

**Goldstine, Skrodzki, Russian,
Nemec and Hoff, Ltd.**

Attorneys at Law

The Prairie Building
835 McClintock Drive ■ Second Floor
Burr Ridge, IL 60527-0860
Telephone (630) 655-6000
Facsimile (630) 655-9808
WWW.GSRNH.COM

William M. Brennan
William J. Cotter
Gregory L. Dose**
Brian M. Dougherty
Robert D. Goldstine
Michelle V. Hanlon***
James D. Healy
Howard M. Hoff
William H. Hrabak, Jr.
Keith R. Krider
Craig T. Martin

Daniel J. McCarthy III
Kenneth J. Nemec, Jr.
Richard J. Nogal
John T. O'Connell*
James E. Olguin
Diana K. Pecen
Donald S. Rothschild
Anne M. Skrodzki
Richard J. Skrodzki
Sara L. Spittler
Stephen P. Walsh

Alison J. Wetzel
Francis J. Wirtz*

Thomas P. Russian
(1946 - 2015)

*Of Counsel

**Also Admitted in California

***Also Admitted in Texas

January 24, 2017

Director of Processing
Illinois Commerce Commission
Transportation Division
527 East Capitol Avenue
Springfield, IL 62794-9280

Re: Rendered Services, Inc., RTV-R 74 Sub 15

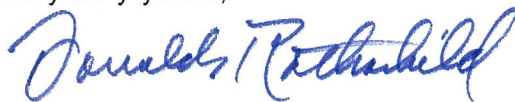
To Whom It May Concern:

Enclosed please find an original and two (2) copies of the following documents for filing with your office:

Rendered Services, Inc.'s Reply in Support of its Motion to Compel

If you have any questions or concerns, please do not hesitate to contact me.

Very truly yours,



Donald S. Rothschild

DSR:dcf

Enclosure

cc: The Honorable Latrice Kirkland-Montaque
Benjamin Barr



**BEFORE THE
ILLINOIS COMMERCE COMMISSION**

In Re:)
RENDERED SERVICES, INC.,)
Respondent.) Docket No. RTV-R 74 Sub 15
81440 MC

NOTICE OF FILING

To: <u>Via First Class Mail</u>	<u>Via Facsimile Transmission</u>
David Lazarides	The Honorable Latrice Kirkland-Montaque
Director of Processing	Chief Administrative Law Judge
Illinois Commerce Commission	Illinois Commerce Commission
Transportation Division	160 N. LaSalle Street, Suite C-800
527 East Capitol Avenue	Chicago, IL 60601
Springfield, IL 62701	


Via Facsimile Transmission
Benjamin Barr
Special Assistant Attorney General
Illinois Commerce Commission
160 N. LaSalle Street, Suite C-800
Chicago, IL 60601

PLEASE TAKE NOTICE that on the 24th day of January, 2017, I caused to be filed with the Illinois Commerce Commission copies of the following documents which are attached and served upon you:

Rendered Services, Inc.'s Reply in Support of its Motion to Compel

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that he caused copies of the aforementioned document to be served upon all parties listed of record via facsimile transmission and by placing same in a postage prepaid envelope and depositing in the U.S. Mail at Burr Ridge, Illinois on this 24th day of January, 2017 before 5:00 p.m.



Donald S. Rothschild
Brian M. Dougherty
Goldstine, Skrodzki, Russian,
Nemec and Hoff, Ltd.
835 McClintock Drive, Second Floor
Burr Ridge, Illinois 60527-0860
(630) 655-6000

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

In Re:)
)
RENDERED SERVICES, INC.,) RTV-R-74 Sub 15
) 81440 MC
Respondent.)

RENDERED SERVICES, INC.’S REPLY IN SUPPORT OF ITS MOTION TO COMPEL

Respondent, RENDERED SERVICES, INC. (“RENDERED”), by its attorneys, Donald S. Rothschild and Brian M. Dougherty, pursuant to 83 Ill. Adm. Code § 200.370, submits its Reply in Support of Its Motion to Compel, stating as follows:

Staff’s Interrogatory Answer No. 4

RENDERED’S Interrogatory Request No. 4 is as follows:

List with particularity any *remedial or disciplinary action* by the Commission (including the Illinois Commerce Commission Police) from August 9, 2012 to the present as a result of any Investigator’s conduct in the course of performing his/her duties, with names, dates and issues involved described and provided. (emphasis added)

Relying on *Fabiano v. City of Palos Hills*, Staff argues that this request is irrelevant and tantamount to a fishing expedition. (Response ¶ 3). In *Fabiano*, a day care center operator was prosecuted for sexually abusing day care children and was subsequently acquitted. She filed a malicious prosecution claim against two police officers who were involved in her case. Prior to trial, the plaintiff requested that the officers produce their personnel files. The trial court denied the request. On appeal, the court noted that the plaintiff offered no argument as to relevance but instead “suggested” that the files “may” contain evidence relating to defendants’ credibility or suggesting a pattern of misconduct. *Fabiano*, 336 Ill. App. 3d at 659. The appellate court affirmed the trial court’s ruling, noting that the discovery requests were merely a “fishing expedition” conducted in the hopes of finding something relevant. *Id.* at 658–59.

Contrary to *Fabiano*, Rendered's interrogatory number 4 *specifically* asks for disciplinary information relative to officers that were involved in issuing Rendered citations. Such information is relevant to the level of competency of the officers and whether those officers received any discipline for issuing Rendered citations that may have been factually or legally unresponsive. See also *Amcore Inv. Grp. v. Colonial Acres Healthcare Ctr., Inc.*, No. 3-10-0700, 2011 WL 10470792, at *4 (Ill. App. Ct. Apr. 14, 2011) (affirming trial court's granting of plaintiff's motion to compel turnover of personnel files) (unpub.). Thus, unlike *Fabiano* where the plaintiff offered nothing but speculation, Rendered's interrogatory number 4 is narrowly tailored to the discovery of relevant employment information of ICC officers.

Staff argues that Rendered's request is better suited for a contested citation hearing. (Response ¶ 5). But 625 ILCS 5/18a-401 gives the ICC broad discretion to look into a relocater's practices, and one of the factual predicates to those practices is the validity of the administrative citations and their ultimate disposition. Using the sheer volume of citations as being indicative of guilt is no different than using one's arrest record as evidence of criminal behavior without going behind the scenes to look at the underlying conduct of the accused. Rendered has the right to probe behind the possible motives and competency of the officers issuing the citations, just like the accused in a criminal case has the right to attack an arresting officer's credibility. *People v. Arze*, 2016 IL App (1st) 131959, ¶ 113, 52 N.E.3d 746, 769, *appeal denied*, 60 N.E.3d 875 (Ill. 2016) ("A defendant has a federal and state constitutional right to confront witnesses against him. This right includes cross-examining witnesses to show any interest, bias, prejudice or motive to testify falsely.") (citations omitted).

Staff's Supplemental Interrogatory Answer No. 1

No hearing can take place until Staff answers supplemental interrogatory number 1. At some point, Staff must provide an answer and Staff has not indicated when that will occur. Surely, Staff knows the identity of some of its witnesses and offers no reason why those persons cannot be disclosed now.

Staff's Supplemental Interrogatory Answers No. 3

Supplemental Interrogatory Answer number 3 is relevant for the same reasons as Rendered's Interrogatory No. 4. This request is reasonably calculated to discover specific training that may have arisen as a result of the issuance of administrative citations to relocators such as Rendered. For instance, if ICC officers were issuing citations based on an erroneous interpretation of the law or regulations, which then necessitated further training, this is indeed relevant to the validity of a citation that may have been issued. Additionally, if a new regulation came into effect, officers may have receiving training on that particular regulation that the officers were now required to enforce. These are but a few instances of how training may be relevant.

The ICC issued a press release that provided the number of citations issued against Rendered which gives the public the impression that Rendered indeed violated the law. This, of course, is inaccurate because the citations were just allegations that had yet to be proven. If the officers charged with issuing citations acted below standards of minimal competency, this is indeed relevant to any and all of the citations issued by any such officer.

Attorney-Client and Work Product Privileges

Staff's argument that "the modern view is that the privilege is a two-way street, protecting both the client's communications to the attorney and the attorney's advice to the

client” (citing *People v. Radojic*, 2013 IL 114197, ¶ 40, 998 N.E.2d 1212, 1221), was merely *dicta* by the Illinois Supreme Court. *Exelon Corp. v. Dep't of Revenue*, 234 Ill. 2d 266, 277 (2009) (“*Obiter dictum* refers to a remark or expression of opinion that a court uttered as an aside, and is generally not binding authority or precedent within the *stare decisis* rule.”). The issue in *Radojic* was the application of the crime-fraud exception to the attorney-client privilege and not whether the *attorney’s* communications to the client were protected. Further, *Radojic* cited two Illinois appellate court cases for support, one of which was relying on a federal case and the other case addressed the crime-fraud exception. *Id.* ¶ 40.

This hardly supports the view that the Illinois Supreme Court has changed the elements of the attorney-client privilege. To the contrary, in *Dalen v. Ozite Corp.*, 230 Ill. App. 3d 18 (2d Dist. 1992), the appellate court, in addressing the attorney-client privilege under facts similar to the present case, held that “[s]ince the memorandum at hand was not written *by* Ozite, the client, but instead was written *for* Ozite by one of its attorneys, the attorney-client privilege does not apply.” *Id.* at 27 (emphasis in original). A black-letter element of the attorney-client privilege is a communication “by the client”. *Id.* at 26, quoting *People v. Adam*, 51 Ill.2d 46, 48 (1972). In *Adam*, an attorney refused to reveal communications with Walker (his client) was held in contempt. The underlying case involved an obstruction of justice charge concerning Walker’s testimony before the grand jury. Walker testified before the grand jury “that she had heard of defendant and that she called his office and spoke with him, arranged to meet him, and retained him. *Adam*, 51 Ill.2d at 49. The appellate court held that “[n]one of these matters are privileged because the privilege applies only to communications made by Miss Walker to defendant.” *Id.* at 49. *Adam’s* has not been overruled and remains good law.

Adam's reasoning makes perfect sense since one of the elements of the privilege is communications from the client to the attorney and the privilege is construed narrowly. *Radojcic*, 2013 IL 114197, ¶ 41. If the privilege encompasses everything an attorney tells the client that does not otherwise reveal client confidences, the privilege is necessarily broadened beyond its narrow scope, thus delimiting the search for the truth. For instance, an attorney may engage in simple fact gathering that does not reveal prior client communications.

Because the privilege log does not clearly describe the nature of the communication, an *in camera* inspection is warranted. *Johnson v. Frontier Ford, Inc.*, 68 Ill. App. 3d 315, 321 (2d Dist. 1979) (“In the absence of other sufficient proof of the claimed privilege the *in camera* examination of the disputed documents ordered by the trial court appears to us to be a reasonable effort by it to find a basis to protect the privilege if it existed, and to prevent its application where it might not exist.”).

Staff next argues that the waiver rule does not apply because the ICC “has not made the subject of either communication an issue in this case.” (Response ¶ 13). This remains to be seen, which is why the ALJ needs to conduct an *in camera* inspection of the two communications to see how they relate to the fitness hearing. *Johnson*, 68 Ill. App. 3d at 321. A ruling requiring disclosure of the two communications would not open a Pandora’s Box to *all* communications. Someone at the ICC initiated an investigation into Rendered’s citations, which prompted the press release. “An implied waiver may be found when the client asserts claims or defenses that put his or her communications with the legal advisor at issue in the litigation.” *Ctr. Partners, Ltd. v. Growth Head GP, LLC*, 2012 IL 113107, ¶ 66. If the ICC is asserting that the volume of citations is part of Rendered’s unfitness, then communications on the subject may have been waived. If an attorney reviewed Rendered’s citations and communicated those facts

to the ICC, it is doubtful that the attorney was acting as a legal adviser as opposed to an investigator. Rendered suspects that there were many oral communications between ICC's attorneys and other ICC representatives which Rendered is not seeking discovery; Staff's fears are unfounded.

Staff argues that item 1 on the privilege log is work product. (Response ¶ 14). Staff contends that the document was made in preparation of litigation and contains mental impressions of Staff, but does not offer any factual support for this statement. (*Id.*). Item 1 should be made available for an *in camera* inspection. *Johnson*, 68 Ill. App. 3d at 321.

On items 2 through 11 of the privilege log, Staff has still not supplied any affidavits from the employees named in the privilege log in order to determine whether they are part of the control group. Staff should be required to do this before any determination is made on this issue.

WHEREFORE, Respondent, RENDERED SERVICES, INC., respectfully requests that the ALJ grant this Motion to Compel and order the Staff of the Illinois Commerce Commission to:

- A. answer Rule 213 Request No. 4;
- B. amend its answers to request numbers 1 and 3 contained in its Supplemental Interrogatory Answers;
- C. produce the first and fifth items contained on the privilege log, provided that item one be produced to the ALJ for an *in camera* inspection to determine the applicability of the attorney work-product privilege;
- D. produce affidavits from the employees identified on items two through eleven of the privilege log; and
- E. award all other relief deemed equitable and just.

Respectfully submitted,

RENDERED SERVICES, INC.,

By: 
One of Its Attorneys

Donald S. Rothschild
Brian M. Dougherty
Goldstine, Skrodzki, Russian,
Nemec and Hoff, Ltd.
835 McClintock Drive
Second Floor
Burr Ridge, IL 60527
(630) 655-6000