



IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

DAVID A. THEIL,)
)
 Plaintiff,)
)
 v.)
) C.A. No. N11C-05-252 JRS
 DENTSPLY INTERNATIONAL INC., a Delaware)
 Corporation, and DENTSPLY LLC, a Delaware)
 Limited Liability Company)
)
 Defendants.)

**AMICUS BRIEF OF LAMBDA LEGAL DEFENSE & EDUCATION FUND, INC.,
EQUALITY DELAWARE, INC., AND THE AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF DELAWARE**

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Dated: February 13, 2012

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STATEMENT OF INTEREST OF AMICI

As set forth in the motion filed concurrently with this *Amicus* brief, *Amici* are non-profit organizations that advocate for civil rights and equality, including the rights of same-sex couples to equal treatment under the law. *Amici* submit this brief to address whether confidential communications between plaintiff David A. Theil (“plaintiff” or “Mr. Theil”) and his spouse, Kenneth Lanza (“Mr. Lanza”), occurring after the couple’s 2008 marriage and before the effective date of the Civil Union and Equality Act of 2011 (the “Equality Act”), 13 *Del. C.* §§ 201 *et seq.*, should be afforded a privilege against discovery in this litigation. *Amici* agree with plaintiff that the confidential marital communications privilege codified in D.R.E. 504 applies to the communications at issue. *Amici* summarize here why Rule 504 applies, and focus as well on an alternative basis for foreclosing discovery into the confidential communications of this couple—the Court’s powers reserved in D.R.E. 501 and Del. Super. Ct. Civ. R. 26 to limit discovery where, as here, protection is warranted by considerations of strong public policy and justice.

ARGUMENT

I. RULE 504’S CONFIDENTIAL MARITAL COMMUNICATIONS PRIVILEGE APPLIES TO COMMUNICATIONS BETWEEN MESSRS. THEIL AND LANZA.

The overarching goal of the Equality Act, signed into law on May 11, 2011, is to extend to same-sex couples who have entered into a legal union all the same protections and rights afforded to married different-sex couples. Granting Messrs. Theil and Lanza the same marital communications privilege available to other married couples in the State is fully consistent with the statutory language and purposes of the Equality Act, as well as of the marital communications privilege.

The Equality Act requires that *all* marital protections be afforded to couples in any legally-recognized union, providing that:

Parties to a civil union lawfully entered into or otherwise recognized pursuant to this chapter shall have all the same rights, protections and benefits, and shall be subject to the same responsibilities, obligations and duties under the laws of this State, whether derived from statutes, administrative rules or regulations, court rules, governmental policies, common law, court decisions, or any other provisions or sources of law, including in equity, as are granted to, enjoyed by or imposed upon married spouses.

13 *Del. C.* § 212(a).

The Equality Act recognizes legal unions validly formed in other jurisdictions, without limitation as to when those legal unions were formed:

A legal union between two individuals of the same sex that was validly formed in another jurisdiction, regardless of whether such legal union is recognized under Chapter 1 of this title¹ or is referred to as a civil union, shall be recognized as a validly established civil union under this chapter for all purposes of the laws of this State

13 *Del. C.* § 213. Accordingly, marriages between same-sex partners entered outside Delaware, such as the 2008 California marriage of Messrs. Theil and Lanza, are recognized as civil unions, and, as of the January 1, 2012 effective date of the Equality Act, are afforded all the same rights, benefits and protections as marriages between different-sex partners. This means that Messrs. Theil and Lanza now have the right to assert the Rule 504 privilege when asked in litigation about confidential communications exchanged after their 2008 marriage.

Rule 504 provides in relevant part that “(b) . . . Any party or witness in any proceeding has a privilege to prevent his spouse from testifying as to any confidential communication between himself and his spouse,” and “(c) . . . The privilege may be claimed by the party or

¹ Section 101 of Chapter 1 of the Domestic Relations Law provides in relevant part: “(a) A marriage is prohibited and void . . . between persons of the same gender. . . (d) A marriage obtained or recognized outside the State between persons prohibited by subsection (a) of this section shall not constitute a legal or valid marriage within the State.”

witness or by the spouse on behalf of the party or witness” This Rule codifies a widely-recognized common law marital communication privilege, founded on a strong public policy interest in promoting privacy and harmony in this valued intimate relationship between two committed life-partners. *See, e.g., Dunnolo v. State*, 397 A.2d 126, 130 (Del. 1978). Indeed, the freedom of spouses to share information “in the confidence of the marital relationship” has been described by the Supreme Court as “the best solace of human existence.” *Trammel v. United States*, 445 U.S. 40, 51 (1980).

The policy reasons underlying the privilege for confidential communications between husband and wife are (1) that the communications originate in confidence, (2) the confidence is essential to the relation, (3) the relation is a proper object of encouragement by the law, and (4) the injury that would inure to it by the disclosure is probably greater than the benefit that would result in the judicial investigation of truth. 8 Wigmore, *Evidence*, § 2332 (McNaughton rev. 1961). The essence of the privilege is to protect confidences only, *id.* at § 2336, and thereby encourage such communications free from fear of compulsory disclosure, thus promoting marital harmony. McCormick, *Handbook of the Law of Evidence* § 86 (2d ed. 1972).

Coleman v. State, 380 A.2d 49, 51-52 (Md. 1977), cited in *Rochen v. Huang*, 1989 WL 5368, at *5 (Del. Super. Ct.).

In a civil litigation context, this privilege ensures that spouses can freely discuss in the privacy of their own home and intimate relationship such hypothetical subjects as the party spouse’s strategy and goals in the litigation, settlement considerations, and the stresses of pursuing a lawsuit to vindicate legal rights. These kinds of private dinner-table conversations between spouses, in which a party airs worries and plans with the party’s single most trusted advisor, are exactly the kinds of confidential communications Rule 504 protects, and which defendants here have no compelling interest to probe in discovery.

Defendants have contended that Section 2 of the Equality Act, an uncodified provision of the law, precludes these partners from asserting the privilege at a deposition *after* the Act’s

effective date, with respect to communications occurring prior to January 1, 2012.² This is not so. Section 2 of the Equality Act, which provides that the enactment “does not affect rights, duties or obligations that matured or were owed, penalties that were incurred, or proceedings that were begun, before its effective date,” does not limit Messrs. Theil and Lanza’s right to assert a Rule 504 privilege at the forthcoming deposition for the simple reason that assertion of the privilege will not change any right, duty or obligation that matured before January 1, 2012.³ The right to refuse to answer a question on the ground of spousal privilege remains an inchoate right that only matures if and when a spouse is asked questions at deposition. Thus, the privilege is available now, for all confidential communications since the 2008 marriage. If more were required to conclude that this couple may assert privilege, it is supplied by the statutory interpretation section of the Equality Act, which expressly provides that the law “shall be broadly construed to accomplish its intended purposes”—that full equality of treatment be accorded to same-sex couples in relationships recognized as civil unions. 13 *Del. C.* § 217(a).

These spouses undeniably are parties to a legal union, in effect since 2008 and throughout the period relevant to this litigation. Upon the effective date of the Equality Act, they became

² See Transcript of January 30, 2012 hearing on motion to quash (“Transcript”), at 19 (Exhibit A).

³ Defendants fully concede that confidential communications between the spouses occurring after 10:00 a.m. on January 1, 2012, the effective time of the Equality Act, are shielded from discovery in this proceeding by the Rule 504 privilege. See Transcript at 25 (Mr. Holly [Counsel for defendants]: “[I]t’s clear 10:01 a.m, January 1st 2012, the privilege applied. We acknowledge that. . . . [I]f they identified, for instance, a communication between Mr. Theil and Mr. Lanza, 10:01 a.m., no indication that it was waived in any way, we would not be before the Court on a motion to compel the issue.”). It thus is undisputed that the privilege applies in this proceeding at the very least to confidential communications between the spouses occurring after the Equality Act took effect, and that Section 2 poses no bar to application of the privilege merely because the lawsuit commenced and the subpoena issued prior to January 1, 2012. Defendants do not contend, and for the reasons argued below could not contend, that Section 2’s reference to “proceedings that were begun” before the effective date is a barrier to assertions of privilege in depositions and other proceedings going forward.

entitled to invoke spousal privilege. While Section 2 of the Equality Act might bar spouses from seeking today to have excluded from evidence confidential communications *already disclosed* in a discovery proceeding prior to January 1, 2012, or seeking to overturn an existing judgment on the basis of such evidence, it does not bar assertion of the privilege by these spouses going forward. *See State v. Carver*, 258 P.3d 256, 259 (Ariz. Ct. App. 2011) (noting “majority view” that “applicability and availability of a privilege should be governed by the current law in force at the time of trial and not at the time the alleged confidential communication took place”) (citation omitted); *State v. Clevenger*, 417 P.2d 626, 631 (Wash. 1996) (noting that “[i]n actual practice, the [marital] privilege is not asserted at the time the action is filed but only when the testimony of the spouse is offered at a trial or hearing,” and holding that amendment to privilege statute post-dating filing of action governs whether spouse is entitled to assert privilege).

This is especially true given the procedural nature of an evidentiary privilege and its application to shield from disclosure communications occurring prior to the effective date of enactment of a new privilege. As this Court has held, evidentiary rules protecting privilege and confidentiality are *procedural*, not *substantive*, and do not “impair the substantive law” in the litigation. *Danklef v. Wilmington Medical Center*, 429 A.2d 509, 511 (Del. Super. Ct. 1981). *Danklef* held that statutory expansion of evidentiary privileges, like other changes in procedural law, “may be invoked by . . . deponents even though [the] action was commenced prior to the effective date of the [evidentiary] statute.” *Id.* (protecting in malpractice action records of internal investigation occurring prior to enactment and effective date of statute conferring confidentiality). “It does not appear that a party is entitled to protection against a change in the Rules of Evidence.” *Id.* at 511-12. *See also Samuelson v. Susen*, 576 F.2d 546, 551-52 (3d Cir.

1978) (applying state privilege statute that took effect subsequent to complaint's filing), discussed with approval in *Danklef*, 429 A.2d at 511.

The Equality Act effectively amended Rule 504, a procedural rule, which now applies to shield from discovery the confidential communications of these spouses. Assertion of the privilege by these spouses *now*, after the effective date of the Equality Act, does not affect substantive legal rights at issue in this employment discrimination case that may have matured prior to January 1, 2012. Section 2's preservation of rights, duties and obligations that matured prior to the effective date of the Equality Act does not bar equal treatment of same-sex and different-sex spouses alike in depositions conducted after the effective date. Application of the spousal privilege to this couple's private spousal communications is thus fully consistent with the language and purposes of the Equality Act and Rule 504.

II. ALTERNATIVELY, CONFIDENTIAL COMMUNICATIONS BETWEEN MESSRS. THEIL AND LANZA SHOULD BE ACCORDED PROTECTION FROM DISCOVERY AS A MATTER OF COURT DECISION.

In enacting the Equality Act, the General Assembly has already conclusively established that same-sex spouses share the same interests in, and so are entitled to, the state-conferred protections of the spousal privilege. Similar policy interests underlying the Equality Act and the marital privilege itself, as well as strong interests in furthering due process and equal treatment for same-sex couples, dictate protecting the privacy of confidential communications between Mr. Theil and his spouse, even if Rule 504 did not already govern here. Rule 501 and Super. Ct. Civ. R. 26 empower the Court to respect these legislative determinations and policies and shield from discovery the pre-Equality Act private confidential communications between these two intimate life partners, who are accorded the status of civil union partners under Delaware law.

Delaware's evidentiary rules expressly confer authority on the courts to extend by decisional law privileges not enumerated in statute.

Delaware substantially adopted the 1974 Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Law, but with a notable modification to Uniform Rule of Evidence 501, the first provision in Article V's "Privileges" section. *See* D.R.E. 501 cmt. and Del. Study Comm. Pref. Note. Rule 501 states:

Except as otherwise provided by Constitution or statute, *or by court decision*, or by these or other rules of court, no person has a privilege to:

- (1) Refuse to be a witness;
- (2) Refuse to disclose any matter;
- (3) Refuse to produce any object or writing; or
- (4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

(Emphasis added.)

Significantly, Delaware *inserted* into the model rule the additional term "*by court decision*" (italicized above), thus expressly vesting leeway in the courts to respond to new situations with extension of, or entirely new, common law privileges. *See* D.R.E. 501 cmt. ("This rule tracks U.R.E. 501 and draft of F.R.E. 501 except that the words 'court decision, or by these or other rules of court' were substituted for the words 'these or other rules promulgated by the Supreme Court of this State.'").

Super. Ct. Civ. R. 26(c) likewise empowers the court to limit discovery to "protect a party or person from annoyance, embarrassment, oppression, or undue burden," using measures ranging from an order "that certain matters not be inquired into," Rule 26(c)(4), to an order that "the discovery not be had," Rule 26(c)(1). The court has further discretion under Rule 26(b)(1) to limit discovery, and "may act upon its own initiative," if the discovery sought is "(iii) . . .

unduly burdensome . . . , taking into account the needs of the case . . . and the importance of the issues at stake in the litigation.”

The Delaware courts have entertained under Rule 501 and Rule 26 applications for privileges and discovery protections not enumerated in Delaware statutes, and have evolved through decisional law privilege doctrines responding to new situations and promoting important interests that outweigh a litigant’s interest in gaining potential evidence. For example, Delaware courts recognize the judicially created “white knight privilege,” Note, Melissa Rhodes, *The White Knight Privilege in Litigated Takeovers: Leveling the Playing Field*, 43 Stan. L. Rev. 445, 447 (1991). With “little basis in traditional procedure,” the “white knight privilege,” or “business strategy immunity,” *id.* at 472, evolved in the 1980s in response to hostile takeover litigation, and limits discovery into the strategies of both bidders and target companies. *See id.* at 445.⁴ Delaware courts have also evolved similar discovery privileges to protect strategic business information in other contexts, thus, for example, preventing discovery into a trustee’s plans for disposition of trust assets in ongoing negotiations, *In re Heizer Corp.*, 1987 WL 19560, at *3-4 (Del. Ch.), or discovery by union members into corporate plans to deal with a possible employee strike, *Gioia v. Texas Air Corp.*, 1988 WL 18224 (Del. Ch.). In recent years, Delaware has also judicially expanded the concept of legislative privilege to restrict discovery into local governmental officials’ deliberations. *In re Kent County Adequate Public Facilities Ordinances Litig.*, 2008 WL 859342 (Del. Ch.). Even in cases where courts have declined to craft a specific privilege, their authority to do so if warranted is acknowledged. *See, e.g.*,

⁴ *See also Cincinnati Bell Cellular Sys. Co. v. Ameritech Mobile Phone Servs., Inc.*, 1995 WL 347799, at *1 (Del. Ch.) (noting that court “has wide discretion to set the limits of discovery,” and discussing origins of business strategy immunity); *Grand Metropolitan PLC v. Pillsbury Co.*, 1988 WL 130637, at *2 (Del. Ch.) (applying “white knight privilege” “under authority of Rule 26(c)”).

Wealton v. Werner Enterprises, Inc., 2000 WL 33115690, at *2 (Del. Super. Ct.) (because self-critical/self-analysis privilege is not “spelled out” in Rules of Evidence or statute, “the source of the privilege in Delaware, by [Rule] 501, must be by court decision”); *State v. Grossberg*, 1998 WL 117975 (Del. Super. Ct.) (evaluating merits of un-enumerated parent-child privilege).

This Court in *Grossberg* endorsed the commonly-used four-prong Wigmore test to determine whether to create a privilege judicially; the marital communications privilege satisfies this test, as shown in *Coleman* (quoted *supra* at 3). Compare *Grossberg*, 1998 WL 117975, at *2, with *Coleman*, 380 A.2d at 51-52. Application of the Wigmore test in this case likewise demonstrates that recognition of a privilege is merited for the communications at issue here. First, it can be presumed that the private communications sought to be protected between these two intimate life-partners and spouses “originate in a confidence that they will not be disclosed”—just as is presumed to be the case with private communications between different-sex spouses. See *Coleman*, A.2d at 51; see also *Grossberg*, 1998 WL 117975, at *2. Second, “[t]his element of confidentiality,” the ability to share and unburden about matters important to a spouse, is “essential to the full and satisfactory maintenance” of the relationship. *Id.* at *2. Third, as passage of the Equality Act conclusively demonstrates, the relationship is “one which in the opinion of the community ought to be sedulously fostered.” *Id.* And, finally, the injury to the relationship by disclosure of the communication would be greater than the benefit gained for the litigation. *Id.* The humiliation and injury to same-sex spouses from being compelled to testify about privately-shared confidences with their intimate life-partners far outweigh any interest defendants may have in learning from a witness spouse such confidential information as litigation or settlement strategy. Such intrusive discovery into their private communications will

cause unconscionable “annoyance, embarrassment, oppression, [and] undue burden” to the couple, Rule 26(c), which the marital privilege has already evolved to prevent.

Indeed, the Delaware statutes and rules at issue should be construed to protect confidential communications between these same-sex partners to avoid a potentially unjust and unconstitutional result.⁵ Although the Court need not reach any constitutional questions in this proceeding, the constitutional dimensions of denying these spouses the same respect and protection for their relationship that different-sex married Delaware couples receive weighs heavily in favor of exercise of the Court’s powers to shield their confidential communications. *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (recognizing Due Process liberty right to form enduring personal bonds with same-sex partner without invasion of privacy or interference from state); *Romer v. Evans*, 517 U.S. 620, 632-35 (1996) (desire to impose legal disadvantage on gay and lesbian people is not even legitimate or rational basis for government action).

CONCLUSION

For the reasons stated herein, *Amici* respectfully submit that confidential communications between Messrs. Theil and Lanza predating the effective date of the Equality Act should be protected from discovery in this litigation.

⁵ *See, e.g., In re Opinion of Justices*, 177 A.2d 205, 211 (Del. 1962) (when “two constructions of a statute are possible and one of them is unconstitutional, the courts are bound to accept the one which is constitutional”).

/s/ Samuel A. Nolen

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Dated: February 13, 2012

EXHIBIT A

1
IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

DAVID A. THEIL, CA No.: N11C-05-252

v.

DENTSPLY INTERNATIONAL, INC.
A Delaware Corporation, and

DENTSPLY, LLC,
a Delaware Limited Liability
Company
Defendants.

BEFORE: HONORABLE JOSEPH R. SLIGHTS, III, J.

APPEARANCES:

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for the Plaintiff

CONNOLLY, BOVE, LODGE & HUTZ LLP
TIMOTHY M. HOLLY, ESQ.
for the Defendant,
Dentsply

HEARING TRANSCRIPT
JANUARY 30, 2012

SUPERIOR COURT REPORTERS
500 North King Street, Suite 2609
Wilmington, Delaware 19801-3725

3
JANUARY 30, 2012
Courtroom No. 8E
9:00 a.m.

PRESENT:

As noted.

6 THE COURT: All right. Then I think that
7 takes us next to Theil versus Dentsply.

8 MS. STRATTON: Good morning, Your Honor.

9 THE COURT: Good morning.

10 MS. STRATTON: May it please the Court,
11 Barbara Stratton on behalf of the plaintiff, David
12 Theil.

13 This is plaintiff's motion to quash or
14 modify defendant's subpoena issued to Kenneth
15 Lanza. Subpoena seeks documents including
16 communication between Mr. Theil and Kenneth Lanza
17 and compels Kenneth Lanza's attendance at a
18 deposition.

19 While plaintiff does not believe that there
20 are any documents in Kenneth Lanza's possession,
21 custody or control responsive to the duces tecum
22 portion of the subpoena, we are concerned that at
23 the deposition defendants will ask about

2
APPEARANCES CONTINUED:

MINSTER & FACCILOLO LLC
DAVID FACCILOLO, ESQ.
TERESA TABAH, ESQ.
For Kenneth Lanza

4
1 communication between Mr. Theil and Mr. Lanza,
2 communication which we believe is protected from
3 disclosure pursuant to the spousal privilege
4 recognized in Delaware, Rule of Evidence 504.

5 The basis for our claim that spousal
6 privilege applies is that our client --

7 THE COURT: Can I stop you?

8 MS. STRATTON: Sure.

9 THE COURT: It seems as if the defense
10 response here is more procedural than substantive.
11 I am not sensing, at least at the moment, a real
12 fight on the question of whether the privilege
13 would apply but more whether or not this motion is
14 jumping the gun if you will.

15 MS. STRATTON: I will address that, Your
16 Honor.

17 I do agree their response does not appear to
18 challenge our view that Delaware civil union law
19 applies to my client's marriage.

20 It appears they oppose the motion on three
21 grounds. The first one they allege we did not meet
22 and confer prior to filing the motion. That is
23 correct, Your Honor. This is a Rule 45 motion to

1 quash or modify a subpoena. The meet and confer
2 requirements of Rule 37 do not apply to a Rule 45
3 motion to quash or modify.

4 Secondly, they allege that the motion is
5 premature, and basically say to the Court that we
6 need to have an actual question posed at the
7 deposition before we need to come to court.

8 This is a matter first impression in
9 Delaware. There is no precedent. It is our
10 opinion we need a clear ruling from the Court
11 applying Rule 504, spousal privilege, to my
12 client's same sex marriage, so that it provides the
13 parameters for questions to be asked at the
14 deposition.

15 Now, it is possible that we will be back,
16 but we do believe that we need that ruling from the
17 Court at this stage.

18 THE COURT: Isn't the problem, though, that
19 you're asking me to give you right now an advisory
20 opinion which Delaware courts historically for
21 centuries have not done?

22 I mean you're basically asking me to decide
23 an issue without a controversy at the moment.

1 MS. STRATTON: I don't think so, Your Honor.
2 Because we're asking for a legal ruling to quash
3 the subpoena to the extent it seeks privileged
4 communication between the parties. And that has
5 never been decided in this Court. And if we have
6 that ruling I think it is going to assist us at the
7 deposition that we take.

8 You know, one of the -- the red flags went
9 off when we received this notice of deposition
10 because we hadn't been contacted to schedule the
11 deposition, even though we have had 20 other
12 depositions in this case. We just get a notice and
13 a subpoena out of the blue scheduling a date for
14 subpoena without being called.

15 It asks for documents between my client and
16 Mr. Lanza, many of which we have already produced
17 in discovery in this case. So we have real
18 concerns here, Your Honor, that I am not quite sure
19 what is going on.

20 I have been litigating discrimination cases
21 for 20 years. It's the first one that involved
22 homosexual discrimination. It is the first one
23 where someone issued a subpoena against a spouse.

1 So there are a lot of red flags here, Your Honor,
2 and that is in large part the reason why we filed
3 the motion.

4 The last point that I want to address is
5 they also allege somehow my client has waived the
6 privilege, and that is a red herring. It is not
7 accurate. We did respond to discovery requests in
8 September 2011.

9 We did not raise any spousal privilege
10 claim. I point out that at that point in time
11 Delaware didn't recognize a spousal privilege for
12 my client's communication. So there was no way we
13 could have at that point.

14 But additionally last week in responding to
15 a second round of discovery we did, when asked for
16 communication between David Theil and Kenneth
17 Lanza, raised as one of our objections spousal
18 privilege. We then noted without waiving the
19 objection there were no documents that fell within
20 the request, but we certainly raised the privilege.
21 So we haven't waived to anything.

22 So for those reasons that's why we come
23 forward today. Thank you.

1 THE COURT: Thank you.
2 Mr. Facciolo.

3 MR. FACCILOLO: If it pleases the Court, I
4 wish to introduce Teresa Tabah of my law firm. She
5 has entered her appearance and she is going to
6 argue this for the Court.

7 THE COURT: All right. Do I have a
8 submission?

9 MR. FACCILOLO: Entry of appearance was
10 entered last week. We entered only our notice that
11 we were enjoined or asking for joinder.

12 THE COURT: All right.

13 MS. TABAH: Good morning, Your Honor. I
14 think the Court has narrowed the issue quite
15 appropriately this morning. It really is a single
16 issue whether the privilege does or doesn't exist
17 -- sorry. I think you're absolutely correct, there
18 is no question pending so therefore to some extent
19 I can see where the Court would be inclined to
20 think this might be an advisory opinion.

21 But I think the difference in the
22 distinction in this particular case is we are under
23 a new statute, we are under a non-heterosexual

1 relationship situation. And I think in any other
2 deposition it would be clear going into the depo
3 that the privilege does in fact exist.

4 So in this particular case we are not
5 even -- we are not even clear whether the Court is
6 going to recognize it.

7 THE COURT: I guess what I would say is the
8 protocol in Delaware at a deposition is if you
9 believe a privilege applies, you raise it, you
10 instruct the witness not to answer, and, if the
11 party taking the deposition disagrees with the
12 invocation of privilege, either because the
13 privilege doesn't exist or because it's been
14 waived, then they may seek a motion compelling a
15 response to the answer, or more likely -- I mean
16 the way it's supposed to work, although it rarely
17 does, is the party who invokes the privilege is
18 meant to come to Court at that time and seek
19 protection.

20 Either way the issue is crystalized by a
21 question that's pending that would seek to elicit
22 privileged information and the Court can then make
23 a ruling in some context that says yes, that

1 question seeks information that would be protected
2 by the marital privilege.

3 Right now what you're asking me to do is to
4 say everybody, just so you know, the marital
5 privilege applies here, even though that doesn't
6 really even seem to be much in controversy here.

7 MS. TABAH: I appreciate the Court's
8 comments on that; however, when you I think read
9 the opposition carefully, it is not clear that the
10 privilege is going to be recognized whatsoever.

11 The opposition appears to primarily skate
12 that issue and never addresses it head on. And so
13 I think in order to facilitate judicial economy and
14 to try to prevent a subsequent motion being clear
15 as to whether that privilege is going to be
16 recognized or not would facilitate this matter
17 moving it along in a more economic fashion I think.

18 THE COURT: All right. Thank you.
19 Good morning.

20 MR. HOLLY: Good morning, Your Honor. My
21 name is Timothy Holly with Connolly Bove and we
22 represent the defendant in this case.

23 To provide the Court some context with where

1 we've been, why we're here, in this case we have
2 already served multiple document requests and
3 multiple document requests have been served. There
4 have been interrogatories back and forth and
5 depositions noticed and taken.

6 Both in interrogatory responses and at
7 deposition Mr. Theil has identified Mr. Lanza as a
8 witness with information relevant to this dispute.
9 Specifically, he claims that he overheard certain
10 conversations and he also claims that he is a
11 witness to particular issues that I think they
12 frame as --

13 THE COURT: Is there going to be a dispute
14 as to whether or not conversations that occurred
15 not by overhearing discussions that Mr. Theil might
16 have had with Dentsply but conversations that
17 occurred directly between Mr. Theil and his partner
18 that those would be protected? Is there going to
19 be a dispute about that?

20 MR. HOLLY: There might well be, Your Honor.

21 THE COURT: As to whether or not the
22 privilege applies?

23 MR. HOLLY: Yes, there may be. I mean we

1 have yet to write up our outline for the deposition
2 of Mr. Lanza. Certainly to the extent --

3 THE COURT: Well, regardless of whether
4 you've written up the outline, one would think that
5 given this motion and the fact that it's been filed
6 that you have considered the legal question that's
7 presented here and that is whether the privilege
8 applies.

9 MR. HOLLY: We have, Your Honor.

10 THE COURT: All right. So I guess my
11 question is, am I going to just be back here in
12 three weeks? You've been here. We've litigated
13 this issue through motion practice. The issue is
14 joined. Your motion in response said this isn't
15 procedurally right. Let us ask the questions and
16 then raise the privilege and then we will come
17 back.

18 And my question to you is, we're here now
19 and you're about ready to take a deposition, if
20 you're going to take the position that the
21 privilege doesn't apply, why don't we just decide
22 that now?

23 MR. HOLLY: Your Honor, first I would say to

1 the extent there are questions of Mr. Lanza
2 regarding the effect of this situation as alleged
3 by Mr. Theil on Mr. Theil we certainly feel like we
4 need to ask those questions and identify Mr. Lanza
5 as a witness to those issues.

6 THE COURT: All right. What I understand
7 that you've said is that Mr. Lanza overheard
8 certain conversations that Mr. Theil had with
9 Dentsply and therefore is going to be able to offer
10 a view as to what was said and what wasn't said.

11 MR. HOLLY: That's Mr. Theil's
12 representation on one issue, yes, Your Honor.

13 THE COURT: So I guess the question then is
14 when the phone hangs up and Mr. Theil and Mr. Lanza
15 are now at the dinner table and they're talking
16 about the conversation that Mr. Theil had with
17 Dentsply, is it going to be your position that you
18 are entitled to get that information from
19 Mr. Lanza?

20 MR. HOLLY: Regarding that specific
21 question, Your Honor, we might well take the
22 position -- we have yet to confer with our client
23 on that issue because we haven't yet asked those

14

1 questions.

2 THE COURT: Can I just tell you that the
3 motion that has been filed here is a motion seeking
4 a declaration that the privilege applies.

5 Now I understand you made the argument that
6 we need to wait to decide that issue. But I want
7 to know if we are going to be back here.

8 MR. HOLLY: We hope not, Your Honor. We
9 hope through the normal exchange and litigation
10 counsel can have discussions and we won't be
11 burdening the Court again.

12 But if we are, Your Honor, I understand Your
13 Honor wants to get to this particular issue, and we
14 think an issue of first impression warrants
15 briefing so that we can assist the Court with
16 analyzing this new issue.

17 And there are wrinkles that could make the
18 privilege not apply in all contexts. For example,
19 this --

20 THE COURT: Let's say that you have
21 arguments that the privilege has been waived.

22 MR. HOLLY: Yes.

23 THE COURT: Then it seems to me that that is

1 a fact specific determination that we take up in
2 the context of a brewing dispute that we can see
3 questions raised at deposition, discovery
4 propounded and a response filed and you say nope,
5 on this particular question you've waived the
6 privilege.

7 But as a predicate matter, as a matter of
8 law what I'm hearing Ms. Stratton to say is if this
9 was a husband/wife situation we wouldn't be here
10 because everyone would know that the privilege
11 applies.

12 We believe that the privilege applies in
13 this instance based on the new statute and we want
14 everyone oriented to that predicate before we go
15 into the deposition.

16 And if we are going to have a dispute about
17 that, about that predicate, then shouldn't we
18 resolve that now rather than waste everyone's time,
19 because it is clear that they're going to invoke
20 the privilege if you ask a question that involves a
21 conversation that occurred in the privacy of
22 partner to partner discussions.

23 MR. HOLLY: Your Honor, we recognize a

16

1 desire for an advisory opinion, and we think it is
2 inappropriate to seek an advisory opinion. But if
3 the Court wishes to issue an advisory opinion, we
4 would be happy -- our client wouldn't be happy to
5 pay the dime for the research to do so but we would
6 be happy to submit briefing.

7 THE COURT: Isn't it pay me now or pay me
8 later?

9 MR. HOLLY: We don't feel so, Your Honor.
10 If the Court wishes for us to proffer one point of
11 consideration --

12 THE COURT: Are you telling me as an officer
13 of the court that there is a reasonable possibility
14 that this deposition could go forward and you will
15 not be back here on this issue?

16 MR. HOLLY: We hope that we wouldn't be,
17 Your Honor. I suspect that we probably would be
18 back on this issue.

19 THE COURT: All right. So then a subpoena
20 has been issued seeking information broad enough
21 that it would cover privileged information subject
22 to the marital privilege.

23 Under Rule 45 if a subpoena in its breath

1 would call for the production of objectionable
2 information, doesn't the rule require the
3 responding party to raise written objection to the
subpoena and to litigate that issue?

6 They are not going to produce the
6 information you want because the subpoena as
7 drafted is broad enough to call for privileged
8 information.

9 So right now before we even get to the
10 deposition in a particular question what they're
11 saying is these guys can't play fast and loose
12 here, Your Honor. If the idea is we want a context
13 to argue that the privilege doesn't apply to a
14 specific question, then let's go forward and have
15 the deposition.

16 But if they're going to take the position
17 that the privilege doesn't apply at all, their
18 subpoena is broad enough that it calls today for
19 the production of privileged information that we do
20 not wish to give because it is privileged and the
21 issue is joined.

22 How is that not a correct perspective of
23 where we are today?

1 MR. HOLLY: Your Honor, we feel Rule 45
2 would require a party served with a subpoena -- a
3 third party served with a subpoena to identify
4 specific context in which they believe privilege
5 applies.

6 THE COURT: What they've said is private
7 conversations between Mr. Theil and Mr. Lanza are
8 covered by the marital privilege.

9 MR. HOLLY: And we don't feel that the law
10 is as broad as they would purport that it is.

11 THE COURT: That issue is joined today, so
12 why isn't the law that broad? You haven't argued
13 that in your papers.

14 MR. HOLLY: We felt that it wasn't ripe,
15 Your Honor, to bring up to the Court's attention
16 arguments that might apply if the privilege in fact
17 was invoked the way it should be, and that's why we
18 didn't address that particular issue.

19 Dentsply wasn't yet put in a position to say
20 what date is the communication at issue, between
21 whom, who overheard it, what's the subject matter.
22 I mean we have no context in which to answer the
23 question of whether the privilege applies.

1 One particular point of significance, Your
2 Honor, is that the bill enactment includes
3 provisions in the rules of construction that
4 specifically identifies that the statute isn't
5 effective until 10 a.m., January 1st, 2012.

6 In the legislative enactment there is a
7 section two -- and I have a copy for Your Honor if
8 you'd like. It states this act does not affect
9 rights, duties or obligations --

10 THE COURT: Is this argued anywhere in your
11 response?

12 MR. HOLLY: It's not, Your Honor. We felt
13 it wasn't ripe. We felt like it was an advisory
14 opinion.

15 THE COURT: So if you rise or fall on that
16 and I say it is ripe, then where does that leave
17 you?

18 MR. HOLLY: Your Honor, if the Court --

19 THE COURT: Having chosen not to address it
20 in your response, you've taken your stand and let's
21 say hypothetically the Court says you don't prevail
22 on that stand.

23 MR. HOLLY: Your Honor, we are prepared to

1 live with this Court's ruling. If this Court
2 wishes to issue an advisory ruling that for all
3 communications with Mr. Theil and Mr. Lanza the
4 doctrine applies, we will abide by the Court's
5 instruction.

6 Dentsply has not, up to this point, had a
7 particular dog in the fight on that issue.
8 Frankly, Your Honor, we feel like Mr. Theil and
9 Mr. Lanza are trying to bait Dentsply into this
10 becoming an issue. They would love for this case
11 to be about Dentsply against issues of orientation.
12 We are not. Dentsply isn't.

13 If the Court wishes to issue an opinion that
14 the document applies, we will abide by the ruling.
15 We also are prepared to issue the Court briefing.

16 If the Court wants to hear a perspective
17 from officers of the court helping the Court
18 analyze this issue, we are prepared to do that, not
19 because Dentsply has a particular dog in that fight
20 but because we understand the Court wouldn't want
21 to get that issue wrong.

22 Standing at the podium if Your Honor is
23 asking me, an officer of the Court, what we,

1 Connolly Bove, believes the right answer to this
2 question is, all I can do is point the Court to the
3 legislature enactment regarding issues of rules of
4 construction and offer my perspective.

5 But our opposition to the motion to quash
6 was based on the issues raised in our opposition.
7 And Your Honor is absolutely correct, we didn't
8 take a position as to the advisory issue of whether
9 the privilege applies. We didn't. We acknowledge
10 that.

11 THE COURT: All right. Tell me why it is
12 that a subpoena that calls for the production of
13 all documents, a subpoena that is as broad as the
14 one that you have issued, doesn't join the issue of
15 privilege today.

16 MR. HOLLY: Your Honor, there could be
17 attorney-client privilege invoked in response to
18 the subpoena. We would respect the invocation of
19 the privilege. There can be spousal privilege
20 invoked. And frankly if we were to produce the
21 privilege log and said look, Dentsply, there is 30
22 documents that are responsive; 15 are between
23 Mr. Lanza and Mr. Theil individually on this

1 particular date --

2 THE COURT: Let me try to be more specific
3 in the question because I acknowledge my last
4 question is not.

5 If they were to invoke an attorney-client
6 privilege, my guess is that you would not be
7 responding to that by saying there is no such
8 preacher recognized in Delaware law.

9 MR. HOLLY: Correct.

10 THE COURT: If there was a husband and wife
11 and they invoke the marital privilege I suspect
12 that you would not be arguing that that does not
13 exist as a preacher of Delaware law.

14 MR. HOLLY: It has for years existed.

15 THE COURT: So now we have a situation where
16 you have two partners who have been joined in a
17 civil union and there is an anticipation that as to
18 certain discussions between them they will invoke
19 the marital privilege, spousal privilege.

20 And in the realm of what you're talking
21 about give us a privilege log and we will look at
22 the communication and see if it exists, what you
23 would say is there is such an animal, the privilege

1 does exist in the law but it doesn't apply here.
2 What I'm asking now is, the subpoena that
3 was issued is broad enough that it could call for
4 the production of information that would otherwise
5 be privileged.

6 MR. HOLLY: It could. January 1st, 2012
7 there could be a privileged communication between
8 Mr. Theil and Mr. Lanza, yes, Your Honor.

9 THE COURT: Or before.

10 MR. HOLLY: Perhaps.

11 THE COURT: So the question I'm asking is
12 why doesn't this subpoena as it is issued today
13 join the question of whether or not the subpoena
14 calls for the production of privileged information
15 such that the motion to quash is not seeking an
16 advisory opinion but rather is seeking a decision
17 on a matter that has been preserved by virtue of
18 the subpoena that was issued.

19 MR. HOLLY: We feel, very simply put, Your
20 Honor, that the motion to quash is asking the Court
21 whether as a legal concept spousal privilege
22 applies period. That's in our view a
23 quintessential question of first impressions

1 seeking an advisory opinion from the Court.

2 There is just no particular communication to
3 which that supposedly applies, and we are left to
4 speculate about how they believe that it applies.
5 We just don't feel like it's an issue in
6 controversy.

7 THE COURT: You've asked for all documents
8 including any emails which related to David Theil's
9 employment, if there is an email between Mr. Theil
10 and Mr. Lanza and no one else.

11 MR. HOLLY: Yes. What date, Your Honor?

12 THE COURT: Any date.

13 MR. HOLLY: We believe --

14 THE COURT: And you've called for that
15 information. This subpoena requires them by the
16 return date to produce that information.

17 MR. HOLLY: Your Honor --

18 THE COURT: They have now said we are not
19 producing information through this motion that is
20 subject to the privilege. And what I thought you
21 were saying is we can't determine if the privilege
22 applies because we don't know what the documents
23 are.

1 But implicit in that position one would
2 think is a recognition that it applies in some
3 instances but it might not apply in other
4 instances.

5 MR. HOLLY: And we agree with that.
6 Communication for sure. We think it's clear
7 10:01 a.m., January 1st, 2012, the privilege could
8 apply. We acknowledge that, just as we acknowledge
9 that in theory there might be an attorney-client
10 privilege document called for.

11 And if they identified, for instance, a
12 communication between Mr. Theil and Mr. Lanza,
13 10:01 a.m., no indication that it was waived in any
14 way, we would not be before the Court on a motion
15 to compel that issue. We might be, however -- we
16 admit, Your Honor, that if -- Mr. Theil resigned
17 February 2010. This statute at issue isn't
18 effective until 10 o'clock a.m., January 1st, 2012.

19 That is an issue if the communication that
20 they claim might not even exist, the email they
21 claim might not even exist, and there is an
22 indication that this might be an important email to
23 Dentsply, then we might be before the Court on a

1 motion to compel. I am not going to represent we
2 wouldn't be.

3 But we want the opportunity to see what
4 documents exist that they claim are responsive or
5 privileged and make a decision on a case by case
6 basis including questions at a deposition.

7 This is an issue that needs to be pressed
8 and therefore is it of enough significance to
9 really dig down and look at the statute, see if our
10 initial impression is correct, which is the
11 privilege wouldn't apply before 10:00 a.m., January
12 1st, 2012.

13 THE COURT: All right.

14 MR. HOLLY: I understand Your Honor's
15 concern, that it wasn't raised in our opposition
16 for the motion to quash, but we simply felt that
17 the issue wasn't ripe. And if this Court disagrees
18 and wishes for assistance looking at this issue, we
19 obviously would accommodate the Court and address
20 that issue and get into it now if the Court wants
21 to issue an advisory opinion or otherwise.

22 THE COURT: All right.

23 MR. HOLLY: Thank you, Your Honor.

1 MS. STRATTON: Your Honor, I am not sure
2 that I need to speak further. It is very clear
3 from their opposition papers that they did not
4 address the point of a motion, which is, whether or
5 not the marital privilege applies to my client's
6 communication with Kenneth Lanza.

7 And we believe it applies for the entire
8 course of the marriage, not just from the date
9 January 1st, 2012 but from the date of the
10 California marriage forward, that that is pursuant
11 to the broad construction that the Delaware statute
12 has given to civil union law.

13 And as Your Honor pointed out, their
14 subpoena directly requests privileged communication
15 between my client and Mr. Lanza. So the time for
16 them to object to our motion is now, it is not some
17 point in the future. So we ask that Your Honor
18 grant the motion and we will proceed with the
19 deposition with that in mind. Thank you.

20 MR. FACCILOLO: If it pleases the Court, can
21 we add another?

22 Go ahead, Teresa.

23 MS. TABAH: Your Honor, I would note for the

1 record this was a validly consumed marriage in
2 California at the time that it was consumed. And
3 this state has always recognized a marriage that's
4 valid in another state as being valid in this
5 state. We haven't picked and chose which types of
6 relationships we were going to.

7 I think 13 Del Code, Section 126 addresses
8 that and extends full privilege to common law
9 marriage again recognizing that other states have
10 different definitions of what marriage consists of.

11 And in particular in 13 Del Code, Section
12 214 when addressing this issue specifically
13 provided that a spousal relationship as used
14 throughout the code should be applied to
15 administrative rules, regulations, court rules,
16 governmental policies, common law and court
17 decisions just the same as it had always existed.
18 I have nothing further.

19 THE COURT: Thank you.

20 MR. HOLLY: May it please the Court.

21 THE COURT: Yes.

22 MR. HOLLY: Just briefly on this issue we
23 note, Your Honor, that the legislative enactment

1 that is at issue under the rules of construction
 2 section, Section 217, states at Section five this
 3 act shall be active 10 a.m., January 1st, 2012.
 4 Section 2, the legislative enactment states, quote,
 5 This act does not affect rights, duties or
 6 obligations matured or were owned, penalties that
 7 were incurred or proceedings that were begun before
 8 this effective date.

9 Nothing further, Your Honor. And thank you
 10 for your time.

11 MS. STRATTON: Your Honor, I would note if
 12 the defendants had an opposition to the legal point
 13 of our motion they should have raised it in their
 14 response to the motion. They haven't done so.

15 Secondly, the statute is very clear that as
 16 of January 1st of this year marriage from -- same
 17 sex marriages from other states should have the
 18 same equality as marriages from this state that are
 19 heterosexual marriages. And therefore we believe
 20 that that recognizes the entire scope of my
 21 client's marriage from 2008 forward.

22 And we believe that again as I said before
 23 the statutory enactment says that this statute

1 should be broadly construed to accomplish its
 2 intended purpose. An intended purpose is make my
 3 client's same sex marriage the same as heterosexual
 4 marriage recognized in Delaware. Thank you.

5 THE COURT: All right. Under Rule 45(c)(3),
 6 a party to whom a subpoena has been directed may
 7 move to quash or modify a subpoena if it requires
 8 disclosure, privileged or other protective matter
 9 and no exception or waiver applies. The protocol
 10 under Rule 45 is for a party who receives that
 11 subpoena to move to quash.

12 Rule 45 also has a mechanism by which a
 13 party who receives a subpoena can object to
 14 production of certain documents and the party who
 15 issued the subpoena would then be obliged to move
 16 to compel production.

17 In this instance the recipient of the
 18 subpoena has elected to invoke the procedure set
 19 forth in Rule 45(c)(3).

20 There was a response to the motion filed.
 21 That response in essence indicated that the matter
 22 was not ripe and that the deposition should move
 23 forward, questions should be asked, documents

1 should be produced, and to the extent that
 2 Mr. Lanza or Mr. Theil wished to invoke the spousal
 3 privilege then a motion to compel that information
 4 could be filed and litigated.

5 I don't agree with that position, but I do
 6 understand why it might have been taken under the
 7 circumstances.

8 The bigger concern that I have -- and again
 9 it is not meant to be critical of counsel -- but I
 10 think the better approach and the more candid
 11 approach would have been to say we dispute whether
 12 the privilege applies at all but in this instance
 13 we don't think the matter is ripe, as opposed to
 14 standing solely on a procedural ground, leaving
 15 open the question, and frankly, begging the
 16 question of whether or not Dentsply is going to
 17 challenge the existence of the privilege as opposed
 18 to its application.

19 It now appears that Dentsply intends to
 20 challenge the existence of the privilege prior to
 21 January of this year.

22 My assumption is that that time frame, 2010,
 23 2011, would cover the bulk of the communications

1 that would be at issue both by virtue of the
 2 subpoena duces tecum and also the subpoena to
 3 appear at a deposition and provide testimony.

4 I think the matter is ripe. I don't think
 5 it is an advisory opinion. And the reason I think
 6 that is it is a practical certainty in my mind
 7 based on what I've heard that this matter will be
 8 in controversy by virtue of the subpoena that was
 9 issued.

10 I don't have the information that I need to
 11 weigh in as a matter of first impression on this
 12 issue. However, I don't believe that a deposition
 13 needs to go forward, nor do I believe that a
 14 privilege log is necessary to join the predicate
 15 question of whether the privilege applies prior to
 16 January of this year.

17 The reason that I note that the issue is
 18 going to come up is unless these folks have an
 19 utterly dysfunctional relationship it is impossible
 20 for me to believe that they did not have private
 21 conversations at some point in 2010, 2011 about
 22 what was happening in this litigation.

23 I think that they did. And if the question

1 is asked tell us about what was said between you
2 after Mr. Theil spoke with Dentsply or at the end
3 of a given day and the privilege is invoked, we are
going to be back here. And I think it is a near
5 certainty that we will be.

6 So I am not one to promote delay or
7 unnecessary burden on parties but I do think given
8 the breath of the issue here and its importance
9 that it is worth approaching this in a thoughtful
10 way.

11 Accordingly I will allow plaintiffs and the
12 deponent, Mr. Lanza, 14 days from today, which will
13 be February 13th, to supply supplemental memoranda
14 not to exceed ten pages. Defendants may respond to
15 that memoranda by February 27th. And I will
16 determine at that time whether additional argument
17 is required on the motion.

18 And the only question I want answered at
19 this point is whether the privilege would apply,
20 or, stated differently, whether it existed in
21 relation to communications that occurred prior to
22 the effective date of the statute as listed or as
23 referenced in the comments to the statute. All

1 right?

2 MS. STRATTON: Thank you, Your Honor.

3 MR. FACCIOLO: Thank you, Your Honor.

4 THE COURT: All right. So we will keep that
5 matter under advisement.

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CERTIFICATE OF COURT REPORTER

I, Kim L. Haley, RPR, CRR-NJ, Official Court
Stenographer of the Superior Court, State of
Delaware, do hereby certify that the foregoing is
an accurate transcript of the proceedings had, as
reported by me, in the Superior Court of the State
of Delaware, in and for New Castle County, in the
case herein stated, as the same remains of record
in the Office of the Prothonotary at Wilmington,
Delaware, and that I am neither counsel nor kin to
any party or participant in said action nor
interested in the outcome thereof.

This certification shall be considered null and
void if this transcript is disassembled in any
manner by any party without authorization of the
signatory below.

WITNESS my hand this 8th day of February,
2012.

/s/ Kim L. Haley, RPR, CRR-NJ
Official Court Reporter
232-RPR