

# Prisoner's Notes Protected By Attorney-Client Privilege

BY LAZAR EMANUEL

In a per curiam decision, the U.S. Court of Appeals for the Second Circuit has confirmed the right of a prison inmate to assert the attorney-client privilege with respect to entries in a journal kept by her during her incarceration. *U.S. v. DeFonte v. Collazos*, Docket # 06-1046-cr (March 14, 2006).

Defendant DeFonte was employed as a guard at the Metropolitan Correctional Center in Manhattan. Collazos was an inmate at the Center. The government charged DeFonte with various crimes allegedly committed during his employment and planned to call Collazos as a witness.

During her incarceration, Collazos had kept a journal in which she recorded a variety of items, including reports of incidents involving DeFonte and of conversations with her attorney and with government prosecutors. The journal was in the sole possession of Collazos until her possessions were mistakenly removed from her cell and transferred to the Federal Correctional Institution in Danbury. When the mistake was discovered, the journal was delivered to the office of the U.S. Attorney, which assigned possession of the diary to a lawyer not involved in the case, "thus successfully screening the prosecutor" (quoting the Court).

DeFonte's counsel learned of the existence of Collazos's journal shortly before the trial of DeFonte was to begin. His counsel requested that the journal be disclosed as a witness statement under 18 U.S.C §3500. That section, known as "the Jencks Act", deals with the production by the government of any statement attributed to its witness and enables the trial court to excise portions of the statement which do not relate to the witness's testimony.

In response to DeFonte's request, Collazos moved to intervene in the proceeding and asked for a protective order on the grounds that the entries in her journal were protected by the attorney-client privilege. The district court (Judge Deborah Batts) denied Collazos's motion. The court found the diary was not protected by the attorney-client privilege and that Collazos had no expectation of privacy with respect to the contents of her cell. Collazos moved in the Circuit Court to stay the district court's order pending an expedited appeal. On consent of the parties, the Circuit Court proceeded to resolve the dispute on its merits.

## Court Confirms Privilege

Judge Batts had based her decision on Collazos's intent in maintaining her journal. She found that Collazos could not have intended her entries to remain confidential "because the law affords her no reasonable expectation of privacy in her cell."

The Circuit Court, however, distinguished between the scope of a prisoner's right to privacy in Fourth Amendment cases relating to search and seizure and her right to privacy as it relates to the attorney-client privilege.

An inmate does not, however, knowingly waive an attorney-client privilege with respect to documents retained in her cell simply because there is no reasonable expectation of privacy in those documents for Fourth Amendment purposes. Rather, the two inquiries are independent of each other. ... Incarcerated or detained individuals do retain the attorney-client privilege.

The Court cited a number of cases confirming a prisoner's right to privacy over certain matters: *Davis v. Goord*, 320 F.3d 346, 351 (2d Cir. 2003) ("courts have consistently afforded greater protection to legal mail than to non-legal mail"); *Sallier v. Brooks*, 343 F.3d 868, 874 (6th Cir. 2003) (recognizing "heightened concern" with allowing prison officials to open and read mail that "has import for...the attorney-client privilege"); and *Gomez v. Vernon*, 255 F.3d 1118, 1133 (9th Cir. 2001) (finding that prisoners retain right to keep privileged documents confidential where not inconsistent with legitimate penological interests).

The Appellate Court distinguished between two types of entries made by Collazos in her journal:

- 1) entries in which Collazos had memorialized private conversations between her and her attorney; and
- 2) entries in which Collazos had "recorded various events in her daily life, namely incidents involving (the defendant) DeFonte and discussions with prosecutors."

Collazos claimed that the second type of entry had been made for the purpose of subsequent discussion with her attorneys.

The Court had little difficulty finding that the first type of entry – a record of her conversations with her own lawyers – was protected from disclosure to defendant DeFonte by the attorney-client privilege. "The purpose of the rule is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice" (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). There was no evidence that Collazos had consented to the removal of the journal from her possession, or that she had shared the contents of the journal with anyone. Without a finding of waiver in a further hearing, "her record of conversations with counsel are not subject to discovery."

But the Court acknowledged that the law on the second type of entry was less clear. Collazos relied on two district court cases. In *Clark v. Buffalo Wire Works Co.*, 190 F.R.D. 93 (W.D.N.Y. 1999), a client had taken notes which he delivered to his attorneys and which he intended to discuss with them; the opposing party sought the notes in discovery. The court held that the notes were privileged even though the lawyer had not read them when they were written by the client – "the notes amounted to a confidential communication between client and attorney for the purposes of legal representation."

In the second case, *Bernbach v. Timex Corp.*, 174 F.R.D. 9 (D.Conn. 1997), the court also concluded that notes taken by a client in anticipation of a meeting with her attorney were privileged because she had actually communicated the information in the notes to her attorney.

The Circuit Court commented as follows:

Central to the finding of privilege in both decisions, it appears, is the fact that the notes were communicated by the client to the attorney. Such a requirement comports with the language of the rule – i.e., that there be a communication by the client – and makes sense from a policy perspective. A rule that recognizes a privilege for any writing made with an eye toward legal representation would be too broad. A rule that allows no privilege at all for such records would discourage clients from taking the reasonable step of preparing an outline to assist in a conversation with their attorney.

It is undisputed by the parties that the journal was never delivered to Collazos’s attorney. The district court took that fact to be dispositive in determining that the journal was outside the scope of the privilege. Collazos argues that delivery of the journal is not necessary as long as the journal’s entries did serve as an outline for an attorney- client conversation. Certainly, an outline of what a client wishes to discuss with counsel – and which is subsequently discussed with one’s counsel – would seem to fit squarely within our understanding of the scope of the privilege.

The Court remanded the matter to the district court “to conduct a hearing to decide which of the writings contained in the journal fall within the scope of the privilege as discussed...”

As part of its discussion, the Court also invited the district court to consider the following issues on remand:

- 1) whether Collazos had treated her notes “in such a careless manner as to negate her intent to keep them confidential”; and
- 2) whether there were “compelling or overwhelming” Sixth Amendment concerns involved in its decision.

*[Editor’s note: The Sixth Amendment guarantees the right of an accused to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor.]*