UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

OGLALA SIOUX TRIBE and ROSEBUD SIOUX TRIBE, as *Parens patriae,* to protect the Rights of their tribal members; And ROCHELLE WALKING EAGLE, MADONNA PAPPAN, and LISA YOUNG, individually and on behalf of all other persons similarly situated, Plaintiffs, vs. LUANN VAN HUNNIK; MARK VARGO; HON. JEFF DAVIS; and KIM MALSAM-RYSDON, in their Official capacities, Defendants.	)	Civ. 13-5020-JLV **JUDGE DAVIS'S RESPONSE TO PLAINTIFFS' SECOND MOTION TO COMPEL**

INTRODUCTION

There are two separate, but related, privileges that are relevant to Plaintiffs' Motion to Compel. (Docket 98.) The first is the judicial privilege, which relates to Judge Davis's duties as a jurist. The second is the deliberative-process privilege, which relates to Judge Davis's duties as a committee member. Both are well-recognized privileges which safeguard the effectiveness of government officials to make well-reasoned decisions on difficult issues. Neither is as narrow as Plaintiffs allege.

LEGAL ANALYSIS

Both the judicial privilege, and the deliberative-process privilege spring from a line of Supreme Court decisions, such as *Fayerweather v. Ritch*, 195 U.S. 276 (1904), and later, *United States v. Morgan*, 313 U.S. 409 (1941), which generally recognize the privilege of government

employees to keep confidential their deliberative or mental processes in the discharge of their official acts. Though the South Dakota Supreme Court has not had occasion to analyze the privileges, the crux of the privileges is understood to "allow the government to withhold documents and other materials that would reveal advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). Generally, the deliberative-process privilege applies to documents or communications which are (1) pre-decisional, and (2) made in the course of the discharge of the officer's public duties. *See id.* Judge Davis's objection to Interrogatory 11 and the documents logged in the Privilege Log (GQ2810 to GQ2819 and GQ3791 to GQ3798) meet these criteria.

A. The Judicial Deliberative-Process Privilege Should be Preserved.

It is a well-settled rule that a judge may not be asked to testify as to his or her mental impressions or communications regarding the discharge of the judge's official duties. *See Nixon v. Sirica*, 487 F.2d 700, 740 (D.C. Cir. 1973) (MacKinnon, J., dissenting) (concluding "[i]t thus appears that the judiciary, as well as the Congress and past Presidents, believes that a protected independence is vital to the proper performance of its specified constitutional duties."); *Matter of Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit (Williams v. Mercer)*, 783 F.2d 1488, 1519 (11th Cir. 1986) (stating "[j]udges, like Presidents, depend upon open and candid discourse with their colleagues and staff to promote the effective discharge of their duties."); *Thomas v. Page*, 837 N.E.2d 483, 488 (Ill. App. 2005) (concluding "[o]ur analysis leads us to conclude that there exists a judicial deliberation privilege protecting confidential communications between judges and between judges and the court's staff made in the course of the performance of their judicial duties *and relating to official court business*.") (emphasis added). Even though the recognition of the privilege is well-settled, there is little authority that relates specifically to the judicial

deliberative-process privilege. "Express authorities sustaining [the judicial privilege] are minimal, undoubtedly because its existence and validity has been so universally recognized. Its source is rooted in history and gains added force from the constitutional separation of powers of the three departments of government." *Nixon*, 487 F.2d at 740.

The most concise statement on the scope of the judicial privilege is, "a judge must be acting as a judge, and that it is information regarding his or her role as a judge that is sought." *State ex rel. Kaufman v. Zakaib*, 535 S.E.2d 727 (W.Va. 2000). Thus, even accepting Plaintiffs' claim that they only seek information related to "procedures," the pre-decisional communications relating to those procedures are, and should be, protected as communications related to the discharge of the judges' official duties.

"It has always been recognized that judges must be able to confer with their colleagues, and with their law clerks, in the circumstances of absolute confidentiality." *Nixon*, 487 F.2d at 740. In order to preserve the "effectiveness of the judicial decision-making process, judges cannot be burdened with a suspicion that their deliberations *and communications* might be made public at a later date." *Thomas*, 837 N.E.2d at 490 (emphasis added). To hold otherwise would irreparably harm the judiciary's ability to effectively discharge its public duties.

The privilege asserted applies to the judges' "mental processes used in formulating official judgments *or the reasons that motivate them in their official acts*." *Thomas*, 837N.E.2d at 494 (citing *State ex rel Kaufman v. Zakaib*, 535 S.E.2d 727 (W.Va. 2000) (emphasis added)). It is indisputable that compelling the disclosure of communications or documents related to the procedures employed by judges in their courtrooms would probe those judges' pre-decisional thought process related to those judges' official acts. Therefore, the privilege invoked, with respect to Interrogatory Number 11 and Request for Production Number 2, should be preserved.

Interrogatory Number 11 requested:

> With respect to *each* judge on the Seventh Judicial Circuit, describe in detail what conversation(s) you had with him or her regarding 48-hour hearings and the procedures that should or should not be included in them and approximately when you had each of those conversations.

Plaintiffs' First Set of Interrogatories, Number 11 (Docket 98, Exhibit 1) (emphasis in original).

In response, Judge Davis objected, and cited the judicial privilege. *Id.*

> Request for Production Number 2 requested:
>
> Produce all documents of which you are aware issued by anyone other than you since you became the Presiding Judge of the Seventh Judicial Circuit that in any manner discusses, recommends, or prescribes procedures with respect to 48-hour hearings involving Indian children.

In response, Judge Davis, cited the judicial privilege, and logged any potentially responsive document in his privilege log, which was attached to his responses.[1] The logged documents include notes and memoranda from the clerks to the judges.

The clerks' notes and memoranda listed in the Privilege Log (GQ2810 to GQ2819 and GQ3791 to GQ3798), as well as the communications between the judges, relate to the judges' mental processes and motivations in their official acts. They are universally understood to be privileged. *See supra.* It is for this reason that Plaintiffs' Motion to Compel, with respect to Interrogatory Number 11, and Request for Production Number 2, should be denied.

> The requirements for the creation of a privilege are as follows:
>
> (1) The communication must originate in a *confidence* that they will not be disclosed.
>
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.

[1] Since filing the Second Motion to Compel, counsel for Plaintiffs' inquired as to why Judge Davis did not produce a copy of Judge Thorstenson's Memorandum Opinion, which was attached as Exhibit 6 to the Complaint (Docket 1), in response to Request for Production Number 2. This document should have been referenced, and it was an oversight to not include that reference in the production. It was attached to the Complaint, and so, Judge Davis is obviously aware of it.

> (4) The *injury* that would inure to the relation by the disclosure of the communication must be *greater than the benefit* thereby gained for the correct disposal of litigation.

Thomas, 837 N.E.2d at 489 (citing 8 J. Wigmore, Evidence § 2285, at527 (McNaughton rev. ed. 1961) (emphasis in original)). Each of these criteria weigh in favor of protecting the privilege for each inquiry made.

1. The communications sought by Plaintiffs originated in confidence.

The first requirement for privilege is whether the subject communications "originated in a confidence that they will not be disclosed." *Id.* This element is easily established. Interrogatory 11 asks for specific details of the confidential communications between judges regarding matters which relate to their public duties. Plaintiffs' First Set of Interrogatories, Number 11 (Docket 98, Exh. 1). Specifically, the inquiry seeks information related to communications between judges regarding the procedures employed in each judge's courtroom. Judges routinely rely on the wisdom, knowledge, and experience of their colleagues and staff regarding the appropriate discharge of their duties, and expect their communications to remain confidential. As such, there is no doubt that these communications and documents relate to the discharge of the judges' official duties, and originate in confidence.

2. The communications sought are essential to the judges' relationship

The next requirement for the privilege is that confidentiality is essential to the relationship of the parties. As discussed, "Judges, like Presidents, depend upon open and candid discourse with their colleagues and staff to promote the effective discharge of their duties." *Williams*, 783 F.2d at 1519. It is inborn in a well-ordered and well-reasoned judiciary to encourage the free exchange of ideas between judges without fear of public scrutiny. While posing hypothetical absurdities or assuming contrary positions may be useful exercises in reaching difficult decisions, they may not be viewed by the public as appropriate without the

necessary and complex context. As such, confidentiality of these communications is essential to ensure that difficult questions regarding their official duties can be explored effectively and without fear of scrutiny.

3. The confidential relationship between the judges and their staff promote the public's interest.

The third requirement for the judicial privilege is that the relation of the parties is one which, in the opinion of the community, ought to be sedulously fostered. *Thomas*, 837 N.E.2d at 489. "[T]here is a strong public policy favoring the protection of the confidentiality of intra-court communications made in the course of the judicial decision-making process. The very integrity of the process often rests on judges' candid communications with their colleagues and staffs and, as a consequence, the confidentiality of such matters is a necessary component of the process." *Id.* at 490. "Because it is the public who benefit from the impartial and independent resolution of matters which come before a court, the communications between judges and their colleagues and staffs are among those which ought to be protected for the public good." *Id.* As a result, the first three requirements for the creation of a privilege are easily satisfied.

4. The injury to the relationship between Judge Davis and his colleagues and staff would be greater than the benefit of disclosing their confidential communications.

The final requirement is that the "injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation." *Thomas*, at 489. It is the requirement which is also most in contention. However, that too weighs in favor of preserving the privilege. It is for the same reason that the confidential relationship between judges and their staff should be sedulously fostered that the injury is greater than the benefit that could be realized by Plaintiffs. "[T]he damage that the judicial decision-making process would suffer from the disclosure of such communications would, in almost every instance, be far greater than the benefit which might be gained by those seeking disclosure." *Id.*

Plaintiffs argue that even if the judicial privilege of nondisclosure did apply, that privilege would be overcome by Plaintiffs' interests in vindicating their federal rights. (Docket 98.) This contention is misguided. Plaintiffs have alleged that Judge Davis's alleged procedures have violated their statutory and constitutional rights. Those alleged procedures are set out in the transcripts and corresponding orders produced. There is no need to pierce the judicial privilege to probe what the judges discussed with each other or their staff prior to employing the procedures illustrated in the transcript. "[A] court speaks only through its orders." *Kaufman*, 535 S.E.2d at 735. In this case, the judges speak through their transcripts and their corresponding orders. Probing the pre-decisional communications that precede those records does not further Plaintiffs' claims. The alleged procedures are the issue in this case, not the mental processes that preceded them.

Conversely, the injury to the relationship between the judges and their staff would be tremendous, and the public good would suffer as a result. "Confidentiality helps protect judges' independent reasoning from improper outside influences . . . [and] safeguards legitimate privacy interest of both the judges and litigants." *Williams*, 783 F.2d at 1520. "Because it is the public who benefits from the impartial and independent resolution of matters which come before the court, the communications between judges and their colleagues and staffs are among those which ought to be protected for the public good." *Thomas*, 837 N.E.2d at 490.

Plaintiffs are emphatic in their assertion that their inquiries relate to "*judicial and administrative procedures, not judges' decisions in individual cases.*" (Docket 98 at 2) (emphasis in original). However, as discussed, the marshalling of "judicial and administrative procedures" is an official duty of Judge Davis and the other judges of the Seventh Circuit. Indeed, one would be hard-pressed to identify a more fundamental duty of a circuit court judge. Moreover, Plaintiffs' cannot point to a single case which limits the privilege to only decisions on the merits of a specific case. Even in simple cases, a judge makes a number of decisions, with

respect to evidence, procedure, and credibility, which have absolutely nothing to do with the merits of the claims. These decisions are nevertheless protected. To hold otherwise would ignore the myriad duties a judge undertakes as a constitutionally elected officer.

Further, Plaintiffs cannot demonstrate that their need for these privileged communications and documents outweigh the compelling need to preserve the independence of the South Dakota judiciary. *Williams v. Mercer*, 783 F.2d 1488, 1521-22 (11th Cir. 1986)

> Once the party asserting the privilege has met the burden of showing that the matters under inquiry implicate communications among a judge and his staff concerning performance of judicial business . . . those matters are *presumptively* privileged and need not be disclosed unless the investigating party can demonstrate that its need for the materials is sufficiently great to overcome the privilege.

Id. (emphasis added). Here, Plaintiffs cannot meet this burden. This showing goes hand-in-hand with the fourth requirement for the establishment of the privilege and cannot be met for the same reason. The confidentiality of intra-court communications is critical to the functioning of a well-reasoned judiciary and it serves the public good.

It is true that "[i]n this case, in order to be successful, plaintiffs must prove the defendants engaged in policies, practices and customs which violate the plaintiffs' constitutional rights." (Docket 98.) However, the "policies, practices, and customs" in question are illustrated in the transcripts. The communications between the judges and their staff do not reflect "policies, practices, or customs." The transcripts and corresponding orders do.

In their Reply to Defendants' Response to Plaintiffs' Motion for Expedited Discovery (Docket 26, at 13.), Plaintiffs' insisted that expedited discovery of the transcripts was necessary because they were "not merely relevant," but "likely to be dispositive" of Plaintiffs' claims. They now have those transcripts. Plaintiffs' alleged need for the confidential communications of the judges and the staffs does not overcome the paramount interest of preserving the independence of the judiciary. Plaintiffs have the transcripts and documents they insisted were

dispositive of their claims. The predecisional communications and documents should be protected.

Finally, although Plaintiffs insist to only be interested in information related to "procedures," not the deliberations on the merits of any particular case. This is not the case. After filing the instant motion, Plaintiffs' counsel clarified that, in response to Request for Production Number 2, Plaintiffs are specifically seeking all drafts, edits, or notes, related to Exhibit 6 of the Complaint, i.e. the Memorandum Decision of Judge Thorstenson. Even a cursory reading of Exhibit 6 reveals that it was issued in response to motions raised *in a specific case*. Though the opinion discusses "procedures" at issue in that case, Plaintiffs' inquiry clearly seeks to probe the decision-making process of that opinion. This process is, and should, remain privileged. Thus, not only is Plaintiffs' narrow construction of the judicial privilege misguided, it is misleading. As a result, Plaintiffs' Motion to Compel, with respect to Interrogatory Number 11, and Request for Production Number 2, should be denied and the judicial privilege asserted by Judge Davis should be preserved.

B. The Administrative Deliberative Process Privilege Should be Preserved.

Next, Plaintiffs ask the Court to compel Judge Davis to produce documents relative to his role as a committee member in amending Section VII of the 2007 Edition of the South Dakota Guidelines for Judicial Process in Child Abuse and Neglect Cases. Plaintiffs' Requests for Production Numbers 3 and 4, respectively, requested:

> Please produce any documents you created, including letters, position papers and memoranda, regarding the interpretation of, the drafting of, or the amending of Section VII of the Guidelines.
>
> Please produce any documents that anyone other than you created, including letters, position papers and memoranda, regarding the interpretation of, the drafting of, or the amending of Section VII of the Guidelines.

Plaintiffs' Second Set of Requests for Production of Documents, Number 3 and 4 (Docket 98, Exh. 1). In response, Judge Davis objected, cited the (administrative) deliberative-process

privilege, and logged the only responsive document, i.e. the edits of the committee members (GQ2934 to GQ3203).

The "administrative" deliberative process privilege "allows the government to withhold documents and other materials that would reveal advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *In re Sealed Case, 121 F.3d 729, 737* (D.C. Cir. 1997). "[T]he privilege serves to protect the deliberative process itself, *not merely the documents containing deliberative material*." *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993) (emphasis added). The privilege safeguards the "quality of agency decisions by allowing government officials freedom to debate alternative approaches in private." *In re Sealed Case*, 121 F.3d at 737. The privilege protects not only advice and recommendations, but also factual material so "inextricably intertwined with deliberative sections of the documents that its disclosure would inevitably reveal the government's deliberations." *Id.* There is no requirement that the privilege relate only to a specific decision on the merits for it to be effective. Moreover, Plaintiffs cannot identify any court which has specifically construed the privilege as narrowly as Plaintiffs suggest.

The privilege is straightforward, and much broader than Plaintiffs argue. As analyzed by Judge Schreier, for the privilege to apply, "the material must be (1) predecisional, that is "antecedent to the adoption of agency policy, and (2) deliberative, that is actually related to the process by which policies are formulated." *Bone Shirt*, at 4 (citing *Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 884 (1st Cir. 1995)). The edits/revisions listed in Judge Davis's Privilege Log (GQ2934 to GQ3203), and identified in response to Plaintiffs' request, satisfy both the temporal criteria and the substantive criteria.

1. The code revisions of the committee are "predecisional."

In order for the deliberative-process privilege to be effective, the materials sought must be "predecisional." *Boneshirt, at 4.* In this case, the documents identified as responsive, listed in Judge Davis's Privilege Log (GQ2934 to GQ3203), satisfy this requirement. The edits/revisions were made "antecedent to" the committee's adoption of the 2007 amendments to the Guidelines. Thus, the temporal requirement for the privilege is met.

2. The code revisions directly relate to the process by which the amendments were formulated.

The next requirement for the deliberative-process privilege to apply is that the materials sought must relate to the "process by which the policies [were] formulated." *Id.* The edits/revisions of the Guidelines considered by the committee are, by definition, the process by which the policies were formulated. It is difficult to imagine a more fundamental example of "materials related to the process by which the policies were formulated." The edits/revisions are literally the process by which the amendments were formulated. As a result, the subject documents meet both the temporal requirements and the substantive requirement for the privilege.

Plaintiffs' effort to redraw the scope of the deliberative-process privilege is a drastic departure from the established scope of the privilege, which would be eviscerated by Plaintiffs' unduly narrow interpretation. However, even if it were true that the privilege only applied to deliberations on the merits, the edits/revisions listed in the Privilege Log actually do relate to a specific decision, i.e. the 2007 amendments to the Guidelines. Thus, Plaintiffs' effort to narrow the scope of the privilege to only deliberations on a specific case is not only misguided, but also misplaced. As a result, Judge Davis's deliberative process should be protected and Plaintiffs' Motion to Compel should be denied with respect to Requests for Productions Number 4 and 5.

CONCLUSION

For the foregoing reasons, Judge Davis respectfully requests the Court deny Plaintiffs' Motion to Compel in total, and preserve the well-recognized confidential and privileged relationship between the judges of the Seventh Judicial Circuit and their staff.

Dated this 3rd day of July, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of July, 2014, I electronically filed **JUDGE DAVIS'S RESPONSE TO PLAINTIFFS' SECOND MOTION TO COMPEL** with the Clerk of the Court for the United States District Court for the Western Division by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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