

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549

Administrative Proceedings Rulings  
Release No. 5684 / April 16, 2018

Administrative Proceeding  
File No. 3-17950

In the Matter of  
**David Pruitt, CPA**

**Order on Respondent's  
Motion to Quash**

At the request of the Division of Enforcement, I issued subpoenas to Respondent David Pruitt and witness Timothy Keenan. Pruitt's subpoena required the production of communications between Pruitt and Keenan and documents and communications concerning an affidavit Keenan signed on February 2, 2018. Keenan's subpoena concerned the same evidence plus evidence responsive to an investigative subpoena issued to him in January 2016.

Pruitt moved to quash or modify the subpoenas, arguing they require the production of privileged communications with his counsel and attorney work-product.<sup>1</sup> Specifically, Pruitt argues that his counsel's notes concerning counsel's communication with Keenan and drafts of Keenan's affidavit are privileged.<sup>2</sup> He also argues that communications with his counsel about the Keenan affidavit are privileged.<sup>3</sup>

Because Pruitt did not support his motion with a privilege log or declaration describing the evidence in question, I directed him to promptly file such a privilege log or declaration.<sup>4</sup> In response, Pruitt filed a privilege

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<sup>1</sup> Mem. at 3.

<sup>2</sup> *Id.* at 6–8.

<sup>3</sup> *Id.* at 9–10.

<sup>4</sup> *David Pruitt, CPA*, Admin. Proc. Rulings Release No. 5674, 2018 SEC LEXIS 870, at \*3 (ALJ Apr. 6, 2018); see *Caudle v. District of Columbia*, 263

log that lists two documents: an e-mail his counsel sent to Keenan on February 1, 2018, and a draft affidavit attached to the e-mail. On the first page of the log, Pruitt states that it “does not include communications solely between Respondent’s defense team and/or Respondent.” He also states that he does not have access to documents in Keenan’s possession.

The Division opposes Pruitt’s motion. It argues that Pruitt cannot plausibly claim that all communications between him and Keenan from 2014 to the present are privileged.<sup>5</sup> The Division also argues that Keenan’s communications with other people cannot be covered by a claim of privilege.<sup>6</sup> And it does not believe that any privilege could protect from disclosure matters covered by its investigative subpoena.<sup>7</sup>

The Division further argues that drafts of affidavits are not subject to protection as work-product.<sup>8</sup> Finally, it argues that Pruitt has waived any other claim of privilege with respect to documents responsive to the subpoenas.<sup>9</sup>

#### *Discussion*

The burden of establishing that evidence is protected by the attorney-client or work-product privilege rests on the party trying to invoke the privilege’s protection.<sup>10</sup> The burden is heavy.<sup>11</sup> Whether relying on attorney-client or work-product privilege, the party invoking privilege must

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F.R.D. 29, 35 (D.D.C. 2009) (“A privilege log has become an almost universal method of asserting privilege under the Federal Rules.”).

<sup>5</sup> Opp’n at 2, 4.

<sup>6</sup> *Id.* at 5.

<sup>7</sup> *Id.* at 5–6.

<sup>8</sup> *Id.* at 6–10.

<sup>9</sup> *Id.* at 11.

<sup>10</sup> *In re Grand Jury Subpoenas Dated Mar. 19, 2002 & Aug. 2, 2002*, 318 F.3d 379, 384 (2d Cir. 2003).

<sup>11</sup> *Id.*

“specifically assert[] [it] with respect to particular documents.”<sup>12</sup> Otherwise, the privilege is waived.<sup>13</sup>

The Division asserts that neither attorney-client nor work-product privilege can protect counsel’s communications with Keenan because he is a third party.<sup>14</sup> Although there is some support for the Division’s position that drafts of affidavits are not protected as work product,<sup>15</sup> that authority rests on the premise that unexecuted drafts are “a statement of facts within the personal knowledge of the witness.”<sup>16</sup> But when an affidavit is prepared by counsel but is not executed, likely because it does not reflect the witness’s recollection, the unexecuted draft reflects the impression of the attorney who drafted it, rather than the witness’s impression. The content of unexecuted drafts, therefore, cannot be described as facts, and revisions to a draft are more likely to reveal the drafting attorney’s impressions and strategy. Unexecuted drafts of affidavits are therefore protected by the work-product privilege.<sup>17</sup> Pruitt need not disclose the two documents listed on his privilege log. Keenan may likewise withhold the draft he received from Pruitt’s counsel and the e-mail that forwarded the draft.

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<sup>12</sup> *United States v. El Paso Co.*, 682 F.2d 530, 539 (5th Cir. 1982); *Caudle*, 263 F.R.D. at 35.

<sup>13</sup> *In re Grand Jury Subpoena*, 274 F.3d 563, 576 (1st Cir. 2001) (relying on *Dorf & Stanton Commc’ns, Inc. v. Molson Breweries*, 100 F.3d 919, 923 (Fed. Cir. 1996)); see *United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 473–74 (2d Cir. 1996) (a deficient privilege log is grounds for rejecting a claim of attorney-client privilege); *Banks v. Office of Senate Sergeant-at-Arms*, 241 F.R.D. 376, 386 (D.D.C. 2007).

<sup>14</sup> Opp’n at 6–10.

<sup>15</sup> See *Infosystems, Inc. v. Ceridian Corp.*, 197 F.R.D. 303 (E.D. Mich. 2000); *Milwaukee Concrete Studios, Ltd. v. Greeley Ornamental Concrete Prods., Inc.*, 140 F.R.D. 373, 378–79 (E.D. Wis. 1991).

<sup>16</sup> *Infosystems*, 197 F.R.D. at 306.

<sup>17</sup> See *Schoenmann v. FDIC*, 7 F. Supp. 3d 1009, 1014 (N.D. Cal. 2014); *Inst. for Dev. of Earth Awareness v. PETA*, 272 F.R.D. 124, 125 (S.D.N.Y. 2011); *Randleman v. Fidelity Nat’l Title Ins. Co.*, 251 F.R.D. 281, 285 (N.D. Ohio 2008); 8 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2024 n.23 (3d ed. Apr. 2018 update) (“Recent cases have generally held that draft affidavits, and communications with counsel relating to affidavits, are covered by the work-product rule.”).

As noted, the Division argues that no claim of privilege protects Pruitt's other communication with Keenan from 2014 to the present or Keenan's communications with other people.<sup>18</sup> But because neither Pruitt nor Keenan have raised any privilege claims as to other communications, there is no need to consider the Division's argument. The same is true as to the matters covered by the Division's investigative subpoena.

Finally, Pruitt states in his privilege log that he is not "includ[ing] communications solely between Respondent's defense team and/or Respondent." I do not understand the subpoena to Pruitt to request communications between Pruitt and his own counsel. However, to the extent there are "records of phone calls, calendar entries indicating when counsel spoke to Keenan and who was present, contemporaneous notes or memoranda of the factual statements made by Keenan during any prior communications,"<sup>19</sup> or other responsive records that were not listed in Pruitt's privilege log, he should immediately disclose those documents to the Division.<sup>20</sup>

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James E. Grimes  
Administrative Law Judge

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<sup>18</sup> Opp'n at 4–5.

<sup>19</sup> Opp'n at 11.

<sup>20</sup> See *OneBeacon Ins. Co. v. Forman Int'l, Ltd.*, No. 04-2271, 2006 WL 3771010, at \*7 (S.D.N.Y. Dec. 15, 2006) (failure to list privileged documents on privilege log waives claim of privilege).