

1 Marty Harper (#003416)
mharper@polsinelli.com
2 Kelly J. Flood (#019772)
kflood@polsinelli.com
3 Andrew S. Jacob (#22516)
ajacob@polsinelli.com
4 **POLSINELLI SHUGHART, P.C.**
Security Title Plaza
5 3636 N. Central Ave., Suite 1200
Phoenix, AZ 85012
6 Phone: (602) 650-2000
Fax: (602) 264-7033
7 *Attorneys for Plaintiffs*

8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE DISTRICT OF ARIZONA**

10 Don ADDINGTON, *et al.*,
11 *Plaintiffs,*
12
13 vs.
14 US AIRLINE PILOTS ASSN., and
US AIRWAYS, INC.,
15 *Defendants.*

CONSOLIDATED CASES NO.
2:08-CV-1633-PHX-NVW;
2:08-CV-1728-PHX-NVW

SUPPLEMENT TO:

***PLAINTIFFS' MOTION FOR
PROTECTIVE ORDER DIRECTING
DEFENDANT'S COUNSEL TO
RESPECT ER 4.2 AND ABSTAIN
FROM EX PARTE CONTACT WITH
MEMBERS OF THE WEST PILOT
CLASS (doc. 274)***

16 Don ADDINGTON, *et al.*,
17 *Plaintiffs,*
18 vs.
19 Steven H. BRADFORD, *et al.*,
20 *Defendants.*

21 Plaintiffs file this supplement to *Plaintiffs' Motion for Protective Order*
22 *Directing Defendant's Counsel to Respect ER 4.2 and Abstain from Ex Parte*
23 *Contact With Members of the West Pilot Class* (doc. 274).

24 **SUPPLEMENT**

25 On March 23, 2009, at 2:22 PM, Defendant's counsel Nicholas Granath
26 responded by email to Don Stevens. Mr. Granath stated as follows:

27 Don

28 You cannot be serious: you have not yet stated to us any factual
or legal basis to complain, let alone bring a motion.

1 Your lead counsel already stated to the Court that you have six
2 clients, and was not that the point of denying that you had ten
3 clients?

4 The individual contacted failed to suggest otherwise as well.

5 The mere fact you have a certified class does not establish an
6 attorney client relationship with this individual. *See, e.g.*
7 *Morisky v. Public*, 191 FRD 419, 424 (DC NJ 200) ("even if
8 certified as a class, 'class members are really neither parties to
9 the litigation nor clients of plaintiffs' counsel"); *Penk v Oregon* 99
10 FRD 511 516 (D.C. Org. 1983) ("class members are really neither
11 parties to the litigation nor clients of plaintiffs' counsel"); *See*
12 *Also, In re Grand Jury Investigation*, 599 F.2d 1224, 1233 (3d
13 Cir. 1979) (The privilege applies only if (1) the asserted holder of
14 the privilege is or sought to become a client; (2) the person to
15 whom the communication was made (a) is a member of the bar of
16 a court, or his subordinate and (b) in connection with this
17 communication is acting as a lawyer; (3) the communication
18 relates to a fact of which the attorney was informed (a) by his
19 client (b) without [**10] the presence of strangers (c) for the
20 purpose of securing primarily either (i) an opinion on law or (ii)
21 legal services or (iii) assistance in some legal proceeding, and not
22 (d) for the purpose of committing a crime or tort; and (4) the
23 privilege has been (a) claimed and (b) not waived by the client.)

24 And your account of the phone call in your email is not accurate:
25 the purpose of the call was as explained to the individual and he
26 voluntarily spoke for an hour; there was no deception and no
27 intimidation.

28 Moreover, this is an individual that our client, USAPA, has an
active relationship with and is required to represent.

So what possible legal basis do you have for any motion? "The
burden of establishing the existence of the attorney-client
privilege, in all of its elements, rests with the party asserting it."
*United States v. International Brotherhood of Teamsters,
Chauffeurs, Warehousemen and Helpers of America, AFL-CIO*,
119 F.3d 210, 214 (2d Cir. 1997) (citing *Schwimmer*, 892 F.2d at
244).

Nick

(Granath Email (Mar. 23, 2009 2:22PM.) (Copy attached hereto). This
reveals a disturbing lack of understanding of the issue.

A. Attorney-Client Privilege and the No-Contact Rule are Different.

Attorney-client privilege and the "no-contact" rule address different
subject matter and have different purposes. The privilege addresses
communications intended to secure legal advice. *See Barton v. U.S. Dist.*

1 *Court for Central Dist. of Cal.*, 410 F.3d 1104, 1111-12 (9th Cir. 2005). The
2 attorney, by virtue of the communication incurs a duty of loyalty. *See id.* at
3 1111 (such communication creates a fiduciary duty). The purpose is to
4 “allow[] individuals to seek the legal advice they need to guide them through
5 the thickets of complex laws.” *In re Napster, Inc. Copyright Litigation*, 479
6 F.3d 1078, 1090 (9th Cir. 2007).

7 In contrast, the “no-contact” rule addresses communication between an
8 individual and an attorney with established loyalty to an adversary. The
9 purpose of the rule is as follows:

10 It preserves the integrity of the lawyer-client relationship by
11 prohibiting contact, absent consent or legal authorization, with the
12 represented party. It also recognizes that without such a Rule “the
13 professionally trained lawyer may, in many cases, be able to win, or
in the extreme case coerce, damaging concessions from the
unshielded layman.

14 *In re Air Crash Disaster Near Roselawn, Indiana on October 31, 1994*, 909 F.
15 Supp. 1116, 1121 (N.D.Ill. 1995) (citations omitted). The rule protects an
16 individual from “the supposed imbalance of legal skill and acumen between
17 the lawyer and the party litigant.” *Massiah v. United States*, 377 U.S. 201,
18 211 (1964) (White, J., dissenting).

19 **B. It is Irrelevant Whether Mr. Phipps Consented.**

20 Mr. Granath truly does not get it. An hour-long conversation with Mr.
21 Phipps was improper, whether or not Mr. Phipps participated “voluntarily.”
22 “The right belongs to the party's attorney, not the party, and the party cannot
23 waive the application of the no-contact rule—only the party's attorney can
24 approve the direct contact and only the party's attorney can waive the
25 attorney's right to be present during a communication between the attorney's
26 client and opposing counsel.” *State v. Miller*, 600 N.W.2d 457, 464 (Minn.
27 1999); *see also United States v. Lopez*, 4 F.3d 1455, 1461-62 (9th Cir. 1993)

1 (same); *Blanchard v. EdgeMark Fin. Corp.*, 175 F.R.D. 293, 301-02 (N.D. Ill.
2 1997); *Faison v. Thornton*, 863 F. Supp. 1204, 1213 (D. Nev. 1993).

3 **C. This Was Law-Firm Approved Misconduct.**

4 Mr. Granath's email more strongly indicates that the Seham law firm
5 approved this violation of the no-contact rule. It is quite plain from Mr.
6 Granath's email that the conduct at issue reflects law firm policy. Such
7 policy itself is a violation of Arizona E.R. 5.1.

8 **D. CONCLUSION**

9 None of the arguments in Mr. Granath's email justify this misconduct.

10
11 Dated this 24th day of March, 2009.

12 **Polsinelli Shughart, P.C.**

13 */s/ Andrew S. Jacob*
14 By: _____

15 Marty Harper
16 Kelly Flood
17 Andrew S. Jacob
18 Security Title Plaza
19 3636 N. Central Ave., Suite 1200
20 Phoenix, AZ 85012
21 *Attorneys for Plaintiffs*

22 **CERTIFICATE OF SERVICE**

23 I hereby certify that on March 24th, 2009, I electronically transmitted
24 the foregoing document to the U.S. District Court Clerk's Office by using the
25 CM/ECF System for filing and transmittal of a Notice of Electronic Filing.

26
27 s/ Andrew S. Jacob
28

From: Granath Nicholas P. [mailto:ngranath@visi.com]
Sent: Monday, March 23, 2009 2:22 PM
To: Don Stevens
Cc: Middlebrook Lucas; Diamantopoulos George; Seham Lee
Subject: Your call

Don

You cannot be serious: you have not yet stated to us any factual or legal basis to complain, let alone bring a motion.

Your lead counsel already stated to the Court that you have six clients, and was not that the point of denying that you had ten clients?

The individual contacted failed to suggest otherwise as well.

The mere fact you have a certified class does not establish an attorney client relationship with this individual. *See, e.g.* *Morisky v. Public*, 191 FRD 419, 424 (DC NJ 200) ("even if certified as a class, 'class members are really neither parties to the litigation nor clients of plaintiffs' counsel"); *Penk v Oregon* 99 FRD 511 516 (D.C. Org. 1983) ("class members are really neither parties to the litigation nor clients of plaintiffs' counsel"); *See Also, In re Grand Jury Investigation*, 599 F.2d 1224, 1233 (3d Cir. 1979) (The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without *****10** the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.)

And your account of the phone call in your email is not accurate: the purpose of the call was as explained to the individual and he voluntarily spoke for an hour; there was no deception and no intimidation.

3/24/2009

Moreover, this is an individual that our client, USAPA, has an active relationship with and is required to represent.

So what possible legal basis do you have for any motion? "The burden of establishing the existence of the attorney-client privilege, in all of its elements, rests with the party asserting it." *United States v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO*, 119 F.3d 210, 214 (2d Cir. 1997) (citing *Schwimmer*, 892 F.2d at 244).

Nick

Nicholas P. Granath, Esq.

Seham, Seham, Meltz & Petersen, LLP
2915 Wayzata Blvd.
Minneapolis, MN 55405
Tel. (612) 341-9080
Cell (612) 210-8460
Fax (612) 341-9079
Email: ngranath@ssmplaw.com

445 Hamilton Avenue, Suite 1204
White Plains, NY 10601
Tel: (914) 997-1346
Fax: (914) 997-7125
Website: www.ssmplaw.com

Other offices located in: *Manhattan *Houston *Minneapolis *Seattle

PRIVILEGED AND CONFIDENTIAL INFORMATION

This e-mail transmission is intended only for the use of the individual(s) herein named, and may contain confidential and/or legally privileged information from the sender. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution or the taking of any action in reliance on the contents of this e-mail/file document is strictly prohibited. If you have received this mail/file document in error, please notify us by telephone so that we can arrange for the return of the document to us at no cost. IRS Circular 230 Notice: Advice rendered in this communication, including attachments, on U.S. tax issues (i) is not intended or written to be used, and it cannot be used, for the purpose of avoiding penalties that may be imposed by the IRS on taxpayers; and (ii) may not be used or referred to in promoting, marketing, or recommending a partnership or other entity, investment plan, or arrangement. This notice is intended to comply with Section 10.35 of IRS Circular 230.
