IN THE IOWA DISTRICT COURT FOR POLK COUNTY

TRACY WHITE, Plaintiff, vs. STATE OF IOWA and IOWA DEPARTMENT OF HUMAN SERVICES, Defendants.	Case No. LACL146265 **PLAINTIFF'S THIRD MOTION IN LIMINE**

COMES NOW the Plaintiff and requests that the following:

1. **DEFENDANTS' PROPOSED WITNESS KAITLYN CLARK SHOULD BE EXCLUDED**

Under Iowa Rule of Civil Procedure 1.517(3)(a), if a party fails to provide information or identify a witness as required by rule 1.500, 1.503(4), or 1.508(3), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.

Defendants have never identified Kaitlyn Clark in Initial Disclosures or Discovery. Nonetheless, they identify Ms. Clark as a trial witness on April 29, 2021—four days before trial. Defendants have given no explanation as to her late disclosure or how it could be substantially justified.

Such a disclosure at the eleventh hour is anything but harmless. Plaintiff has never deposed Ms. Clark. Plaintiff does not have Ms. Clark's contact information. Plaintiff has no idea what Ms. Clark might say. This is exactly the kind of "surprise witness" situation that makes great television, which Rule 1.517(3)(a) was designed to prevent.

2. **DEFENDANTS SHOULD BE PROHIBITED FROM STATING OR IMPLYING THAT THEY RELIED ON ATTORNEY ADVICE**

Because the attorney client privilege "obstructs the search for the truth and because its benefits are, at best, 'indirect and speculative,' it must be 'strictly confined within the narrowest possible limits consistent with the logic of its principle.'" *In re Grand Jury Investigation*, 599 F.2d 1224, 1235 (3d Cir. 1979) (quoting 8 Wigmore on Evidence § 2291, at 554 (McNaughton rev. 1961)). Privileges are disfavored and must be strictly construed. *United States v. Bryan*, 339 U.S. 323, 331 (1950).

Vern Armstrong testified that an Assistant Attorney General was present at a meeting in which he, Jean Slaybaugh, and DAS representative Carol Adams discussed what, if any, action would be taken as a result of DHS' 2018 investigation into Tracy's complaints. (Armstrong Dep. 46:7–48:14, 65:5-14) (attached). It was ultimately decided that Mike McInroy would be given a verbal "coaching and counseling."

Defendants objected on the basis of attorney client privilege and instructed Armstrong not to answer questions about the discussion that led to that decision. (Armstrong Dep. 48:8-10).

Because they chose to prevent discovery about the specifics of any attorney advice they received, Defendants are prohibited from offering any evidence that they consulted with or relied on attorney advice in making the decision about McInroy or the remedial action that was appropriate in response to Tracy's complaints. That includes even mentioning the presence of an attorney in that meeting, because the natural implication is that they would not have taken action of which the attorney disapproved. *See Software AG v. BEA Sys., Inc.*, 2005 WL 859266 (D. Del. April 8, 2005) (recognizing the true value of telling jury of attorney's involvement is "to give the jury a subtle 'wink wink' in the hope that the jury will draw the improper inference" that their actions must have been legal); *Van Straaten v. Shell Oil Prods. Co. L.L.C.*, 2010 WL 11586386 (N.D. Ill. June 8, 2010) (defendants not allowed to use the attorney-client privilege as both a shield and a sword by creating the impression that they consulted with their attorneys while still preserving their privilege). Defendants must not be permitted to manipulate the evidence or abuse the privilege in this manner.

"The attorney-client privilege is not a strategic tool designed to enable a litigant to gain an advantage by keeping evidence to himself." *Young v. Gibson*, 423 N.W.2d 208, 210 (Iowa 1988). As exceptions "to the demand for every man's evidence," privileges must be strictly construed because they are "in derogation of the search for the truth." *U.S. v. Nixon*, 418 U.S. 683, 710 (1974).

A party is not permitted to selectively waive the attorney client privilege. "[A] litigant cannot use the work product doctrine as both a sword and shield by selectively using the privileged documents to prove a point but then invoking the privilege to prevent an opponent from challenging the assertion." *Frontier Refining Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 704 (10th Cir. 1998). It would be "manifestly unfair" to allow one party to make factual assertions but then deny the other party "the foundation for those assertions in order to contradict them." *Lee Nat'l Corp. v. Deramus*, 313 F. Supp. 224, 227 (D. Del. 1970).

These are not new rules.

> "[A] client who goes upon the stand in an attempt to secure some advantage by reason of transactions between himself and his counsel waives his right to object to the attorney's being called by the other side to give his account of the matter. Any other rule would . . . convert the statute from being a mere shield into a weapon of offense."

Kantaris, 169 N.W.2d at 830 (quoting *Kelly v. Cummens*, 143 Iowa 148, 151, 121 N.W. 540, 541 (1909).

Plaintiff would be severely prejudiced if Defendants were still allowed to tell the jury that they consulted with someone from the AG's office and, expressly or impliedly, that they relied on attorney advice. Therefore, any such evidence should be excluded under Iowa Rule of Evidence 5.403.

WHEREFORE, Plaintiff respectfully requests that the Court grant her Motion in Limine and prohibit Defendants, their attorneys, and witnesses from referencing the above subjects in front of the jury at any time during the trial, including testimony, voir dire, opening statements, and closing arguments.

/s/ Madison Fiedler Carlson

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