IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GLENN GATES, et al.,	**:**	**CIVIL ACTION**
Plaintiffs,	**:**	
	:	
v.	**:**	
	:	
ROHM AND HAAS COMPANY, et al.,	**:**	
Defendants	**:**	**NO. 06-1743**

MEMORANDUM AND ORDER

PRATTER, J. NOVEMBER 22, 2006

BACKGROUND

This class action concerns claims for medical monitoring and monetary damages for loss of property value due to alleged environmental contamination by the defendant corporations in McCollum Lake Village, Illinois. A discovery dispute has arisen prompting the Defendants to move to compel disclosure by or on behalf of the Plaintiffs of certain information and/or documents generated in connection with an April 27, 2006 meeting organized and conducted by Plaintiffs' counsel for the purpose of discussing this lawsuit – which had been commenced two days before the meeting – with community residents and potential class members. Local journalists attended some parts of the meeting and accounts of the meeting appeared in the press.

Discovery is underway in the litigation, including disputed demands by the Defendant Rohm and Haas for a list of the attendees at the meeting, a copy of the PowerPoint presentation by counsel at the meeting and copies of the questionnaires distributed by the lawyer and completed by the attendees. Following the filing of the defense motion to compel, Plaintiffs agreed to produce a copy of the PowerPoint presentation and a list of the attendees but continued

to oppose production of the completed questionnaires.

Plaintiffs' counsel justifies the remaining objection on the grounds that the completed questionnaires are protected from disclosure by the attorney-client privilege and the blank questionnaire form is covered by the work product doctrine. Plaintiffs distinguish between the PowerPoint presentation, which they admit was viewed by members of the press at the meeting, and the questionnaires, which they claim were distributed after the press was directed to leave the meeting. According to Plaintiffs, the attendees who remained were directed to fill out the questionnaires if they wanted to be part of the class or if they believed they might have an individual claim. Therefore, argue Plaintiffs, the questionnaires were a means for putative class members to communicate with counsel and seek legal advice and/or evaluation of their claims. Since the completed forms have been maintained as confidential materials, Plaintiffs argue that they constitute a confidential attorney-client communication protected by the attorney-client privilege.[1] Plaintiffs do not dispute the relevance of the documents.

Having conducted an in camera review of the questionnaire form and following a review of the parties' respective legal and factual arguments, the Court will grant the motion in part with

[1] "The issue of whether or not a certain matter is privileged is governed by the law of the state in which the United States court is held." Spray Products Corp. v. Strouse, Inc., 31 F.R.D. 244, 246-247 (E.D. Pa. 1962). See also Fed. R. Evid. 501 ("[I]n civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law."). The Court's jurisdiction in the instant personal injury case is founded on diversity and the rule of decision for all claims and defenses is supplied by state law. Therefore, the Court should apply state law in determining whether an attorney-client relationship exists. In Pennsylvania, privileged status is accorded confidential communications between an attorney and his client as a result of a statute. Act of 1887, P.L. 158, § 5, cl. (d), 28 P.S. § 321, provides: "Nor shall counsel be competent or permitted to testify to confidential communications made to him by his client or the client be compelled to disclose the same, unless in either case this privilege be waived upon the trial by the client."

certain limitations and deny it in part for the reasons explained below.

DISCUSSION

A. Plaintiffs' Burden of Demonstrating Grounds for Nondisclosure

Under Federal Rule of Civil Procedure 26(b)(5), a party withholding otherwise discoverable documents on the basis of the attorney-client privilege or the work product doctrine must describe the unproduced material with enough specificity to enable the other parties to assess the applicability of the privilege or protection. Fed. R. Civ. P. 26(b)(5). Plaintiffs' Memorandum of Law in opposition to Defendants' Motion to Compel and the attached blank questionnaire provide sufficient explanation of the nature of the remaining withheld documents for the Court to determine whether those documents are privileged or otherwise protected.

B. Discovery of the Names and Addresses of Putative Class Members

Both the Supreme Court and the Court of Appeals for the Third Circuit have held that the names and addresses of putative class members are discoverable. Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 170 (1989), aff'g 862 F.2d 439 (3d Cir. 1988) (plaintiffs permitted to obtain names and addresses of discharged employees from the defendant employer). See also Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 354 n.20 (1978) ("We do not hold that class members' names and addresses never can be obtained under the discovery rules. There may be instances where this information could be relevant to issues that arise under Rule 23, or where a party has reason to believe that communication with some members of the class could yield information bearing on these or other issues.").

At the present stage of this litigation, the Court need not determine whether putative class members are "clients" for the purposes of the attorney-client privilege if disclosure is limited to

the factual information contained in the questionnaires. Even if putative class members are considered clients, the attorney-client privilege does not protect against discovery of "factual information conveyed to an attorney by a party/client." Penk v. Oregon State Bd. of Higher Educ., 99 F.R.D. 511, 516 (D. Or. 1983). This information "is discoverable from the party/client through interrogatories served directly on the party/client." Id.; see also Webb v. Westinghouse Elec. Corp., 81 F.R.D. 431, 434-35 (E.D. Pa. 1978) (holding that "factual information gleaned by plaintiffs' counsel from the questionnaires sent to class members is discoverable by defendant through interrogatories served on plaintiffs' counsel"). In Penk, the court acknowledged counsel's promise of confidentiality with respect to the questionnaires but noted that the class members' privacy interest could be protected by restricting access to information obtained from the questionnaires to defendant's counsel. Id. at 517.

In the instant case, the factual information contained in the questionnaires is discoverable, including the names and addresses of the putative class members,[2] even if the questionnaires themselves are not.

C. Discovery of the Completed Questionnaires

It is not patently clear from the motion papers whether or not Defendants specifically seek

[2] However, at this time, Defendants are prohibited from contacting and interviewing putative class members. The Pennsylvania Rules of Professional Conduct provide that "a lawyer shall not communicate about the subject of the presentation with a party that lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." Pa. Rules Prof'l Conduct R. 4.2; E.D. Pa. Civ. P. 83.6, R.IV. Under Pennsylvania law, putative class members "are more properly characterized as parties to the action." Bell v. Beneficial Consumer Discount Co., 348 A.2d 734, 736 (Pa. 1975). As parties to the action, putative class members are afforded the protections contained in Rule 4.2 of the Rules of Professional Conduct. Dondore v. NGK Metals Corp., 152 F. Supp. 2d 662, 666 (E.D. Pa. 2001). Therefore, at least for the time-being, defense counsel is prohibited from contacting or interviewing "potential witnesses who are putative class members." Id.

the completed questionnaires themselves. See Def. Mem. 10-13. To the extent that is the defense intent, the Court must decide whether the manner in which the information was acquired renders the information privileged. There is no bright line rule as to whether putative class members are considered clients for the purposes of determining whether a communication is privileged. See, e.g., In re Community Bank of Northern Virginia, 418 F.3d 277, 313 (3d Cir. 2005) (noting that "courts have recognized that class counsel do not possess a traditional attorney-client relationship with absent class members"); Dondore v. NGK Metals Corp., 152 F. Supp. 2d 662, 666 (E.D. Pa. 2001) (holding that "putative class members stand at least in a fiduciary relationship with class counsel) (citing In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 822 (3d Cir. 1995)); In re McKesson HBOC, Inc. Sec. Litig., 126 F. Supp. 2d 1239, 1245-46 (N.D. Cal. 2000) ("While lead counsel owes a generalized duty to unnamed class members, the existence of such a fiduciary duty does not create an inviolate attorney-client relationship with each and every member of the putative class.").

It is not surprising that most reported cases on this subject are very fact- and circumstance-specific. Where courts have specifically addressed the discoverability of questionnaires completed by putative class members, the dispositive factor typically is whether the putative class members were seeking legal advice or representation at the time they filled out the questionnaires.

In Penk, for example, the court held that the questionnaires themselves – that is, the manner in which the information was obtained – were not discoverable. Id. Likewise, in Vodak v. City of Chicago, No. 03-2463, 2004 WL 783051 (N.D. Ill. 2004), the magistrate judge held that the questionnaires completed by putative class members were not discoverable because they

were completed for the purpose of obtaining legal advice and, therefore, protected by the attorney-client privilege. Id. at *1.[3] In that case, lawyers from the National Lawyers Guild organized a public meeting following a protest during which many people were arrested. Id. At the meeting, the lawyers distributed a questionnaire that they had prepared in order to gather identification information in addition to specific questions concerning each individual's legal circumstances. Id. The court found it dispositive that the lawyers directed only those persons "seeking legal representation or specific legal advice" to complete the questionnaire. Id. See also High Tech Commc'ns, Inc. v. Panasonic Co., No. 94-1477, 1995 WL 83614, *4 (E.D. La. 1995) (holding that the party seeking production "can discover facts disclosed in the questionnaires by deposing the individuals who responded to them"); Hudson v. Gen. Dynamics Corp., 186 F.R.D. 271, 275 (D. Conn. 1999) (concluding "it was error to compel the production of the plaintiffs' response to their attorney's questionnaire absent any clear finding that the plaintiffs had waived their attorney client privilege by placing the contents 'in issue through some affirmative act for [their] own benefit'") (internal citation omitted).[4]

In contrast, courts have compelled production of questionnaires where no attorney-client relationship existed and where individual depositions and/or interrogatories would have been

---

[3] The identification information and blank questionnaire were not at issue in Vodak because plaintiffs had already produced a blank questionnaire and the names and addresses of every person who signed in at the meeting. Vodak, 2004 WL 783051, at *2.

[4] The Hudson court noted that "[i]n actions involving representation of multiple clients like this one, a client questionnaire is often prepared by counsel as an efficient substitute for more time consuming fact-to-face interviews to provide the attorney with client information in response to focused questions fashioned by the attorney about the potential client and his or her claims. . . . Such questionnaire use is to impart information from client to counsel to promote informed, effective representation . . . ." Hudson, 186 F.R.D. at 275.

overly burdensome. In Morisky v. Public Service Electric and Gas Co., 191 F.R.D. 419 (D.N.J. 2000), class counsel created questionnaires and distributed them at a public meeting organized by employees, as distinct from attorneys. Id. at 421. However, the attorneys also gave out additional copies of the questionnaires to be distributed by the attendees to other employees. Id. Moreover, the named plaintiff testified that "he had not even considered suing [the defendant] before he received and completed the questionnaire." Id. at 422. Supporting its conclusion that plaintiffs' counsel could not establish that the employees who completed the questionnaires "were clients or sought to become clients at the time the employees returned the completed questionnaires," the court noted that (1) plaintiffs' attorneys had no record of any communication with the employees prior to the meeting; (2) the questionnaires were distributed before the lawsuit was filed in a location open to the public; (3) plaintiffs' attorneys could not establish that the people at the meeting were the same people who completed the questionnaires; (4) some of the questionnaires were distributed to employees by other employees, and these employees did not have any communication with the attorneys at the time they completed the questionnaires; and (5) the questionnaires contained "fact inquiries that have nothing to do with legal representation." Id. at 423-24. The court determined that "the ultimate purpose of the questionnaire was to solicit potential clients," and that the questionnaires were not protected by the attorney-client privilege because no attorney-client relationship was established or sought at the time the employees completed the form. Id. at 424.

Similarly, in Vallone v. CNA Financial Corp., No. 98-7108, 2002 WL 1726524 (N.D. Ill. 2002), the court held that there is no attorney-client relationship between putative class members and class counsel under circumstances where the solicitation was improper. Id. at *1. The court

held that an attorney-client relationship was not established by an improper solicitation but indicated that, under different circumstances, it may be proper to find the responses privileged or to distinguish between the factual content and the expression of the factual content. Id. Indeed, two years later, the same court (albeit a different presiding judge) held that questionnaires completed by putative class members were not discoverable because they were completed for the purpose of seeking legal advice. See Vodak, 2004 WL 78305, at *1.

The Hudson court distinguished between questionnaires completed "by the plaintiffs when they were clients or while attempting to become prospective clients," which were held to be privileged, and those questionnaires completed in response to a solicitation for witness statements, which were not given privileged status. Id. at 276. The court held that the latter were not privileged because, even though the employees who completed them later retained plaintiffs' attorney as their lawyer, their initial questionnaires "were not completed for the purpose of obtaining legal advice, but solely to serve as witness statements, and were completed prior to the existence of or any attempt by the recipient to create an attorney client relationship." Id. at 277.

D. Work Product Protection

Plaintiffs' counsel here also argues that the form itself may constitute work product. The work product doctrine prevents discovery of documents or tangible things prepared by counsel in anticipation of litigation and is designed to protect the work, thoughts, and analysis of counsel. Fed. R. Civ. P. 26(b)(3); Hartman v. Banks, No. 93-3344, 1995 WL 453737 (E.D. Pa. July 26, 1995). The Morisky court held that the questionnaires were not protected by the work product doctrine because they were "not distributed in a confidential manner" and because, more significantly, plaintiffs' attorneys produced a blank questionnaire during discovery. Id. at 425.

Acknowledging that "the actual questions conceived and organized by [plaintiffs' counsel] are the only arguable work product," the court held that the attorneys had waived this objection when they produced the blank questionnaire. Id.

In the instant case, the available record states that the questionnaires were "prepared by counsel in anticipation of litigation" and were allegedly distributed only to persons seeking legal advice or representation. The form itself has not yet been disclosed to opposing counsel.

Even if the completed questionnaires are protected as work product, they are discoverable if the defendant has a substantial need for the information and where other means of discovery would be overly burdensome. See, e.g., Dobbs v. Lamonts Apparel, Inc., 155 F.R.D. 650, 653 (D. Alaska 1994) (holding that work product protection does not apply because the completed questionnaires were "necessary for the full and fair development of the case"). Specifically, courts have declined to distinguish between the form and its content where the alternative would require the party seeking production to depose each of the many putative class members or serve numerous sets of interrogatories. Morisky, 191 F.R.D. at 426 (deposing each of the 141 individuals who completed the questionnaire "would be unduly burdensome for both parties . . . [and] unnecessarily delay the case").

In Dobbs and Morisky, the courts also distinguished between a witness's actual responses to a questionnaire and responses prepared by an attorney for an interrogatory, holding that the party seeking production of the questionnaires was entitled to discover the third party witness's verbatim statement because "a verbatim witness statement, even one solicited by counsel, is per se necessary to the full and efficient development of a case . . . [and] must be subject to efficient discovery without being filtered by someone else." Dobbs, 155 F.R.D. at 653. But see High

Tech Commc'ns, Inc. v. Panasonic Co., No. 94-1477, 1995 WL 83614, at *4 (E.D. La. 1995) (holding that "a document does not lose its work product status merely because it contains discoverable factual information" and the party seeking production "can discover facts disclosed in the questionnaires by deposing the individuals who responded to them").

CONCLUSION

Here, after balancing the various interests as well as the practical consequences of the Court's ruling one way or the other, the Court concludes that the factual demographic (i.e., identification) information contained in the questionnaires must be disclosed because it is not protected by the privilege. The issue is then whether the questionnaires themselves (as distinct from the information itself) must be disclosed or whether some alternative means of supplying the information would suffice under the circumstances of this case.

If the questionnaires are considered a confidential attorney-client communication, they are protected by the attorney-client privilege. The following facts weigh in favor of finding an attorney-client relationship under the present circumstances: (1) the attorneys organized the April 27 meeting; (2) persons not seeking legal advice or representation were allegedly directed to leave the meeting before the questionnaires were distributed and the attorneys reportedly directed only those seeking legal advice or representation to fill out the questionnaires; (3) the individuals who completed the questionnaires received them directly from and returned them to an attorney; (4) a lawsuit had already been filed at the time the questionnaires were distributed; and (5) the questionnaires have been kept confidential. On the other hand, the following facts weigh against finding an attorney-client relationship: (1) the meeting was open to the public; (2) with the exception of the "comments" section, the questionnaires contain "fact inquiries" unrelated to

legal advice or representation; and (3) the attorneys did not have contact with the meeting attendees before the meeting.

Accepting these circumstances as being accurately portrayed, the Court concludes that an attorney-client relationship was formed when individuals, hearing the attorney's directions, chose to complete and submit the questionnaire. Therefore, the questionnaires are protected by the attorney-client privilege. The questions themselves were created by counsel in anticipation of litigation and, therefore, are protected by the work product doctrine. These protections ostensibly preclude disclosure of the completed questionnaires or blank questionnaires themselves. However, the purely factual information contained on the completed questionnaires is not protected, and the manner in which it was conveyed should be excepted from work product protection because it appears to the Court to be an inescapable conclusion that requiring the defense to go through the laborious process of using the already produced attendee list for preparing and serving, and the plaintiffs and their counsel to go through the equally laborious process of answering and/or defending, individual interrogatories or depositions would likely be overly burdensome as well as unnecessarily expensive and time-consuming, not to mention a meaningless exercise to the extent of any attendees who did not fill out questionnaires or become putative class members.[5] Therefore, the Court will order Plaintiffs to produce all of the information that appears on the various completed questionnaires under the heading "Client Information," with the exception of cell phone and e-mail information. Plaintiffs may elect to provide this information by producing copies of the completed questionnaires after redacting cell

[5] Plaintiffs do not state how many questionnaires they received but the instant suit was brought on behalf of "the owners and residents of approximately 500 homes located in McCollum Lake Village." (See Compl. ¶ 1.)

phone and e-mail information and any and all text under the heading “Comments, Questions Or Other Information You Would Like To Share” or by, at Plaintiffs’ counsel’s own cost, accurately reproducing the “Client Information” data as an answer to an interrogatory or as a newly created document compiled for the purpose of complying with this directive.

An appropriate Order consistent with this Memorandum follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GLENN GATES, et al.,	**:**	**CIVIL ACTION**
Plaintiffs,	**:**	
	:	
v.	**:**	
	:	
ROHM AND HAAS COMPANY, et al.,	**:**	
Defendants	**:**	**NO. 06-1743**

O R D E R

AND NOW, this 22nd day of November, 2006, upon consideration of Defendants' Motion to Compel Discovery (Docket No. 42) and Plaintiffs' Response thereto (Docket No. 45), it is hereby ORDERED that the Motion is GRANTED in part and DENIED in part.

It is further ORDERED that, on or before December 6, 2006, Plaintiffs shall produce all of the information that appears on the various completed questionnaires under the heading "Client Information," with the exception of cell phone and e-mail information. Plaintiffs may elect to provide this information by producing copies of the completed questionnaires after redacting cell phone and e-mail information and any and all text under the heading "Comments, Questions Or Other Information You Would Like To Share," or by, at Plaintiffs' counsel's own cost, accurately reproducing the "Client Information" data as an answer to an interrogatory, or as a newly created document compiled for the purpose of complying with this directive.

BY THE COURT:

S/Gene E.K. Pratter
GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE