

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 6606/June 14, 2019

ADMINISTRATIVE PROCEEDING
File No. 3-16293

In the Matter of

LAURIE BEBO and :
JOHN BUONO, CPA : ORDER
:

The Securities and Exchange Commission instituted this proceeding with an Order Instituting Proceedings (OIP), pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission’s Rules of Practice on December 3, 2014. Only Respondent Laurie Bebo remains in the proceeding.¹

Under consideration are Respondent’s request for subpoena directed to the Commission, dated January 31, 2019; the Division of Enforcement’s opposition, dated February 8, 2019; and Respondent’s reply, dated February 15, 2019.

The conduct alleged in the OIP occurred from 2009 through early 2012, when Bebo was CEO of Assisted Living Concepts, Inc. (ALC), which was a publicly traded assisted living and senior residence provider. The OIP alleges that ALC leased eight of its facilities from Ventas, Inc., and that Bebo knew, or was reckless in not knowing, that ALC misrepresented in its Forms 10-K and 10-Q that it was in compliance with occupancy and financial covenants in its lease with Ventas. The sanctions authorized in the OIP include sanctions that the Commission can also pursue by bringing suit in federal court: civil penalties and an officer and director bar. These sanctions were first authorized in administrative proceedings as to non-registrants, such as Bebo, by Section 929P(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010,² which became effective on July 22, 2010. Some of the conduct alleged in the OIP occurred after July 22, 2010 – the conduct was alleged to have occurred from 2009 to early 2012. Bebo argues that Section 929P(a) is unconstitutional on its face and as applied to her in this proceeding.³

¹ See *Laurie Bebo*, Exchange Act Release No. 74177, 2015 SEC LEXIS 347 (Jan. 29, 2015) (settlement order as to John Buono, CPA).

² The OIP also authorizes a cease-and-desist order, which Bebo describes as the functional equivalent of an injunction, and disgorgement. These two sanctions were authorized as to “any person” by the Securities Enforcement Remedies and Penny Stock Reform Act of 1990. See Section 21C(a), (e) of the Exchange Act.

³ Bebo filed a motion for summary disposition that argued that Section 929P(a) is facially unconstitutional, which the undersigned denied. *Laurie Bebo*, Admin. Proc. Rulings Release No. 6571, 2019 SEC LEXIS 1094 (May 10, 2019). That argument is preserved for appeal.

Bebo seeks documents relating to the Commission's decisions in choosing whether to bring this and other cases as administrative proceedings or as actions in federal district court. The Division argues the subpoena should not be issued because some of the documents sought are publicly available and the others are protected from disclosure by the deliberative process privilege, attorney client privilege, and the work product doctrine.

Privilege

Attorney client privilege applies to a communication between client and counsel that was intended to be, and was in fact, kept confidential and made for the purpose of obtaining or providing legal advice. *United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996). The deliberative process privilege applies to predecisional intra-agency memoranda. *See, e.g., NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149-53 (1975). The work product doctrine⁴ provides that a party may obtain discovery of documents prepared in anticipation of litigation only on a showing that the party has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Any disclosure must protect against disclosure of the mental impressions, conclusions, opinions, and legal theories of an attorney representing a party. *See United States v. Deloitte LLP*, 610 F.3d 129, 135-36 (D.C. Cir. 2010); *see also* Fed. R. Civ. P. 26(b)(3). As a general rule, a party waives attorney client privilege when disclosing a privileged communication to a third party and waives work product protection when sharing protected materials with an adversary or a conduit to an adversary.

The Subpoena

The items sought to be produced are:

(1) documents sufficient to identify all contested actions by case name, filing date, filing number, and securities law violations alleged by the Commission in (a) federal district court, and (b) SEC administrative proceedings from July 22, 2010, to the present. The subpoena request is unnecessary as to these documents, which are publicly available on the Commission's website: <https://www.sec.gov/litigation/litreleases.shtml> (actions filed in federal district court) and <https://www.sec.gov/litigation/admin.shtml> (administrative proceedings). Thus, the subpoena as to these documents will not be issued as it would be unreasonable. *See* 17 C.F.R. § 201.232(b). Bebo argues that “[p]resumably, the Commission has readily accessible records” that identify the contested actions in lieu of putting Bebo “through the expense of wading through every litigation release and public notices of orders instituting administrative proceedings, review the substance of each litigation release to determine whether it was a settled action or a contested action, which ones were ‘follow-on’ administrative proceedings, and compile the information herself.” Reply at 19. This argument, which concedes that the requested information is readily available, is rejected. It is not clear why Bebo believes that the Commission has “readily accessible records” in the exact

⁴ The work product doctrine, articulated in *Hickman v. Taylor*, 329 U.S. 495 (1947), and codified in Federal Rule of Civil Procedure 26(b)(3), is applied in Commission administrative proceedings. *See Clarke T. Blizzard*, Investment Advisers Act Release No. 2030, 2002 SEC LEXIS 3408, at *11-12 & n.17 (Apr. 23, 2002).

format that she desires. It is also noted that the subpoena request did not ask for ‘follow-on’ proceedings to be omitted from contested actions.⁵

(2) documents relating to any generally applicable guidelines, rules, or procedures used by the Commission in evaluating, approving, or rejecting the Division’s recommendation to proceeding in federal district court or in an administrative proceeding from July 22, 2010, to the present.

(3) documents relating to the development of the publicly available document titled “Division of Enforcement Approach to Forum Selection in Contested Actions” (Forum Selection Memo).

(4) all documents relating to the Commission’s consideration or deliberations with respect to its decision to file an administrative proceeding in this case rather than filing an action in federal district court.

Concerning Items 2 and 3, the Division is unaware of any publicly available documents other than the Forum Selection Memo. Any other such documents relating to “guidelines, rules, or procedures used by the Commission in evaluating, approving, or rejecting the Division’s recommendation to proceeding in federal district court or in an administrative proceeding from July 22, 2010, to the present” are covered by privilege, including the deliberative process privilege. *See, e.g., SEC v. Somers*, No. 11-cv-165, 2013 U.S. Dist. LEXIS 111795, at *6 (W.D. Ky. Aug. 8, 2013). Item 4 seeks documents relating to the Commission’s consideration of forum selection in the instant case. Likewise, any such documents are covered by privilege, including the deliberative process privilege. *Id.*; *see also Orlando Joseph Jett*, Admin. Proc. Rulings Release No. 514, 1996 SEC LEXIS 1683 (June 17, 1996) (vacating administrative law judge’s order to produce such documents as to the particular case for *in camera* review).⁶

In light of the above, the requested subpoena will not be issued.

IT IS SO ORDERED.

/S/ Carol Fox Foelak
Carol Fox Foelak
Administrative Law Judge

⁵ Nor did it ask for the omission of any other proceeding that can only be brought as an administrative proceeding, *e.g.*, a stop order proceeding, or a proceeding in which the only authorized sanction is a bar from the securities industry or revocation of a registrant’s registration.

⁶ It is noted that Items 2, 3, and 4 would not lead to the discovery of relevant evidence in light of the denial of Bebo’s Motion for Summary Disposition for Constitutional Violations. *Laurie Bebo*, 2019 SEC LEXIS 1094.