

NO. 2014-55319

HOUSTON COMMUNITY COLLEGE,	§	IN THE DISTRICT OF
	§	
Plaintiff and	§	
Counter-Defendant	§	
	§	
v.	§	HARRIS COUNTY, TEXAS
	§	
RENEE BYAS,	§	
Defendant and	§	
Counter-Plaintiff	§	55 TH JUDICIAL DISTRICT

DEFENDANT RENEE BYAS' SECOND MOTION TO COMPEL

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant Renee Byas (“Ms. Byas”) seeks production of documents withheld from discovery by Plaintiff Houston Community College (“HCC”). HCC asserts these documents are protected by either, or both, the attorney-client privilege or the attorney work product privilege. The items should be produced, however, because the privileges do not apply or the documents fall within an exception to Rule 503.

I. LEGAL BACKGROUND

Texas’s attorney-client privilege is defined in Texas Rule of Evidence 503. The privilege exists to encourage the client to “tell all” to counsel to obtain the best legal advice. *West v. Solito*, 563 S.W.2d 240, 245 (Tex. 1978) (orig. proceeding). Rule 503 limits its protection to only communications “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client.” TEX. R. EVID. 503(a)(5).

The Texas Supreme Court, however, has explained that “[p]rivileges are not favored in the law and are strictly construed” because they “contravene ‘the fundamental principle that the public . . . has a right to every man’s evidence.’” *Jordan v. Fourth Court of Appeals*, 701 S.W.2d 644,

647 (Tex. 1985) (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980)). The party asserting the attorney-client privilege bears the burden of proving both the privilege and its applicability to specific materials because the privilege obstructs the search for truth. *Jordan*, 701 S.W.2d at 648-49; see also *In re E.I. DuPont de Nemours and Company*, 136 S.W.3d 218, 223 (Tex. 2004).

“The discovery rules provide that any party may request a hearing on a claim of privilege and the party asserting the privilege must present any evidence necessary to support the privilege.” *In re Carbo Ceramics, Inc.*, 81 S.W.3d 369, 373 (Tex. App.—Houston [14th Dist.] 2002, orig. proceeding). A court may allow an in camera review of documents and the party asserting the privilege must produce the materials for inspection “in a reasonable period of time after the hearing.” *Id.* at 373.

II. ARGUMENT

The items withheld by HCC are not privileged under Rule 503 and should be produced for three reasons.¹ First, a significant portion of the materials are not covered by Rule 503 because they are directly relevant to both parties’ claims and defenses.

Second, some of the withheld materials fall under the crime-fraud exception defined in Rule 503(d)(1). Ms. Byas alleges that HCC’s Board of Trustees (the “Board”) repeatedly pressured her to change or ignore the bond procurement rules so Trustees could give contracts to supporters. Shortly before Ms. Byas was transitioned from acting chancellor back to general counsel, the Board hired Vidal Martinez as the Board’s special counsel. Three weeks later, just days after Chancellor Maldonado started work at HCC, Dr. Maldonado’s assistant sent a copy of Ms. Byas’s contract to Mr. Martinez. Two weeks later HCC placed Ms. Byas on leave to

¹ Ms. Byas also believes an in camera review of the items are necessary because the document may only contain facts and will not constitute a confidential communication between counsel and client for the purpose of securing legal advice.

“determine” her contract’s validity. Shortly thereafter, Mr. Martinez became closely involved in Ms. Byas’s termination while serving as special counsel for bond-related matters.

The Board hired Mr. Martinez to engineer Ms. Byas’s termination because she would not comply with Trustees’ requests to change bond procurement rules nor would she end the then-pending Gardere investigation. The Board also hired Mr. Martinez to help the Board find a means to evade the IRS regulations and HCC procurement rules governing the bond procurement process. Because of this, Rule 503(d)(1) exempts from the attorney-client privilege communications involving Mr. Martinez about these matters.

Third, numerous communications between Mr. Martinez and HCC administrators should be released because Mr. Martinez served solely as special counsel to the Board of Trustees until July 2014. Rule 503 would not apply to communications between school employees and Mr. Martinez prior to July 2014.

A. HCC MUST PRODUCE ITEMS RELATED TO HCC’S ALLEGATIONS THAT MS. BYAS BREACHED HER DUTIES TO HCC BECAUSE SUCH ITEMS ARE NOT PRIVILEGED UNDER RULE 503(D)(3).

Texas Rule of Evidence 503(d)(3) codifies the exception to the attorney-client privilege for controversies arising between lawyer and client. HCC sued its lawyer, Ms. Byas, for breach of fiduciary duty and a declaratory judgment. Ms. Byas, counterclaimed, asserting that HCC had breached its duty to her. Either party may assert that the attorney-client privilege does not exist “[a]s to a communication relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer.” TEX. R. Evid. 503(d)(3).

The Court previously considered Rule 503(d)(3)’s application and, in a February 23, 2014 order, concluded that “HCC [made] specific factual recitations and claims which make it clear that the controversy between HCC and Byas goes deeper than a declaratory judgment claim and return

of documents.” Because of that, the Court determined that the transcript and exhibits from Ms. Byas’s termination hearing were not privileged under Rule 503(d)(3) for this dispute.²

The termination hearing, and accompanying exhibits, covered a broad range of topics including HCC’s assertions that: 1) Ms. Byas failed to follow HCC rules and procedures, and had improperly obtained the renewal of her 2013 contract; 2) Ms. Byas misrepresented deadlines related to the bond expenditures; 3) Ms. Byas overstated the breadth, scope, and purpose of the Gardere investigation; 4) Ms. Byas had improperly downloaded documents and e-mails on June 6, 2014, after HCC placed her on leave; 5) Ms. Byas had improperly forwarded an e-mail related to a potential hire; 6) Ms. Byas had improperly communicated with Jacobs Project Management; and, 7) Ms. Byas was insubordinate and had improperly challenged the authority of her boss, Cesar Maldonado.

Before and during the termination hearing Ms. Byas asserted that HCC’s claims were pretextual and that HCC placed her on leave because: 1) She would not prematurely end the Gardere investigation; 2) she would not alter the bond procurement rules or the spending time frame for the bonds despite Trustees’ repeated requests; and, 3) she was cooperating with the FBI.

Now, HCC wants to withhold 97 documents that HCC argues do not fall within any exception to Rule 503. Pl.’s Mot. for Prot. Order 3, April 7, 2014. Additionally, unless Ms. Byas enters into, or the Court orders, a protective order, HCC seeks to withhold an additional 651 documents that HCC believes falls within Rule 503(d)(3)’s exception. *Id.* Ms. Byas seeks the Court’s review of these items in camera because the items fall within Rule 503(d)(3)’s exception to the attorney-client privilege and should be released without a protective order.

² The Court, however, noted that certain items could still be considered “privileged” outside the context of this litigation and, therefore, must be filed under seal if attached to a pleading in this case.

When a client attacks his attorney's performance or when an attorney claims that a client has not lived up to his contract obligations (regardless of when the claim is made), the privilege is inapplicable to the extent that the otherwise confidential communications are relevant and necessary to the parties' dispute. *See West*, 563 S.W.2d at 245 n.3 (when a client challenges an attorney's professional conduct, the client waives the privilege so far as it is necessary for the attorney to defend his character); *Joseph v. State*, 3 S.W.3d 627, 637 (Tex. App.–Houston [14th Dist]. 1999, no pet.) (“It is well settled that a client waives the attorney-client privilege when litigating a claim against his attorney for a breach of legal duty.”).

When the client raises claims that place his attorney-client communications into a lawsuit, he waives the privilege protection applicable to those communications. *Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105, 108 (Tex. 1985) (“A plaintiff cannot use one hand to seek affirmative relief in court and with the other lower an iron curtain of silence against otherwise pertinent and proper questions which may have a bearing upon his right to maintain his action.”). “When the client files suit, he retains control and thus, the scope of any disclosure can be limited by the client's power to drop the suit.” *Vinson & Elkins v. Moran*, 946 S.W.2d 381, 394 (Tex. App.– Houston [14th Dist.] 1997, writ dism'd).

Under Texas case law and the Restatement of Law Governing Lawyers,

The attorney-client privilege does not apply to a communication that is relevant and reasonably necessary for a lawyer to employ in a proceeding:

- (1) to resolve a dispute with a client concerning compensation or reimbursement that the lawyer reasonably claims the client owes the lawyer; or
- (2) to defend the lawyer against an allegation by any person that the lawyer, an agent of the lawyer, or another person for whose conduct the lawyer is responsible acted wrongfully during the course of representing a client.

RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 133 (1996); *see Willy v. Admin. Rev. Bd.*, 423 F.3d 483, 496 (5th Cir. 2005) (exception applied in wrongful termination case in which

company's former in-house counsel claimed that company terminated him because he wrote report concluding that company had violated environmental laws); *Potash Corp. of Saskatchewan v. Macias*, 942 S.W.2d 61, 66 (Tex. App.–Corpus Christi 1997, no writ) (“When a dispute rises between lawyers and their clients, the lawyer may reveal confidential information only ‘[t]o the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.’”)(quoting TEX. R. DISCIPLINARY PROF. CONDUCT 1.05(c)(5)).

Within the 97 e-mails, color-coded green on Exhibit A, HCC has withheld materials relevant to Ms. Byas's defense against HCC's assertions that she breached her duties.³ For example, HCC continues to withhold e-mails between Mr. Martinez and Dr. Maldonado that relate to HCC's assertion that Ms. Byas had an invalid contract. (*See e.g.* Ex. A, Privilege ID 317, 346, 355, 369, 489, 831.) These e-mails are directly relevant to Ms. Byas's defense against HCC's declaratory judgment claim. HCC also continues to withhold e-mails between Mr. Martinez and Dr. Maldonado that relate to the bond procurement process. (*See e.g.* Ex. A, Privilege ID 359, 430, 832.) These items are relevant to Ms. Byas's breach of contract claim and her defense against HCC's assertion that she misrepresented bond-related deadlines. The Court should find these items, and the other green colored items on Exhibit A, not privileged under Rule 503(d)(3). The communications are relevant and reasonably necessary for Ms. Byas's defense and claims.

The Court should also order HCC to release the items color-coded yellow in Exhibit A without imposition of a protective order because these items directly relate to Ms. Byas's defense

³ A spreadsheet listing documents withheld by HCC and sought by Ms. Byas is attached as Exhibit A. The spreadsheet is based on HCC's privilege logs. Ms. Byas's counsel segregated items depending on which legal argument applies to their release. The group of documents related to this subject—Rule 503(d)(3)'s exception—is color-coded green. The group of 651 items that both Ms. Byas and HCC believe fall within Rule 503(d)(3)'s exception, and that HCC seeks to only release pursuant to a protective order, are color-coded yellow and listed below the green colored items.

and claims. Under Rule 503(d)(3), they are not privileged and should be shared with Ms. Byas. A protective order is unnecessary. Ms. Byas is still bound by her ethical duties to HCC and understands that she may only reveal confidential information “to the extent reasonable necessary” to enforce her claim or establish her defense. TEX. R. DISCIPLINARY PROF. CONDUCT 1.05(c)(5).

B. RULE 503(d)(1) APPLIES TO CERTAIN COMMUNICATIONS BECAUSE THE TRUSTEES SOUGHT MR. MARTINEZ’S COUNSEL SO THEY COULD TERMINATE MS. BYAS AND THEN AVOID COMPLIANCE WITH BOND PROCUREMENT RULES.

Ms. Byas believes that the attorney-client privilege does not apply to a number of withheld communications with Mr. Martinez because these e-mails fall under the crime-fraud exception to the attorney-client privilege.⁴

As acting chancellor, Ms. Byas documented conversations with Trustees in a journal.⁵ Her notes indicate that Trustees such as Carroll Robinson, Neeta Sane, and Chris Oliver, sought to: 1) Retaliate against Ms. Byas for commencing the Gardere investigation; 2) change, or delay, the bond procurement process so contracts could go to Trustees’ supporters; 3) hide or change legal opinions related to HCC’s adherence to bond procurement rules and IRS regulations.

For example, during her tenure as acting chancellor, Ms. Byas’s journal entries state:

- After she commenced the Gardere investigation into allegations that Mr. Robinson improperly influenced selection of a subcontractor, Mr. Robinson sought for Trustees to hold a no confidence vote against Ms. Byas. After learning of the investigation, Mr. Robinson called Ms. Byas and instructed her to fire the outside bond counsel who had informed others about the possible improprieties.
- Board of Trustees Chair Neeta Sane met with Ms. Byas in February 2014, and informed Ms. Byas that she did not like how HCC staff had evaluated

⁴ The withheld documents that relate to this argument are listed in Exhibit A and color-coded blue.

⁵ At the April 27, 2015 hearing, Ms. Byas’s counsel will tender copies of journal excerpts for the Court’s in camera review. All entries described in this Motion, and the ones that will be tendered to the Court, occurred during Ms. Byas’s tenure as acting chancellor. But, some of these entries reference discussions Ms. Byas or Trustees had with outside legal counsel. Ms. Byas submits this material for in camera review to protect any confidential communications between HCC and counsel. HCC received copies of Ms. Byas’s journal during discovery.

the bond contract bids. Because Ms. Sane disagreed with HCC staff evaluations, Ms. Sane refused to place action items on the Board agenda that related to the Construction Manager at Risk (CMAR) contracts for the various bond projects.

- Ms. Byas forwarded a legal opinion from HCC’s bond disclosure counsel to Ms. Sane. After reading the opinion, Ms. Sane was angry and “asked [Ms. Byas] not to ever send something to her like this in writing again.” Ms. Sane wanted Ms. Byas to ask outside legal counsel to rescind the opinion. Ms. Byas refused. Ms. Sane then told Ms. Byas that she would not permit the bond procurement process to move forward.
- Ms. Sane and Mr. Oliver informed Ms. Byas that they “would not support” the bid evaluations performed by HCC staff because the evaluations did not award contracts to people in the Trustees’ districts.
- Ms. Byas repeatedly discussed the bond procurement process with outside legal counsel and sought his opinion. When Ms. Byas shared outside legal counsel’s opinion with Ms. Sane, the Board chair grew incensed. Ms. Sane hid the information from other Trustees.⁶
- Ms. Byas attended a conference in Santa Fe with three trustees, who cornered her in the conference’s hotel lobby, “badger[ing]” her about changing the CMAR process. The discussion lasted until 12:20 AM. After the conversation, one trustee informed Ms. Byas that she needed to “take [her] lawyer hat off” and as acting chancellor cooperate with Trustees.

At the end of April 2014, shortly before Ms. Byas transitioned back to General Counsel, the Board hired Mr. Martinez to serve as special counsel for the Board on special projects. Mr. Martinez and Ms. Sane informed others that the Board had hired Mr. Martinez to assist on bond-related matters. *See* Ex. D, E, F. At least one Trustee was uncomfortable with Mr. Martinez’s role because she stated that he had no expertise in bond matters. *See* Ex. F.

On May 21, 2014, a few days after Chancellor Maldonado started at HCC, Mr. Martinez received “requested information regarding administrative contract renewals”. (*See* Ex. A, Privilege ID 317). A few days later, Mr. Martinez received an e-mail from Dr. Maldonado’s

⁶ For in camera review, Ms. Byas refers the Court to the journal entry Bates stamped BYAS0003863 and BYAS0003864.

assistant attaching the 2013 Board agenda item for Ms. Byas's contract. (*Id.* at Privilege ID 346.) Less than two weeks later, Dr. Maldonado and Mr. Martinez had an e-mail exchange about the status of Ms. Byas's contract. (*See* Ex. A, Privilege ID 364-65; 367, 369, 371). Then, Ms. Byas was placed on leave while HCC "determin[ed]" her contract's validity. Eventually HCC terminated Ms. Byas and Mr. Martinez stepped in to assist the Board and, later, HCC with bond-related matters.

Board meeting agendas, minutes, and the evidence used during Ms. Byas's termination hearing show that the Board purposely avoided voting on the award of CMAR contracts through June 2014, when HCC placed Ms. Byas on leave.

Under Rule 503(d)(1), there is no privilege "[i]f the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud." *See Henderson v. State*, 962 S.W.2d 544, 552-53 (Tex. Crim. App. 1997) (when client merely revealed information to lawyer regarding location of kidnapping victim without seeking lawyer's advice or assistance crime-fraud exception was not applicable, but when client sought lawyer's help in moving victim's body or erasing evidence of victim's location, crime-fraud exception did apply; "The attorney's services must be sought or used to further the activity in question.").

The issue under this exception is whether Trustees sought an attorney's legal services (whether Ms. Byas's, special board counsel, or other outside legal opinions) to assist them in what they knew or reasonably should have known was either an illegal act or a fraud, such as avoiding compliance with bond procurement rules or IRS regulations.

If the client seeks advice about a contemplated act when doubtful or ignorant of its illegal nature, is told of its illegality, and desists from acting, the communication is privileged, but if the

client continues to seek advice from this (or another) attorney, knowing (or at least having been told) that his contemplated acts are illegal, the exception applies. *See* 1 S. Goode, O. Wellborn, & M. Sharlot, Guide to the Texas Rules of Evidence § 503.7 (Texas Prac. 2014 database update) (*citing Williams v. Williams*, 108 S.W.2d 297, 299-300 (Tex. Civ. App.–Amarillo 1937, no writ)). The crime-fraud exception applies to the attorney-client privilege and the work-product privilege. *Freeman v. Bianchi*, 820 S.W.2d 853, 861 (Tex. App.–Houston [1st Dist. 1991, orig. proceeding).

Ms. Byas, the party seeking to invoke the exception, has the burden to 1) make a *prima facie* showing that the Trustees were engaged in an ongoing attempt to commit a crime or fraud by avoiding compliance with bond procurement rules to commit fraud or a crime, and 2) show that the otherwise privileged communication relates to that illegal or fraudulent conduct. *Granada Corp. v. Honorable First Court of Appeals*, 844 S.W.2d 223, 227-28 (Tex. 1992) (“The crime-fraud exception applies only if a *prima facie* case is made of contemplated fraud. . . . Additionally, there must be a relationship between the document for which the privilege is challenged and the *prima facie* proof offered.”). In *Granada*, the plaintiff shareholders offered evidence of memos, Board of Directors’ meeting minutes, and deposition excerpts that “suggest[ed] the possibility of fraud” in misleading shareholders about Granada’s plans to sell its assets. *Id.* That “suggestive” evidence sufficed for a *prima facie* showing, and, because the otherwise privileged documents “tend[ed] to show that Granada pursued schemes to freeze out the shareholders despite legal advice alerting its officers to the possible illegality of such plans,” the otherwise privileged documents were subject to production. *Id.* at 228.

The party seeking the documents need not establish the existence of an actual crime or fraud; she need offer only *prima facie* evidence suggesting that the client sought legal assistance or advice in a knowing effort to avoid compliance with the law. *Id.* *See also In re Grand Jury*

Proceedings, 417 F.3d 18, 23 (1st Cir. 2005) (“As we read the consensus of precedent in the circuits, it is enough to overcome the privilege that there is a reasonable basis to believe that the lawyer's services were used by the client to foster a crime or fraud. The circuits—although divided on articulation and on certain practical details—all effectively allow piercing of the privilege on something less than a mathematical (more likely than not) probability that the client intended to use the attorney in furtherance of a crime or fraud.”); *United States v. Chen*, 99 F.3d 1495, 1503 (9th Cir. 1996) (“The test for invoking the crime-fraud exception to the attorney-client privilege is whether there is ‘reasonable cause to believe that the attorney's services were utilized in furtherance of the ongoing unlawful scheme.’ . . . Reasonable cause is more than suspicion but less than a preponderance of evidence.”).

Because it is often hard to determine if the client has misused the attorney-client privilege without seeing the document as to which the privilege is claimed, courts may review privileged materials *in camera* and then decide whether disclosure is appropriate. *See, e.g., United States v. Zolin*, 491 U.S. 554, 572 (1989) (explaining a “lesser evidentiary showing” is needed for *in camera* review than what is needed to pierce the privilege; all that is needed is a factual basis “to support a good-faith belief by a reasonable person” that “in camera review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.”).

Ms. Byas’s journal entries evidence that Ms. Byas repeatedly shared with Trustees outside counsel’s legal opinions about rules and regulations governing the bond procurement process. Certain Trustees responded by: 1) Refusing to place properly approved contracts on the Board agenda for a vote; 2) asking Ms. Byas, the acting chancellor, if HCC could ignore outside counsel’s legal opinions; 3) asking the acting chancellor to fire outside legal counsel; 4) repeatedly pressuring Ms. Byas to have HCC staff alter bond procurement rules; 5) hiding legal opinions from

other Trustees; and, 6) hiring Mr. Martinez to engineer Ms. Byas's termination and then serve as special counsel for bond-related matters.

The Board hired Mr. Martinez to help Trustees avoid compliance with bond procurement rules and regulations after Mr. Martinez had effectuated Ms. Byas's termination. Ms. Byas seeks the disclosure of e-mails to or from Mr. Martinez that involve the bond contract process, her contract, and her termination because these items fall within Rule 503's crime-fraud exception.

C. HCC MUST PRODUCE CERTAIN COMMUNICATIONS BETWEEN MR. MARTINEZ AND HCC ADMINISTRATORS BECAUSE HCC'S ADMINISTRATORS WERE NOT MR. MARTINEZ'S CLIENTS.

HCC has withheld e-mails between Mr. Martinez and HCC administrators, claiming these e-mails are protected by the attorney-client privilege.⁷ Between April 2014 and July 2014, Mr. Martinez only represented HCC's Board of Trustees. These documents are not protected by Rule 503 because Mr. Martinez was not communicating with his client in these e-mails.⁸

On or about April 21, 2014, the Trustees hired Mr. Martinez in closed session after telling Ms. Byas, HCC's acting chancellor, to leave the closed session. Mr. Martinez drafted an engagement letter for Neeta Sane, Chair of the Board of Trustees. In the letter, Mr. Martinez wrote that his firm was hired:

[I]n connection with representing the Houston Community College System regarding: 1) The negotiation of the Chancellor's employment contract and related work; 2) the annual evaluation process for the Chancellor; and 3) Special Projects as defined by the Board.

See Ex. B (emphasis added). The letter contains no definition of special projects.

⁷ The documents related to this argument are color-coded orange in Exhibit A.

⁸ Two e-mails, Privilege ID 506 and 507 between Derrick Mitchell and Dr. Maldonado. These e-mails should be disclosed for the same reasons as the e-mails between Mr. Martinez and HCC administrators. Mr. Mitchell represents the Board, not HCC. These communications are not covered by Rule 503. These e-mails are color-coded pink in Exhibit A.

In early June 2014, Mr. Martinez wrote attorneys at Gardere Wynne Sewell, the law firm hired by HCC to conduct an ethics investigation into Trustees' conduct. Mr. Martinez informed Gardere he was "retained by the Houston Community College System as Board Counsel for Special Projects." *See* Ex. C (emphasis added). Ms. Sane also informed Gardere that the Board of Trustees had hired Mr. Martinez as special counsel to the Board. *See* Ex. D (emphasis added).

During Ms. Byas's termination hearing, Ms. Byas, Dr. Maldonado, and the Board's former counsel, Jarvis Hollingsworth, all stated that the Board had hired Mr. Martinez to serve as special counsel to the Board. *See* Ex. E (emphasis added).

HCC administrators also believed that Mr. Martinez initially worked as Board counsel. This is evidenced by a June 2014 e-mail in which HCC's chancellor wrote Ms. Sane and asked permission for HCC to hire Mr. Martinez as the school's special projects counsel. *See* Ex. F. Ms. Sane forwarded Dr. Maldonado's e-mail to other Trustees. Zeph Capo, a Trustee, responded that he thought Mr. Martinez should not research Trustee's legal questions because that task "belongs to [Board of Trustees'] counsel and [I] don't think we should have fuzzy lines there." *Id.*

When Mr. Martinez sent Dr. Maldonado an engagement letter for his role as special counsel to HCC Mr. Martinez wrote: "You will find the engagement letter for my services beginning July 1, 2014. For the period prior to that, I will send my statement to the HCCS Board for the specific assignments that they had engaged me for previously. . . ." *See* Ex. G.

Invocation of the attorney-client privilege depends on the existence of an attorney-client relationship, which courts have defined as a contractual relationship where an attorney agrees to provide professional legal services to a client. *Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld*, 105 S.W.3d 244, 254 (Tex. App.—Houston [14th Dist.] 2003, rev. denied). A contract may create the relationship or the actions of the parties may imply the relationship. *Id.* at 254. "The

determination of whether there is a meeting of the minds must be based on objective standards of what the parties did and said and not on their alleged subjective states of mind.” *State v. DeAngelis*, 116 S.W. 3d 396, 403 (Tex. App.—El Paso 2003, no pet.).

According to the Board of Trustee’s policies, the Board is a corporate body and “upon recommendation of the Chancellor” board counsel may be appointed. *See* Ex. H. This counsel, according to the Board’s policies, reports directly to the Board and the attorney’s duties include providing advice and counsel to the Board. *Id.* The policies state that Board counsel has “access to the Chancellor.” *Id.* The policies do not state that this attorney represents HCC.

Both the engagement letters and the parties’ actions demonstrate that until July 2014, Mr. Martinez served solely as Board counsel. In early June 2014, Mr. Martinez informed other attorneys and HCC administration that he represented the Board. *See* Ex. C. And, at that time, contemporaneous communications demonstrate that HCC’s chancellor believed Mr. Martinez solely represented the Board. *See* Ex. F. Even after Mr. Martinez had started working for HCC, Dr. Maldonado believed Mr. Martinez had previously served as the Board’s special counsel. *See* Ex. E. From an objective standard, the attorney-client relationship existed between Mr. Martinez and the Board until July 2014. *See DeAngelis*, 116 S.W. at 403.

Ms. Byas seeks production of communications between Mr. Martinez and HCC officials from April 2014 to July 2014. These items are not privileged because Mr. Martinez represented only the Board and the privilege ran between Mr. Martinez and the Board, not HCC.

III. CONCLUSION

Ms. Byas respectfully requests that this Court inspect the documents listed in Exhibit A in camera and order HCC to release the documents that do not fall under Rule 503’s protection. The items withheld by HCC are not protected by the attorney-client privilege because: 1) They are not confidential communications between counsel and a client; 2) they are exempt under the crime-

fraud exception; or, 3) they are not privileged under Rule 503(d)(3) as they are relevant to Ms. Byas's defense against HCC's claims. For these reasons, and any other the Court sees fit, Ms. Byas requests that the Court grant this Motion to Compel.

Respectfully submitted,

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