UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,

Plaintiff,

-against-

NEW YORK CITY BOARD OF EDUCATION, *et al.*,

Defendants.

----------X

MEMORANDUM
AND ORDER
96-CV-374 (RML)

A P P E A R A N C E S:

RALPH F. BOYD, JR.
Assistant Attorney General
United States Department of Justice
Civil Rights Division
950 Pennsylvania Ave., N.W.
Patrick Henry Building, Room 4609
Washington, D.C. 20530
BY: John M. Gadzichowski, Esq.
Charles E. Leggott, Esq.
Jodi B. Danis, Esq.
Keisha Dawn Bell, Esq.
Counsel for Plaintiff United States

MICHAEL A. CARDOZO
Corporation Counsel of the
City of New York
100 Church Street
New York, N.Y. 10007
BY: Norma A. Cote, Esq.
Counsel for the Municipal Defendants

CENTER FOR INDIVIDUAL RIGHTS
1233 Twentieth Street, N.W., Suite 300
Washington, D.C. 20036
BY: Michael E. Rosman, Esq.
Hans Bader, Esq.
Co-Counsel for Brennan Intervenors

McCARTER & HIGGINS
39 Avenue of the Commons, Suite 200
Shrewsbury, N.J. 07702
BY: George W. C. McCarter, Esq.
Co-Counsel for Brennan Intervenors

AMERICAN CIVIL LIBERTIES UNION
Women's Rights Project
125 Broad Street, 18th Fl.
New York, NY 10004
BY: Emily J. Martin, Esq.
Lenora Lapidus, Esq.
Counsel for Caldero Intervenors

LEVY, United States Magistrate Judge:

Plaintiff United States requests a formal written ruling on certain discovery disputes addressed by this court at a telephonic hearing on February 2, 2003. (See Letter to the court from Jodi B. Danis, Esq., dated May 22, 2003.) The disputes relate to the Brennan Intervenors' discovery requests, which sought records of all communications between the Department of Justice and representatives of the Municipal Defendants concerning the Offerees. In response to the Brennan Intervenors' requests, the United States produced a privilege log. (See id., Ex. B.) Most of the documents listed on the privilege log are e-mails between Aaron Schuham or Meredith Burrell, then attorneys at the Department of Justice, and Norma Cote, counsel for the Municipal Defendants. (See id.)

At the hearing, the court made a preliminary determination that the United States and the Municipal Defendants could assert a joint defense privilege to the Brennan Intervenors' document requests. (See Transcript of Civil Cause for Status Conference, dated Feb. 3, 2003, at 37.) The court also observed that the communications between counsel for the United States and counsel for the Municipal Defendants were not directly relevant to the ultimate question this court is to decide, *i.e.*, whether the Settlement Agreement at issue should be approved as lawful, fair, reasonable, adequate, and consistent with the public interest. See United States v. New York City Bd. of Educ., 85 F. Supp.2d 130, 136 (E.D.N.Y. 2000) (citing EEOC v. Hiram Walker & Sons, Inc., 768 F.2d 884, 889 (7th Cir. 1985); Vulcan Soc'y of the New York City Fire Dep't, Inc. v. City of New York, 96 F.R.D. 626, 629 (S.D.N.Y. 1983)).

The joint defense privilege is often referred to as the "common interest" rule, and is not a separate privilege but "'an extension of the attorney client privilege.'" United States v.

Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989) (quoting Waller v. Financial Corp. of Am., 828 F.2d 579, 583 n. 7 (9th Cir. 1987)). See also Bruker v. City of New York, No. 93 CIV. 3848, 2002 WL 484843, at *4 (S.D.N.Y. Mar. 29, 2002) ("The joint defense privilege or common interest rule is not really a separate privilege. Rather, it is a limited exception to the general rule that the attorney-client privilege is waived when a protected communication is disclosed to a third party outside the attorney-client relationship"). It protects "the confidentiality of communications from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties." Schwimmer, 892 F.2d at 243; accord Bank of America, N.A. v. Terra Nova Ins. Co. Ltd., 211 F. Supp.2d 493, 496 (S.D.N.Y. 2002); Strougo v. BEA Assocs., 199 F.R.D. 515, 520 (S.D.N.Y. 2001); Shamis v. Ambassador Factors Corp., 34 F. Supp.2d 879, 893 (S.D.N.Y. 1999). Before a communication can be protected under the common interest rule, the communication must meet the other applicable elements of the attorney-client privilege. In other words, the communications must be for the purpose of giving and receiving legal counsel. See Gulf Islands Leasing, Inc. v. Bombardier Capital, Inc., No. 02 Civ. 2839, 2003 WL 21251569, at *6 (S.D.N.Y. May 29, 2003). Here, it appears undisputed that, except for the fact that the communications were between counsel for different parties, they otherwise satisfy the requirements of the attorney-client privilege.

The common interest rule is intended to allow clients to share information with an attorney for another party who shares the same legal interest. See SR Int'l Bus. Ins. Co. v. World Trade Center Props., LLC, No. 01 Civ. 9291, 2002 WL 1334821, at *3 (S.D.N.Y. June 19, 2002). Like all privileges, the common interest rule is narrowly construed. See, e.g., United States v. Weissman, 195 F.3d 96, 100 (2d Cir. 1999) ("[p]rivileges should be narrowly construed

and expansions cautiously extended") (citing University of Pennsylvania v. EEOC, 493 U.S. 182, 189 (1990)). There are two elements of the common interest rule: (1) the party who asserts the rule must share a common legal interest with the party with whom the information was shared, and (2) the communications for which protection is sought must have been designed to further that interest. See Johnson Matthey, Inc. v. Research Corp., No. 01 CIV. 8115, 2002 WL 1728566, at * 6 (S.D.N.Y. July 24, 2002). "The key consideration is that the nature of the interest be identical, not similar, and be legal, not solely commercial." North River Ins. Co. v. Columbia Cas. Co., No. 90 Civ. 2518, 1995 WL 5792, at *3 (S.D.N.Y. Jan. 5, 1995) (quotation marks and citation omitted); accord Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 160 F.R.D. 437, 447 (S.D.N.Y. 1995). Contrary to the Brennan Intervenors' assertion, there is no requirement that a joint defense agreement be in writing or relate to the litigation in its entirety. (See Letter to the court from Michael E. Rosman, Esq., dated Jan. 3, 2003, at 3.)

With respect to the specific communications at issue here, I have reviewed the privilege log and I find that the United States and the Municipal Defendants had shared legal interests and that the communications were designed to further those interests. At that point in the litigation the United States and the Municipal Defendants, while still adversaries, had entered into a settlement and were jointly defending against objections to the Agreement and the Brennan Intervenors' motions. To do so, it was necessary for them to share information and discuss strategy.

I also find that the attorneys' thought processes as to which individuals met the criteria to be Offerees and what benefits the Offerees were to receive from the settlement are not directly relevant to the question of whether this court should approve the Agreement. The

Agreement largely speaks for itself. If the Intervenors wish to argue that certain Offerees did not meet the criteria, that certain non-Offerees did, or that the criteria were erroneous, nothing is preventing them from doing so. All of the information they need as to who the Offerees are and what the criteria were is in the court record and is available to them.

SO ORDERED.

Dated: Brooklyn, New York
July 24, 2003

ROBERT M. LEVY
United States Magistrate Judge