

THE HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

LEXINGTON INSURANCE COMPANY,

Plaintiff,

v.

SANDRA SWANSON, an individual,

Defendant.

Case No. 2:05-CV-01614-MJP

**MOTION TO QUASH NOTICES AND  
SUBPOENAS FOR VIDEOTAPED  
DEPOSITIONS OF CHRISTOPHER L.  
NEAL AND EARL SUTHERLAND AND  
SUBPOENAS DUCES TECUM**

**NOTED ON MOTION CALENDAR:  
JUNE 8, 2007**

***ORAL ARGUMENT REQUESTED***

**I. RELIEF REQUESTED**

Plaintiff Lexington Insurance Company ("Lexington") requests an order quashing the Notice and Subpoena for Videotaped Deposition of Christopher L. Neal and Subpoena Duces Tecum, and the Notice and Subpoena for Videotaped Deposition of Earl Sutherland and Subpoena Duces Tecum. These notices and subpoenas were served on May 25, 2007, and demand attendance by Attorneys Neal and Sutherland on May 31, 2007. Lexington requests that the Court quash the Notices, Subpoenae for Deposition and Subpoenae Duces Tecum directed to Attorneys Neal and Sutherland because: 1) the subpoenas seek discovery of privileged information in direct contravention of Federal Rules of Civil Procedure; 2)

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1 procedural defects in the service of those subpoenas render them invalid; and 3) Defendant  
2 seeks to depose Attorneys Neal and Sutherland *after* the discovery deadline.

3 **II. STATEMENT OF FACTS**

4 On May 25, 2007, Defendant served a Notice and Subpoena for Videotaped  
5 Deposition of Christopher L. Neal and Subpoenas Duces Tecum upon Lexington's counsel,  
6 Christopher L. Neal. (Declaration of Christopher L. Neal ("Neal Decl.")). That same day,  
7 Defendant also served a Notice and Subpoena for Videotaped Deposition of Earl Sutherland  
8 and Subpoenas Duces Tecum upon Lexington's counsel, attorney Earl Sutherland.  
9 (Deposition of Earl M. Sutherland ("Sutherland Decl.")). Each of these depositions has been  
10 noticed to occur on May 31, 2007, "or other date agreed to by the parties pending ruling by  
11 the Court on Defendant Swanson's [as yet unconfereed/unserveed/unfiled] motion to compel  
12 withheld claims file materials . . . ." Neal Decl. ¶ 2. Ex. 1. The discovery cutoff in this  
13 matter is May 30, 2007. (Dkt. 106)

14 Mr. Neal is Lexington's current legal counsel. Neal Decl. ¶ 2. In addition to serving  
15 as Lexington's coverage counsel from October, 2004, to present, he represents Lexington as  
16 counsel of record in the present matter and in the matter styled *Swanson and Bogut v.*  
17 *Issaquah Care Center, LLC, et. al.*, King County Superior Court Cause No. 06-2-098-44-7  
18 SEA. Neal Decl. ¶ 3. During the latter half of 2004, Mr. Sutherland served as Lexington's  
19 monitoring and coverage counsel with respect to an underlying tort action initiated by  
20 Defendant Sandra Swanson in King County. *Sandra Swanson v. Issaquah Care Center*, King  
21 County Superior Court Cause No. 03-2-20442-1 SEA. Sutherland Decl. ¶ 3.

22 The Notice and Subpoenas and Subpoenas Duces Tecum issued to Attorneys Neal and  
23 Sutherland provide as follows:

24 (X) YOU ARE HEREBY COMMANDED to produce and permit  
25 inspection and copying of the following documents or objects at the  
26 place, date and time specified below:

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1 1. All correspondence, notes, reports or other documents relating  
2 to the claims or coverage issues arising from the claims brought  
3 by Sandra Swanson, Haelen Health Systems, Dr. Palermo or  
others against ICC, LLC or for coverage under any policy of  
insurance issued to ICC, LCC.

4 HEREIN FAIL NOT AT YOUR PERIL

5 Neal Dec. Ex. 1.

6 Lexington has previously produced all relevant and non-privileged portions of its  
7 claims files related to the claims brought by Defendant Swanson (as ICC) and Haelen Health  
8 Systems against ICC. Neal Decl. ¶ 4. Swanson has previously attempted to obtain the  
9 privileged material in both pending matters, but each Court has denied Swanson may obtain  
10 the privileged material. See Dkt. Nos. 93 at 8-12 and 16; Dkt. Nos. 84, Exhibit A.

11 On May 24, 2007, Defendant's counsel, David Beninger, advised Attorney Neal that  
12 he would only be deposed in the event the Court granted Defendant's as yet unfiled motion to  
13 compel the privileged documents.<sup>1</sup> Neal Decl. ¶ 5. Inherent in these facts is the reality that  
14 by deposing Attorneys Neal and Sutherland, Defendant necessarily seeks only discovery of  
15 privileged communications.

16 Throughout the course of their present and former representation, Attorneys Neal and  
17 Sutherland have communicated extensively with Lexington for the purpose of advising  
18 Lexington respect to the claims asserted against ICC and Lexington by Defendant Swanson  
19 (individually and as ICC) and to the coverage issues arising by virtue of the claims asserted in  
20 the underlying tort action. Neal Declaration ¶ 6; Sutherland Decl. ¶ 4. Mr. Neal has also  
21 communicated extensively with Lexington for the purposes of representing Lexington in the  
22 present action and the state court action. Neal Decl. ¶ 6. At no time did Neal or Sutherland  
23 perform any function for Lexington other than the provision of legal advice or service. Neal  
24 Decl. ¶ 6, Sutherland Decl. ¶ 4. Attorneys Neal and Sutherland should not be compelled to

25 \_\_\_\_\_  
26 <sup>1</sup> The time to file a second motion to compel production of Lexington's attorney-client  
communications has passed. (Dkt. 106)

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1 respond to Defendant's Notices, Subpoenas and Subpoenas Duces Tecum. Defendant merely  
2 seeks disclosure of information protected by the attorney-client privilege. Furthermore,  
3 Attorneys Neal and Sutherland should not be compelled to appear for depositions after the  
4 discovery deadline and in violation of the Amended Scheduling Order for Discovery and  
5 Dispositive Motions entered by this Court.

6 **III. STATEMENT OF THE ISSUES**

7 1. Whether the Court should issue an order quashing Defendant's Notices and  
8 Subpoenas for Videotaped Deposition and Subpoenas Duces Tecum where Defendant seeks  
9 discovery of information protected by the attorney-client privilege?

10 2. Whether the Court should issue an order quashing Defendant's Subpoenas in  
11 light of procedural defects which render them invalid?

12 3. Whether the Court should issue an order quashing Defendant's Notices and  
13 Subpoenas for Videotaped Deposition and Subpoenas Duces Tecum where Defendants seek  
14 to depose Lexington's counsel after the discovery deadline?

15 **IV. EVIDENCE RELIED UPON**

16 This motion is based upon the record in this case, and the Declaration of Christopher  
17 L. Neal in Support of this Motion and exhibits attached thereto, and the Declaration of Earl  
18 M. Sutherland.

19 **V. AUTHORITY**

20 **A. The Court Should Quash the Notices of Deposition, Subpoenas and Subpoena**  
21 **Duces Tecum Because Defendants Seek Discovery of Communications That Are**  
22 **Protected From Discovery By The Attorney-Client Privilege.**

23 FRCP 45(c)(3) sets forth ways in which a court may quash or modify a subpoena. In  
24 pertinent part, FRCP 45(c)(3)(A) provides:

25 On a timely motion, the court by which a subpoena was issued shall quash or  
26 modify a subpoena if it:

- ...  
(iii) requires disclosure of privileged or other protected matter and no  
exception or waiver applies...

\*\*\*

1  
2 A court must quash or modify a subpoena under any circumstance, such as those in the  
3 present case, in which the subpoena requires disclosure of privileged or protected information.  
4 *Raso v. CMC Equip. Rental, Inc.*, 154 F.R.D. 126, 128-29 (E.D. Pa. 1994). FRCP 26 defines  
5 the scope and limits of discovery. FRCP 26(b)(1) provides that “parties may obtain discovery  
6 regarding any matter, not privileged, that is relevant to the claim or defense of any party...”  
7 Under FRCP 26(b)(1), this court is authorized to prevent discovery of privileged and  
8 protected matters. An order quashing the Notices and Subpoenas and Subpoenas Duces  
9 Tecum to Attorneys Neal and Sutherland is appropriate because compliance with the Notices  
10 and Subpoenas will require the disclosure of information protected from discovery by the  
11 attorney-client privilege.

12 The attorney-client privilege is one of the most basic, yet fundamental, protections  
13 afforded litigants. Generally, the attorney-client privilege attaches to direct communication  
14 between a client and his attorney as well as communications made through their respective  
15 agents. *JPMorgan Chase & Co. v. Pierce*, 2007 WL 1041196, 4 (E.D.Mich.,2007); *In Grand*  
16 *Jury Subpoena 92-1 (SJ)*, 31 F.3d 826, 829 (9<sup>th</sup> Cir. (1994). Specifically, the attorney-client  
17 privilege protects those communications made in confidence for the purpose of obtaining  
18 legal advice from the lawyer. *U.S. v. El Paso Co.*, 682 F.2d 530, 538 (5<sup>th</sup> Cir. 1982). The  
19 attorney-client privilege also “protects from forced disclosure any communications from an  
20 attorney to his client when made in the course of giving legal advice.” *In re LTV Sec. Litig.*,  
21 89 F.R.D. 595, 602 (N.D. Tex. 1981). The attorney-client privilege extends to legal advice  
22 and opinions from an attorney to his client. *American Optical Corp. v. Medtronic, Inc.* 56  
23 F.R.D. 426, 430 (D. Mass. 1972).

24 The United States Supreme Court has stated that the privilege exists to encourage full  
25 disclosure by the client to its attorney and to foster a relationship of trust. *Commodity Futures*  
26 *Trading Comm'n v. Weintraub*, 471 U.S. 343, 348, 105 S.Ct. 1986, 1990 (1985); accord

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1 *Upjohn Co. v. U.S.*, 449 U.S. 383, 389, 101 S.Ct. 677, 682 (1981)(communications by  
2 company employees to company's counsel at the direction of corporate superiors and for the  
3 purpose of securing legal advice were communications protected from compelled disclosure).  
4 In explaining the practical consequence of the attorney-client privilege, commentator noted:

5 Today, the privilege is the client's prerogative. The client, not the lawyer,  
6 holds the privilege. The client has the ultimate authority to raise or waive the  
7 privilege. An attorney may not testify as to communications made by a client  
8 unless released by the client. In fact, the American Bar Association has  
9 suggested that the name of the privilege should be changed to the "client-  
10 attorney" privilege to reflect more accurately the primacy of the roles.

11 The practical consequence of the privilege is that there can neither be  
12 compelled nor voluntary disclosure by the attorney of matters conveyed to the  
13 attorney in confidence by the client for the purpose of seeking legal advice.  
14 Thus, the privilege exists as a privilege against testimonial compulsion of the  
15 attorney with respect to matters conveyed to the attorney by the client, and  
16 against testimonial compulsion of the client as to matters communicated to the  
17 attorney for the purpose of seeking the attorney's lead counsel. The privilege  
18 tends, in most instances, to be a two-way street, protecting from compelled  
19 disclosure what is said or written to or by an attorney to the client for the  
20 purpose of seeking legal counsel.

21 Epstein, *The Attorney-Client Privilege and the Work Product Doctrine* (4th Ed. Supp.  
22 at pp. 2-3).

23 Attempts to depose opposing counsel are highly disfavored. Recently, the California  
24 Court of Appeal held that depositions of opposing counsel are presumptively improper,  
25 severely restricted, and require an "extremely" good cause-a high standard. *Carehouse*  
26 *Convalescent Hosp. v. Superior Court*, 143 Cal.App.4th 1558, 1562, 50 Cal.Rptr.3d 129  
(2006). In *Carehouse*, Plaintiffs sought to depose a hospital's counsel in a wrongful death  
case. There, the Court of Appeal stated:

Attorney depositions are disruptive, and add to the length and expense of  
litigation. Rather than preparing the clients' case for trial, counsel must be  
prepared (often by retaining additional counsel) to place himself or herself in  
the witness box, being a responsive witness while remaining a partisan  
advocate. "There is a reason there are so few successful player-coaches-it's  
hard to do two things well at the same time.... We speak from painful  
experience: Lawyers make the absolute worse deposition witnesses." (Solovy  
& Byman, *Discovery: Opponent Deponents* 23 Nat'l L.J. (Jan. 8, 2001) p.  
A17.) The parties get sidetracked into endless collateral disputes about which

1 attorney statements are protected and which are not, and it increases the  
2 possibility that the lawyer may be called as a witness at trial. "It is not hard to  
3 imagine additional pretrial delays to resolve work-product and attorney-client  
4 objections, as well as delays to resolve collateral issues raised by the attorney's  
5 testimony."

6 \*\*\*

7 Attorney depositions chill the attorney-client relationship, impede civility and  
8 easily lend themselves to gamesmanship and abuse. "Counsel should be free to  
9 devote his or her time and efforts to preparing the client's case without fear of  
10 being interrogated by his or her opponent."

11 "[I]n the highly charged atmosphere of litigation, attorney depositions may  
12 serve as a potent tool to harass an opponent." (Flynn, Jr., On 'Borrowed Wits':  
13 A Proposed Rule for Attorney Depositions (1993) 93 Colum. L.Rev.1956,  
14 1965 (hereafter Flynn, Jr.).

15 *Carehouse Convalescent Hosp. v. Superior Court*, 143 Cal.App.4th 1558, 1562-1563, 50  
16 Cal.Rptr.3d 129 (2006)(citations omitted).

17 The *Carehouse* court held that Plaintiffs have not shown "extremely good cause" for  
18 counsel's deposition because the likelihood the attorney would assert claims of work product  
19 and attorney-client privilege was great and, therefore, the usefulness of the procedure was  
20 questionable. *Carehouse Convalescent Hosp. v. Superior Court*, 143 Cal.App.4th at 1566.

21 It is clear that attorney-client privilege must be jealously guarded. Indeed, the United  
22 States Supreme Court has made clear that where any party to the privilege discloses any  
23 significant part of a confidential communication, the privilege is waived. *Permian Corp. v.*  
24 *U.S.*, 665 F.2d 1214, 1219 (D.C. Cir. 1981)(holding that when confidential communication  
25 voluntarily disclosed to one person, privilege waived to all others). It is well-settled that  
26 "only a client can waive the privilege and, to support a finding of waiver, there must be  
evidence that he intended to waive it." *See Connecticut Mut. Life. Ins. Co. v. Shields*, 18  
F.R.D. 448, 451 (S.D.N.Y. 1975) (cited in Epstein, *The Attorney-Client Privilege ad the*  
*Work-Product Doctrine* (4<sup>th</sup> Ed. Supp. at p. 316). "[T]rue waiver is an intentional, voluntary  
act and cannot arise by implication. *JPMorgan Chase & Co. v. Pierce*, 2007 WL 1041196, \*5  
(E.D.Mich. 2007)

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1 As counsel for Lexington, Attorneys Neal and Sutherland have exchanged numerous  
 2 communications with Lexington for the purpose of obtaining and providing legal advice  
 3 concerning the claims against Lexington's insured ICC, as well as coverage issues that arose  
 4 with respect to the insurance policies issued to ICC by Lexington. There is no evidence that  
 5 Lexington has ever waived the attorney-client privilege, or otherwise authorized its counsel to  
 6 disclose privileged communications, and this Court has already observed that Lexington has  
 7 not advanced an "advice of counsel" defense to Swanson's counterclaims. Neal Decl. ¶ 7. In  
 8 the absence of waiver, Attorneys Neal and Sutherland cannot be compelled to comply with  
 9 the Notices and Subpoenae where such compliance will necessarily require them to divulge  
 10 protected client confidences. Defendant's request to depose Attorneys Neal and Sutherland is  
 11 nothing more than a thinly-veiled attempt to obtain discovery of privileged communications,  
 12 which she is not entitled to discover, and which this Court has previously held Swanson may  
 13 not obtain. (Dkt. 93) Similar to counsel in the *Carehouse* case, the depositions of Attorneys  
 14 Neal and Sutherland are unlikely to yield any useful information where counsel will most  
 15 assuredly assert the attorney-client privilege in response to any and all inquiries requiring  
 16 disclosure of client confidences and legal opinions and advice tendered to Lexington.  
 17 Defendant should not be permitted to waste time and resources by engaging in tactics that will  
 18 accomplish nothing more than harassment of Lexington and its counsel.

19 **B. The Court Should Quash the Subpoenas for Videotaped Depositions Because**  
 20 **Defendant Failed to Comply with the Procedural Requirements of FRCP 45(c).**

21 FRCP 45(b)(1) provides:

22 A subpoena may be served by any person who is not a party and is not less  
 23 than 18 years of age. Service of a subpoena upon a person named therein shall  
 24 be made by delivering a copy thereof to such person and, if the person's  
 25 attendance is commanded, **by tendering to that person the fees for one day's**  
 26 **attendance and the mileage allowed by law.**

27 The United States Code provides that a witness in attendance at any court of the  
 28 United States shall be paid a witness fee of \$40 per day for each day's attendance. 28 U.S.C.

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1 § 1821(a)(1) and (b). A witness shall also be paid a travel allowance. 28 U.S.C. § 1821(c)(2).  
2 In calculating the travel allowance for a witness using a private vehicle, the rate per mile shall  
3 not exceed the Standard Mileage Rate set forth by the Internal Revenue Service. 5 USC §  
4 5704(a)(1). Currently, that rate is 48.8 cents per mile.<sup>2</sup>

5 It has been repeatedly held that the witness fee and mileage allowance must be  
6 tendered with the subpoena. *Tedder v. Odel*, 890 F.2d 210, 211 (9<sup>th</sup> Cir. 1989); *In re Dennis*,  
7 330 F.3d 696, 704 (5<sup>th</sup> Cir. 2003); *Gregg v. Clerk of U.S. Dist. Court*, 160 F.R.D. 653, 654  
8 (N.D.Fla. 1995); *Badman v. Stark*, 139 F.R.D. 601, 604 (M.D.Penn. 1991). Here, Defendant  
9 failed to tender the witness fee and mileage allowance as mandated by FRCP 45 at the time  
10 she served Attorneys Neal and Sutherland with her subpoenas. Based upon this procedural  
11 defect, Defendant’s subpoenas are invalid. Lexington is entitled to an order granting its  
12 motion to quash the subpoenas on this ground.

13 **C. The Court Should Quash the Notices and Subpoenas and Subpoenas Duces**  
14 **Tecum where Defendants Seek to Depose Attorneys Neal and Sutherland and**  
15 **seek Production of Documents after the Discovery Deadline.**

16 Pursuant to the Amended Scheduling Order for Discovery and Dispositive Motions,  
17 the discovery deadline in this matter is May 30, 2007 (Dkt. 106) Despite this, Defendant has  
18 noticed the depositions of Attorneys Neal and Sutherland for a date after the cutoff, in direct  
19 contravention of the Court’s order. As if attempting to obtain discovery of privileged  
20 information were not enough, Defendant now seeks to obtain this information by deposing  
21 Attorneys Neal and Sutherland *after* the deadline this court has established for the conclusion  
22 of all discovery in this matter. Defendant has had ample time to seek the depositions of  
23 Attorneys Neal and Sutherland and any other witness it chose to depose in this matter. Rather  
24 than noting the depositions of Attorneys Neal and Sutherland in advance of the discovery  
25 deadline, Defendant choose to wait until well past the “11<sup>th</sup> hour”. Defendant should not be

26 <sup>2</sup> See UNITED STATES INTERNAL REVENUE SERVICE WEBSITE,  
<http://www.irs.gov/taxpros/article/0..id=156624,00.html>, accessed May 25, 2007.

1 permitted to impose an undue burden upon Lexington by requiring its counsel to waste  
2 precious time and resources preparing for and attending depositions designed to elicit  
3 privileged information where Lexington's counsel would otherwise expend such time and  
4 resources advising Lexington and/or other clients.

5 **VI. CONCLUSION**

6 Lexington requests that the Court quash the Deposition Notices, Subpoenas and  
7 Subpoenas Duces Tecum to Attorneys Neal and Sutherland because they seek discovery of  
8 information that is protected by the attorney-client privilege and work-product doctrine.  
9 Defendant's attempt to obtain discovery of privileged communications, failure to comply with  
10 the procedural requirements for service of subpoenas as set forth by the Civil Rules, and  
11 noticing of depositions to occur after the discovery deadline has passed violates the letter and  
12 spirit of discovery and traditional notions of fair play. Requiring Attorneys Neal and  
13 Sutherland to respond to Defendant's Notices, Subpoenas and Subpoenas Duces Tecum will  
14 result in nothing more than wasted time and resources where the law strictly prohibits them  
15 from disclosing the very information their depositions are designed to elicit – privileged  
16 communications between Lexington and its counsel.

17 DATED: May 30, 2007.

18 COZEN O'CONNOR

19  
20 By: /s/ Christopher L. Neal  
21 Thomas M. Jones, WSBA #13141  
22 Christopher L. Neal, WSBA #25685  
23 Katina C. Thornock, WSBA #31527  
24 Attorneys for Plaintiff Lexington Insurance  
25 Company  
26

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 30th day of May, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

David M. Beninger  
Luvera, Barnett, Brindley, Beninger & Cunningham  
701 Fifth Avenue, Suite 6700  
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(Counsel for Defendant Swanson)

Christopher L. Neal  
Cozen O'Connor  
1201 Third Avenue, Suite 5200  
Seattle, WA 98101  
(Counsel for Plaintiff)

By: /s/ Eileen Brousseau  
Secretary to Christopher L. Neal  
WSBA No. 25685  
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