UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

IN RE:	C/A No. 18-05693-HB
Melissa Arletta Hogan,	Chapter 13
Debtor(s).	**ORDER GRANTING UNITED STATES TRUSTEE'S MOTION FOR PROTECTIVE ORDER**

THIS MATTER is before the Court on the *Motion for a Protective Order Quashing Notice of Rule 30(b)(6) Deposition* filed by United States Trustee ("UST"). An Objection was filed by Deighan Law LLC, f/k/a Law Solutions Chicago, LLC d/b/a in South Carolina as UpRight Law LLC ("Upright") and a hearing was held on December 17, 2020.[1] For the reasons set forth below, the UST has shown good cause for the issuance of a protective order quashing Upright's Rule 30(b)(6) deposition notice.

FACTUAL AND PROCEDURAL BACKGROUND

On July 17, 2019, the UST filed a *Motion for Review of the Conduct of Deighan Law LLC, Disallowance and Disgorgement of Fees, and Other Appropriate Relief* ("Motion for Review of Conduct"),[2] asserting Upright committed misconduct in connection with providing bankruptcy services to Debtor Melissa Arletta Hogan that is sanctionable by the Court. The Motion alleges Hogan contacted with Upright for its advertised "free case evaluation" and/or "free initial consultation." She paid Upright approximately $1,075.00 in fees, then terminated its services and sought a refund, which Upright failed to provide. Hogan eventually retained F. Lee O'Steen and filed for bankruptcy relief on November 6, 2018. The UST alleges there are other bankruptcy cases in this district in which Upright allegedly failed to provide an appropriate refund to

[1] The hearing was delayed by various pandemic-related issues.
[2] ECF No. 67.

individuals who sought to terminate its services prior to filing their bankruptcy cases and it is possible there are others.

The UST initiated the Motion for Review of Conduct pursuant to its authority under 11 U.S.C. § 307 and 28 U.S.C. § 586(a), seeking relief in the form of sanctions and injunctions under the Bankruptcy Code and the Court's inherent authority for alleged violations of §§ 329 and 526, Fed. R. Bankr. P. 2017(a), and SC LBR 9011-1(b). It requests the Court review Upright's conduct and, if appropriate: (1) require the disallowance and disgorgement of funds received by Upright from Hogan; (2) enjoin Upright from collecting any fees from residents of South Carolina until he or she has a consultation with an attorney admitted to practice before this Court who has agreed to represent the individual in a case before the Court; (3) enjoin Upright from retaining unearned fees and costs from residents of South Carolina; (4) enjoin Upright from practicing in this Court until it demonstrates it will comply with 11 U.S.C. § 526 and has procedures in place to ensure its compliance; (5) impose sanctions against Upright pursuant to § 526(c)(5)(B); and (6) impose sanctions as appropriate for deterrence.

The parties have been engaged in discovery for several months. The UST responded to the following interrogatories issued by Upright:

1. State the total amount of money that the UST collectively is seeking from Upright Law, in whatever form (including but not limited to disgorgement, civil penalties, or sanctions) in this Motion for Sanctions.

2. As to any allegation that the UpRight Law has demonstrated a "clear and consistent pattern or practice" of violating 11 U.S.C. § 526, identify and provide: (a) all cases that constitute or contribute to the alleged "clear and consistent pattern or practice"; (b) a detailed description of the particular violation of 11 U.S.C. § 526 in each case that gives rise to the alleged violation; and (c) how the alleged violations relate to one another.

3. Identify any person with knowledge of, or who is likely to have knowledge of, any facts and matters alleged in, or concerning, the allegations in the Motion for Sanctions, any actions, inaction or conduct related thereto, and each and every injury or damage complained of. As to each person identified, state the nature and subject matter of their knowledge, and state whether you, or your attorneys or agents or anyone acting on your behalf, have taken any statements, signed or unsigned, from such persons, written or oral, and, if so, identify who has custody of each such statement.

4. Identify all witnesses that the UST will or may call at the evidentiary hearing in support of the Motion for Sanctions.

5. Identify all documents that the UST will or may use, introduce, seek to admit into evidence, use as demonstrative evidence, or reference in any argument, at evidentiary hearing or deposition in this matter.

6. For any Request for Admission that the UST answers with anything other than an unqualified admission, fully describe the factual and legal basis for such answer.

7. Describe any damage, harm, injury, expense or loss to Ms. Hogan that resulted from the conduct at issue in each of the claims asserted in the Motion for Sanctions.

8. Describe any damage, harm, injury, expense or loss to the Debtors' bankruptcy estate that resulted from the conduct at issue in each of the claims asserted in the Motion for Sanctions.

9. As to any allegation that the UpRight Law violated 11 U.S.C. § 526, 11 U.S.C. § 329, 11 U.S.C. § 105, Fed. R. Bankr. P. 2017, or Local Civil Rule 83.IX.01 DSC, identify and provide: (a) a detailed description of the particular violation that gives rise to the alleged violation; (b) a description of the facts that support each alleged violation described in subsection (a); and (c) any and all facts that support or contradict the allegations of violations.

. . . .

11. Identify any documents and communications, including those within the office of the UST or with any attorneys, agents, representatives, or employees of any other regional office of the United States Trustee, concerning any facts and matters alleged in, or concerning, the Motion for Sanctions, any actions or conduct related thereto, and each and every injury or damage complained of.

. . . .

14. Does the UST contend that he possesses authority to review the reasonableness of attorney fees paid by a prospective debtor to a law firm, but who does not end up filing for bankruptcy? If the answer is "yes," describe the jurisdictional and statutory basis for that position.

15. Describe the basis for the UST's contention that "clerical" or "administrative services" are "not compensable" in connection with a consumer bankruptcy representation, including but not limited to the identification of any judicial decision in a Chapter 7 or Chapter 13 case that supports the UST's position.

. . . .

18. Identify any guidance, formal or informal, that the UST has on the issue of whether "administrative" or "clerical" services are "not compensable" in a Chapter 7 or Chapter 13 bankruptcy representation.

. . . .

21. Does the UST disagree with the following statements in the Final Report of the ABI Commission on Consumer Bankruptcy, 2017-19:

a. "[I]f the debtor is unable to complete the prepetition payments [associated with a Chapter 7 bankruptcy], no case will be filed, and the debtor will likely lose at least some portion of the funds deposited with the lawyer as payment for whatever services – legal or administrative – were provided"? (ABI Report at 90)

b. "Any administrative cost in holding funds before filing can be covered by a higher fee." (*Id.*)

c. For a Chapter 7 case not filed because the client did not complete payment of fees, "the attorney may deduct expenses from any refund if the case is not filed." (*Id.* at 92).

If the UST disagrees with either statement, describe in detail the basis for the UST's disagreement, including any judicial decisions in Chapter 7 or Chapter 13 cases, or guidance issued by the UST, that would support the UST's disagreement.

The UST also responded to the following requests for production of documents issued by Upright:

1. All documents related to the UST's claim in the Motion for Sanctions against UpRight Law pursuant to 11 U.S.C. § 105, including any documents that would support a claim that UpRight Law acted in bad faith in relation to the manner in which it handled the refund request of Ms. Hogan.

2. All documents related to the UST's claim against UpRight Law in the Motion for Sanctions pursuant to 11 U.S.C. § 329, including any documents that address the UST's basis for contesting the reasonableness of fees that: (a) have already been refunded to Ms. Hogan; and (b) that address whether law firms can, or cannot, charge for services that the UST deems to be "administrative."

3. All documents related to the UST's claim against UpRight Law pursuant to 11 U.S.C. § 526 in the Motion for Sanctions, including but not limited to: (a) the "substantial prediscovery evidence" of UpRight Law violating Section 526 in connection with case cancellations or refunds (*see* page 7 of Doc. 96); and (b) Upright Law's alleged clear and consistent pattern or practice of offering free case evaluations by non-attorney staff with little or no information.

4. All documents concerning any allegation that UpRight Law did not handle refunds appropriately for the following debtors: (a) Johnny Lester Garner; (b) George Walker; and (c) Sherry Walker.

. . . .

6. All documents that relate to, or consist of, communications with Lee O'Steen concerning UpRight Law.

7. All Documents comprising communications between the UST and Melissa Hogan, or anyone acting for or on behalf of Melissa Hogan.

8. All documents relating to consideration (if any) paid or given to Ms. Hogan for purposes of enabling her to continue to meet her obligations under the repayment plan entered in her Chapter 13 bankruptcy.

. . . .

12. All documents relating or referring to the issue of whether lawyers who are affiliated with a debt relief agency can themselves constitute a "debt relief agency" within the meaning of 11 U.S.C. §526 and the Bankruptcy Code.

. . . .

16. All documents concerning the reasonableness of the fees charged by UpRight Law to Debtor.

17. All documents concerning any attorney fee guidelines of the UST for consumer bankruptcy attorneys who file Chapter 7 and Chapter 13 bankruptcies.

18. All documents concerning unwritten guidelines or rules on professional fees in consumer bankruptcy cases.

19. All documents concerning published U.S. Trustee guidelines on professional fees in consumer bankruptcy cases.

20. All documents concerning directives on professional fees in consumer bankruptcy cases.

. . . .

22. Any motion for sanctions or adversary proceeding filed in the District of South Carolina, other than the instant Motion for Sanctions, that alleges that a consumer bankruptcy firm may not charge clients for administrative services or expenses in a case in which the client does not end up filing for bankruptcy.

23. Any document relating or referring to the jurisdiction of the United States Trustee relating to: (a) refunds of clients who engage a bankruptcy attorney but who do not end up filing for bankruptcy; or (b) to review fees under § 329 when the attorney already has disgorged all fees to the debtor.

. . . .

29. Copies of all phone records of Ms. Hogan between January 1, 2017 and the present.

The UST has since supplemented its responses to these written discovery requests.

The UST previously filed a motion for a protective order regarding Upright's written discovery requests, which sought information and communications regarding the UST's approach

toward Upright's fees, business model, and marketing compared to those of other debtors' attorneys and its motives for initiating the Motion for Review of Conduct.[3] Upright requested information and documentation regarding Upright, multi-state practice models or untraditional practice models, pleadings filed by the UST regarding other attorneys, as well as communications between the UST and chapter 7 and chapter 13 trustees, and surveys and analysis of other bankruptcy cases. On March 6, 2020, the Court entered an *Order Granting UST's Motion to Limit Discovery & Denying Upright's Motion to Compel* ("Discovery Order") finding no responses to these written discovery requests were required by the UST.[4] The Court concluded the information sought by Upright was not sufficiently relevant to the Motion for Review of Conduct or Upright's defense and, therefore, was outside the scope of discovery permitted by Fed. R. Civ. P. 26(b)(1). It reasoned that the UST's motivation to seek this relief against Upright is not at issue here since the Court will ultimately determine if any violations occurred and, if so, whether any sanction is appropriate. The Court also determined any discovery related to an "affirmative defense" asserted by Upright was not relevant because under Fed. R. Bankr. P. 9014, contested matters do not provide for affirmative defenses under Fed. R. Bankr. P. 7008. Thus, any claims Upright may have against the UST must be brought in the correct forum, through an independent action, based on a well-pled pleading.

In response, Upright filed a motion to reconsider the Discovery Order arguing, in part, that the Court erred in concluding Fed. R. Bankr. P. 7008 does not apply and Upright is not entitled to discovery concerning its affirmative defense. Because the UST seeks to enjoin Upright, Upright

[3] The motion concerned Upright's interrogatories 10, 12, 13, 16, 17, 19, and 20 and requests for production 5, 9 – 11, 13 – 15, 21, and 24 – 28.

[4] ECF No. 152. The Discovery Order also denied Upright's motion to compel regarding interrogatories 18 and 21 and requests for production 6 and 22. The UST responded in part to these discovery requests by providing some non-privileged materials and communications regarding Hogan's case and a privilege log for materials it asserts are protected by the work-product doctrine.

argued this action should have been initiated as an adversary proceeding, which would allow for its affirmative defense under Fed. R. Bankr. P. 7008. The Court denied Upright's motion ("Reconsider Order"), finding the matter was appropriately before the Court as a contested matter because the remedies requested by the UST, including to enjoin certain conduct, are provided in 11 U.S.C. § 526 and may be initiated by a motion of the UST.[5] *See* 11 U.S.C. § 526(c)(5). The Court reiterated that the discovery requests were not relevant to the Motion for Review of Conduct because other instances of sanctions being awarded or not pursued are immaterial to a party's obligation to comply with applicable authorities.

On September 24, 2020, Upright noticed a deposition of the UST pursuant to Fed. R. Civ. P. 30(b)(6).[6] The Notice seeks to depose the UST's designee on the following topics:

1. The basis for UST's claim in the Motion pursuant to 11 U.S.C. § 329.
2. The basis for the UST's allegations in the Motion that Upright intentionally violated 11 U.S.C. § 526 in its dealings with Ms. Hogan.
3. The basis for the UST's allegations in the Motion that Upright engaged in a clear and consistent pattern or practice of violating § 526, including but not limited to the UST's allegations related to *In re Garner*, Case No. 17-01737-hb and *In re Walker*, Case No. 18-04406-hb.
4. The nature of, and basis for, any relief sought by the UST pursuant to 11 U.S.C. § 526(c)(5), including but not limited to the injunctive relief sought by the UST at page 13 of the Motion.
5. The legal and factual basis for the UST's assertion that "Upright's dealings with other prospective assisted persons has an effect on the current estate." (*See* Doc. 146 at 4).
6. With respect to the UST's prayer for relief pursuant to 11 U.S.C. § 105 and the Bankruptcy Court's inherent authority, the specific nature of the relief sought in the Motion.
7. With respect to the UST's prayer for relief pursuant to 11 U.S.C. § 105 and the Bankruptcy Court's inherent authority, the basis for such relief sought in the Motion, including but not limited [to] how such relief is necessary to carry out the provisions of Title 11, to enforce a court's order, and/or to prevent an abuse of process.

[5] ECF No. 157, entered Mar. 25, 2020.
[6] Made applicable to this contested matter by Fed. R. Bankr. P. 9014 and 7030.

8. Prior enforcement since April 1, 2017 brought by the UST that constitute attempts to review the reasonableness of fees charged in attorney-client engagements that do not result in the filing of a bankruptcy petition.
9. Prior enforcement actions since April 1, 2017 brought by the UST pertaining to "free consultations."
10. The legal basis (including but not limited to policies of the Executive Office of the United States Trustee or the UST) for any enforcement action by the UST in which the UST has taken the position that the attorney fees received by an attorney pursuant to an attorney-client engagement that does not result in the filing of a bankruptcy petition are subject [to] a review of "reasonableness."
11. The basis for the allegation in the Motion that services "such as telephone calls, texts, e-mails, and voicemails" are 'not compensable'" in a Chapter 7 case. (*See* Motion at p. 11).
12. Determination and calculation of any damages, civil penalties, or other monetary relief in whatever form they are sought in the Motion.
13. In the event that the Bankruptcy Court issues such an award of monetary relief, the person(s) or entity/entities that would be the recipient(s) of any damage award, civil penalty, or other monetary relief.
14. The nature of any communication between the UST (including officers, employees, and personnel of the UST) and Ms. Hogan or her counsel.
15. The nature of any communication between the UST and the Chapter 13 Trustee relating to the administration of the bankruptcy estate in Ms. Hogan's bankruptcy case.
16. The nature of Lee O'Steen's advertisements regarding "free consultations."

In response, the UST filed this Motion seeking to quash the Notice pursuant to Fed. R. Civ. P. 26(c)(1). It asserts Upright seeks to depose the UST's designee on topics not relevant to the Motion for Review of Conduct or nearly identical to the information sought in Upright's written discovery requests, to which the UST has already provided detailed responses. The UST also argues that through its Notice, Upright seeks to depose the UST regarding his investigative processes and work product, which are not subject to discovery. The UST asserts the Notice is an attempt by Upright to harass in seeking irrelevant, burdensome, duplicative, and improper discovery.

DISCUSSION AND CONCLUSIONS

The general standard for the scope discovery under Fed. R. Civ. P. 26 is relatively broad since it allows the parties to:

> obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Fed. R. Civ. P. 26(b)(1). Evidence is relevant if it "(a) has any tendency to make a fact more or less probable than it would be without the evidence and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. Or, as paraphrased in the commentary, "[d]oes the item of evidence tend to prove the matter sought to be proved?" *Id.*

However, simply because the "requested information is discoverable under Rule 26[(b)] does not mean that discovery must be had." *Nicholas v. Wyndham Int'l Inc.*, 373 F.3d 537, 543 (4th Cir. 2004). On its own initiative, or in response to a motion, the Court must limit discovery in appropriate cases where it determines:

> (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
>
> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
>
> (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

Fed. R. Civ. P. 26(b)(2)(C). Further, "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters[.]" Fed. R. Civ. P. 26(c)(1)(D). The party seeking a protective order must make a particularized showing of why discovery should be denied, and conclusory or

generalized statements fail to satisfy this burden as a matter of law. *See Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 402-03 (4th Cir. 2003).

While the Court has broad discretion in its resolution of discovery issues that arise in the cases before it, *Mylan Labs., Inc. v. Akzo, N.V.*, 2 F.3d 56, 64 (4th Cir. 1993), the good cause requirement under Fed. R. Civ. P. 26(c)(1) creates a rather high hurdle for proponents of a protective order and they should be used sparingly and cautiously granted. *Baron Fin. Corp. v. Natanzon*, 240 F.R.D. 200, 202 (D. Md. 2006) (citations omitted). "This is especially the case with requests to stay depositions, the majority of which courts deny." *Id.* (citing *Motsinger v. Flynt*, 119 F.R.D. 373, 378 (M.D.N.C. 1998) ("Absent a strong showing of good cause and extraordinary circumstances, a court should not prohibit altogether the taking of a deposition.")); *see also Sec. & Exch. Comm'n v. Lemelson*, 334 F.R.D. 359, 361 (D. Mass. 2020) ("Courts are "extremely hesitant to prohibit the taking of a discovery deposition, and it is very unusual for a court to prohibit the taking of a deposition altogether . . ." (citing 10A *Fed. Proc.*, L. Ed. § 26:301)). "[I]n the few cases in which a protective order has been granted [precluding a deposition altogether], it clearly appeared that the information sought was wholly irrelevant and could have no possible bearing on the issue." *S.E.C. v. Dowdell*, No. C/A No. 3:01CV00116, 2002 WL 1969664, at *3 (W.D. Va. Aug. 21, 2002) (citations omitted). However, efforts to depose the attorney of an opposing party are "view[ed] skeptically" and "permitted only when the information sought is not available from another source." *Carr v. Double T Diner*, 272 F.R.D. 431, 435 (D. Md. 2010). "Generally, the party seeking the deposition [of opposing counsel] must 'establish a legitimate basis for requesting the deposition and demonstrate that the deposition will not otherwise prove overly disruptive or burdensome.'" *Allen v. TV One, LLC*, No. CV DKC 15-1960, 2016 WL 7157420, at *2 (D. Md.

Dec. 8, 2016) (quoting *N.F.A. Corp. v. Riverview Narrow Fabrics, Inc.*, 117 F.R.D. 83, 86 (M.D.N.C. 1987)).

Government agencies are not exempt from the discovery rules. Indeed, Fed. R. Civ. P. 30(b)(6) allows a party to notice the deposition of, *inter alia*, a governmental agency and the agency must designate persons who consent to testify on its behalf. A deposition of a government agency "should not summarily be countenanced, but may nonetheless be appropriate in some instances . . ." *Lemelson*, 334 F.R.D. at 362.

The UST's primary objection is that the topics included in Upright's Notice will be equivalent to deposing the agency's counsel and inevitably encroach on privileged information. "When the attorney-client privilege applies, 'it affords confidential communications between lawyer and client complete protection from disclosure.'" *In re Grand Jury Subpoena*, 341 F.3d 331, 335 (4th Cir. 2003) (quoting *Hawkins v. Stables*, 148 F.3d 379, 383 (4th Cir. 1998)). The work product doctrine, is "'a qualified privilege,' to be held by lawyer and client alike, 'for certain materials prepared by an attorney acting for his client in anticipation of litigation.'" *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 173-74 (4th Cir. 2019), *as amended* (Oct. 31, 2019) (quoting *United States v. Nobles*, 422 U.S. 225, 237–38 (1975)). Pursuant to the work product doctrine, which has been incorporated into Fed. R. Civ. P. 26(b)(3), "an attorney is not required to divulge, by discovery or otherwise, facts developed by his efforts in preparation of the case or opinions he has formed about any phase of the litigation." *Chaudhry v. Gallerizzo*, 174 F.3d 394, 403 (4th Cir. 1999) (quoting *In re Doe*, 662 F.2d 1073, 1077 (4th Cir. 1981)); *see also* Fed. R. Civ. P. 26(b)(3). "Rule 26(b)(3) protects 'things that are prepared in anticipation of litigation,' whether they are prepared by a [party's] attorney, consultant, or other agent. This doctrine is premised on the idea that '[n]ot even the most liberal of discovery theories can justify unwarranted inquiries

into the files and the mental impressions of an attorney.'" *Lewis v. Richland Cnty. Recreation Comm'n*, C/A No. 3:16-CV-2884-MGL-TER, 2018 WL 4596119, at *4 (D.S.C. Sept. 25, 2018) (quoting *Hickman v. Taylor*, 329 U.S. 495, 510 (1947)).

The law distinguishes between fact work product and opinion work product. "[F]act work product . . . is 'a transaction of the factual events involved,' and . . . opinion work product . . . 'represents the actual thoughts and impressions of the attorney.'" *In re Search Warrant*, 942 F.3d at 174 (quoting *In re Grand Jury Subpoena*, 870 F.3d 312, 316 (4th Cir. 2017)). The production of fact work product may be compelled "in limited circumstances, where a party shows 'both a substantial need and an inability to secure the substantial equivalent of the materials by alternate means without undue hardship.'" *Id.* (quoting *In re Grand Jury Subpoena*, 870 F.3d at 316); *see also* Fed. R. Civ. P. 26(b)(3). Opinion work product, on the other hand, "'enjoys a nearly absolute immunity' and can be discovered by adverse parties 'only in very rare and extraordinary circumstances.'" *Id.* (quoting *In re Grand Jury Subpoena*, 870 F.3d at 316).

In support of its argument, the UST cites *E.E.O.C. v. McCormick & Schmick's Seafood Restaurants, Inc.*, C/A No. WMN-08-CV-984, 2010 WL 2572809, at *2 (D. Md. Jun. 22, 2010), which relied on *S.E.C. v. SBM Inv. Certificates, Inc.*, C/A No. 06–0866, 2007 WL 609888 (D. Md. Feb. 23, 2007). In *SBM Certificates*, the Rule 30(b)(6) deposition notice topics primarily sought the SEC's communications related to its investigation of other specific cases and the results of the investigation at issue. The court granted the SEC's motion for a protective order to quash the deposition notice because the topics would require preparing a witness with attorney opinion work product.

In *McCormick & Schmick's*, the Rule 30(b)(6) deposition notice sought, *inter alia*, factual information and documents supporting or rebutting the allegations of the complaint. The court noted that:

> Numerous other federal courts have similarly concluded that 30(b)(6) deposition notices directed to a law enforcement agency involving the type of information Defendants seek in this case were, in effect, notices to depose opposing counsel of record and would not be permitted given a) the agencies' lack of independent knowledge of the transactions at issue and that the information the noticing party was seeking was generated by the agencies' counsel or counsel's agents in preparation of trial, b) the consequent high potential for intrusion into attorney work product, c) the undue burden and inefficiency entailed to prepare a lay witness to engage in rote memorization and recitation of the evidence in the case, and d) the availability of alternative means to secure legitimate factual discovery.

2010 WL 2572809, at *4. The court granted the EEOC's motion for a protective order, finding the topics of the notice "on their face seek attorney work product and would require the deposition of EEOC counsel or a proxy prepared by counsel. The need to prepare a proxy would result in an undue burden to EEOC, particularly where the underlying factual information allegedly sought is obtainable through other discovery means." *Id.* at *5. The Court also reasoned that the EEOC's expected objections to questions during the deposition asserting attorney-client privilege and protected work product "would likely involve recourse to this Court and a significant burden on this Court's time that would be lessened by other means of discovery." *Id.* It distinguished its decision from those cited by the defendant, stating "in each of those cases . . . the Court only allowed deposition of an investigator designated by EEOC as to the facts the investigator learned during her investigation, but did not allow questions that invaded work product or attorney client privilege." *Id.*

Like the notice served on the EEOC in *McCormick & Schmick's*, Upright's Notice includes topics seeking information supporting the basis for the UST's allegations in the Motion for Review of Conduct and the relief sought therein. While the matter before the Court is presented as a

motion filed by the UST against Upright, this is not a conventional two-party dispute. The UST is a government agency with civil enforcement responsibilities. It is the component of the Department of Justice responsible for overseeing the administration of bankruptcy cases and private trustees under 28 U.S.C. § 586 and 11 U.S.C. § 101. The UST is a part of the national United States Trustee program, which has "broad administrative, regulatory, and litigation/enforcement authorities whose mission is to promote the integrity and efficiency of the bankruptcy system for the benefit of all stakeholders – debtors, creditors, and the public." DEPT. OF JUSTICE, *U.S. Trustee Program*, https://www.justice.gov/ust (last visited Dec. 18, 2020).

The UST initiated the Motion for Review of Conduct because of its statutory obligations under 28 U.S.C. § 586 and based on facts obtained from the Court's docket or otherwise provided by Hogan and/or Upright. Any further preparation by the UST of the Motion for Review of Conduct would constitute privileged work product. By seeking the basis and grounds for allegations of the Motion for Review of Conduct, Upright's Notice, in effect, seeks to depose opposing counsel of record and obtain information generated by the UST's counsel or agents and prepared in anticipation of this litigation. While a designee other than the UST's counsel may testify on these topics, preparation of such witness would require the use of attorney work product and would be unduly burdensome since it would result in the recitation of facts known from information publicly available or provided by Upright or Hogan. Moreover, the alleged underlying factual information sought by Upright was obtainable through its substantially similar written discovery requests, to which the UST has already responded and supplemented at least once.

Upright has not demonstrated a substantial need for the information it seeks to obtain from the UST's deposition or an inability to secure the substantial equivalent by alternate means without undue hardship, especially in light of the extensive written discovery the parties have already

engaged in and the substantial similarities among the topics included in the Notice and the information already provided in the UST's written discovery responses. While Upright asserts it has a right to cross examine other parties to this dispute, the UST was not involved when the facts and events giving rise to this matter occurred and, therefore, it is difficult to determine how such examination would be appropriate or productive. Upright failed to articulate what testimony Upright could elicit that is not protected by the work product doctrine or not previously produced in the UST's written discovery responses. This case does not present rare and extraordinary circumstances to allow Upright to question the UST on its counsel's mental processes in seeking to pursue its investigation against Upright and initiate its Motion for Review of Conduct.

Moreover, the Court has already determined that the information sought in Notice topics 8, 9, and 10 is not relevant to this matter and, therefore, not discoverable. The Court's Discovery Order and Reconsider Order prohibited Upright's written discovery requests seeking information and communications concerning the UST's approach toward Upright's fees, business model, and marketing compared to those of other debtors' attorneys, its motives for initiating the Motion for Review of Conduct, and its involvement in other consumer matters involving attorney's fees and client representation. Those Orders found that such information was not relevant to whether Upright committed misconduct here and should be sanctioned as a result. Upright seeks essentially the same information in Notice topics 8, 9, and 10 and, therefore, the proposed discovery is outside the scope permitted by Rule 26(b)(1). *See* Fed. R. Civ. P. 26(b)(2)(C)(iii).

Likewise, Notice topics 13, 15, and 16 request information wholly unrelated to the issues presented in the Motion for Review of Conduct. The Chapter 13 trustee's administration of this bankruptcy case and Hogan's estate and the nature of any advertisements used by her counsel do not "tend to prove the matter sought to be proved" here – whether Upright committed any

sanctionable conduct and, if so, what sanctions, if any, are appropriate. Further, as discussed in the Discovery Order, the Court – not the UST – will determine what sanctions, if any, are appropriate and what form they may take.

Based on the foregoing, the UST has demonstrated good cause for issuance of a protective order by making a particularized showing of why the Notice should be quashed.

IT IS, THEREFORE, ORDERED that the UST's Motion for Protective Order is granted and Upright's Rule 30(b)(6) Notice is quashed in its entirety because it seeks information not discoverable under Fed. R. Civ. P. 26 as it is not relevant to this matter, privileged, and/or unreasonably cumulative or duplicative, and complying with the Rule 30(b)(6) Notice would create an undue burden for the UST.

FILED BY THE COURT
12/21/2020

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

Entered: 12/21/2020

Chief US Bankruptcy Judge
District of South Carolina