealings with HUD regarding the acquisition and/or implementation of contracts with HUD, and (d) legal/contractual issues between Hamilton and its landlord. Regarding all four areas of individual legal service, Hamilton employees shared information and asked questions in confidence with the Holland & Knight attorneys and paralegals working on those projects. The advice focused on Hamilton's own business interests, and not on the substantive contractual obligations of either Hamilton's or Holland & Knight's work for HUD. In other words, the advice did not deal with the subject matter of Hamilton's or

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<sup>3</sup> Mr. Moorhouse recently left Holland & Knight to join Reed, Smith, Shaw & McClay.

Holland & Knight's work with HUD such that it would be expected to be shared with HUD.

Hamilton was aware that other Holland & Knight attorneys (primarily Richard Dunnells, LaFonte Nesbitt and Stephen Niles) provided legal advice to HUD and HUD's contractors (including Hamilton) on various legal issues that arose as HUD designed and implemented its enormously complex loan sale program in the early 1990s. Holland & Knight (again, primarily Richard Dunnells and his subordinates) provided legal assistance on the loan sales either as a direct contractor to HUD or as a subcontractor under at least one contract between Hamilton and HUD. Notwithstanding Holland & Knight's legal work for HUD, both Hamilton and Holland & Knight understood that the legal work performed by Richard Moorhouse, Steven Weiss, David Kahn, Wayne Gray, Dorn McGrath and their subordinates was confidential and distinct from Holland & Knight's work for HUD or work for Hamilton through the subcontract.

The Special Masters' April 26<sup>th</sup> final decision on the 17 disputed "Holland & Knight documents" apparently assumes that Holland & Knight jointly represented HUD and Hamilton on the matters addressed in those documents. However, Hamilton does not assert the attorney-client privilege (against HUD) as to Holland & Knight documents relating to work that Holland & Knight performed for HUD or as a subcontractor to Hamilton on a HUD contract. Hamilton is asserting the privilege only as to the discreet legal projects identified above that Holland & Knight undertook solely for Hamilton.

The United States Court of Appeals for the District of Columbia Circuit addressed the same situation in *Eureka Investment Corp. v. Chicago Title Ins. Co.*, 743 F.2d 932 (D.C. Cir. 1984) and concluded that the attorney-client privilege applies to

communications concerning a law firm's individual representation of one client even though the firm also had represented that client and the now-adverse party jointly on a matter in which the two clients shared a common interest. A discovery dispute arose between Eureka Investment Corporation and Chicago Title Insurance Company ("CTI") because the law firm of Fried, Frank, Harris, Shriver & Kampelman ("Fried, Frank") previously had represented Eureka and CTI jointly with respect to a lawsuit filed by tenants opposed to Eureka's effort to convert an apartment building into condominiums, and the firm also represented Eureka individually with respect to Eureka's conversion plans and Eureka's rights vis-à-vis CTI. 743 F.2d at 936. The Circuit Court agreed with the trial court that Eureka could invoke attorney-client privilege in the second scenario (against CTI) even though it could not assert the privilege against CTI under the first scenario (*i.e.*, the joint representation). While in the first scenario, Fried Frank jointly represented a common interest of the two parties, Fried Frank's communications with Eureka in the second situation "were made in the course of representation distinctly not in the interest of CTI." *Id.* at 937.

The Court pointed out that the "case falls at the intersection of two principles stated by Wigmore." *Id.* at 936.

First, "a communication by A to X as the common attorney of A and B, who afterwards become party opponents, is not privileged as between A and B since there was no secrecy between them at the time of communication." Second, [a] communication by A to X as A's attorney, X being then also the attorney of B, now become the party opponent, is ordinarily privileged because of the relation of X toward A. Nor does the fact of A's knowledge that X is already B's attorney, nor the fact of B's being already adversely interested destroy the privilege. This is so because, although X ought not to undertake to act for both in any matter where there is a

possibility of adverse interests, nonetheless A is protected by reason of the relation.

*Id.* at 936-37 (*quoting* 8 J. Wigmore Evidence § 2312 at 605-608).

The Court observed that the policy behind Wigmore's first principle, "to encourage openness and cooperation between joint clients -- does not apply to matters known at the time of communication not to be in the common interest of the attorney's two clients." 743 F. 2d at 937. Eureka had a justifiable expectation of confidentiality in the distinct, individual representation although it involved the same underlying business endeavor at issue in the joint representation.

The communications sought here were made not only after the interests of CTI and Eureka diverged but after their common attorney knew they diverged and undertook separate representation of Eureka on this understanding. Eureka and Mr. Singer thus expressly understood there to be an attorney-client relationship between them distinct from the one to which CTI was a party. In this crucial respect, this case differs from the leading cases under Wigmore's first principle, where the party claiming a privilege (and his attorney) had no reasonable expectations of confidentiality for the privilege to protect.

*Id.*

Before moving on to other issues raised on appeal, the Circuit Court reemphasized a point made in Wigmore's treatise: even if the attorney should not have undertaken the individual representation because of the possibility of an adverse interest with the other client, Eureka's privilege is protected due to the confidential nature of its relation with Fried Frank.

Given Eureka's expectations of confidentiality and the absence of any policy favoring disclosure to CTI, Eureka should not be deprived of the privilege even if, as CTI suggests, the asserted attorney-client relationship should not have been created. We need not express any view on CTI's

contention that Fried, Frank should not have simultaneously undertaken to represent Eureka in an interest adverse to CTI and continued to represent CTI in a closely related matter. As Wigmore's second principle expressly states, counsel's failure to avoid a conflict of interest should not deprive the client of the privilege. The privilege, being the client's, should not be defeated solely because the attorney's conduct was ethically questionable. We conclude, therefore, that Eureka was privileged not to disclose the requested documents.

*Id.* at 937-38.

In the present case, Hamilton understood that Holland & Knight was representing HUD and Hamilton on numerous issues of common interest to HUD and Hamilton either as a direct contractor to HUD or a subcontractor on one of Hamilton's contracts with HUD. The larger common interest essentially was making sure that legal requirements and/or impediments were addressed so that the loan sales program would succeed.

Hamilton was equally confident, however, that it had a confidential relationship with Holland & Knight as to those issues in which it did not share a common interest with HUD (the separate relationship involving legal advice that was either unrelated to any HUD work or related to HUD work, but conceivably adverse to HUD). As additional proof of the separate relationship, different Holland & Knight attorneys handled Hamilton's distinct legal matters and the firm billed the matters separately. Holland & Knight also had evaluated whether potential conflicts existed, and advised Hamilton that there were no conflicts that would prevent the firm from undertaking the separate legal work for Hamilton. Whether or not the OIG believes that Holland & Knight could represent Hamilton in a distinctly confidential capacity without violating the firm's

ethical obligations has no bearing on Hamilton's legitimate expectation of confidentiality with its attorneys.

Hamilton respectfully requests that the Court reverse the Special Masters final finding as to the 17 "Holland & Knight documents" and reinstate the Special Masters' preliminary rulings as to those documents (partially sustaining Hamilton's privilege claim as to document No. 54 and completely sustaining Hamilton's privilege claims on the other 16 documents). Alternatively, Hamilton requests that the court reverse the Special Masters' final finding as to the 17 Holland & Knight documents and remand the issue to the Special Masters for a ruling consistent with the Circuit Court's holding in *Eureka*.

Respectfully submitted,

DRINKER BIDDLE & REATH LLP

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Dated: May \_\_, 1999

**CERTIFICATE OF SERVICE**

On this \_\_\_\_\_ day of May, 1999, a copy of the foregoing Respondents' Exception to Recommendation of the Special Masters Regarding Certain Privileged Documents was sent via first-class mail, postage prepaid, to:

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