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COMMONWEALTH OF MASSACHUSETTS

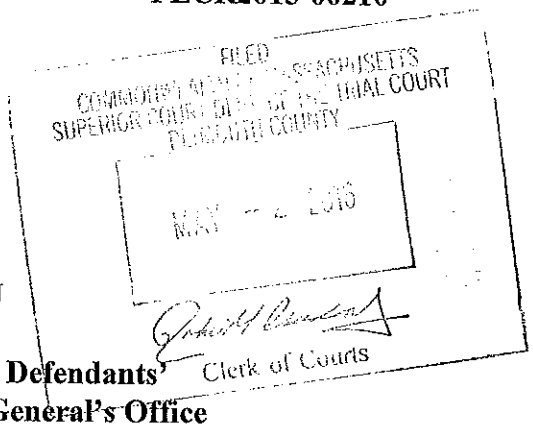
PLYMOUTH, ss.

SUPERIOR COURT
PLCR2015-00208
PLCR2015-00209
PLCR2015-00210

COMMONWEALTH

vs.

DEREK HOWARD
JOHN D. RAPOSO
GEORGE A. BILLADEAU



Memorandum of Decision and Order on Defendants' Motion for Rule 17 Subpoena to Attorney General's Office Seeking "Case Evaluations"

Defendants Derek Howard, John Raposo, and George Billadeau each are charged with one count of manslaughter in violation of G.L. c. 265, § 13 and one count of violation of civil rights pursuant to G.L. c. 265, § 37 in connection with the death of Joshua Messier. This matter is before the court on the defendants' Motion for a Rule 17 Subpoena to Attorney General's Office Seeking "Case Evaluations." As the title of the defendants' motion suggests, they couched their requests in terms of Mass. R. Crim. P. 17(a)(2) and *Commonwealth* v. *Lampron,* 441 Mass. 265 (2004), under which a criminal defendant may, before trial, subpoena documents from a third party. In its written opposition, the Attorney General's Office maintained that defendants had failed to meet the requirements of *Lampron,* 411 Mass. at 269-270. In particular, the Attorney General's Office questioned whether the defendants had satisfied the first requirement of *Lampron,* a showing that the documents sought were relevant and admissible.

During the hearing on their motion, the defendants conceded that Rule 17 does not provide an appropriate framework for their motion and asked this Court to order the discovery pursuant to

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its inherent authority, primarily arguing that they were entitled to documents generated on their behalf while represented by the Attorney General's Office in a civil suit. Possibly the underlying civil case, or a separate civil action, might be a more appropriate vehicle to raise such issues. However, all parties agree that the instant criminal case provides an efficient and appropriate forum to resolve the matter. Therefore, in consideration of the arguments of the parties, and after in camera review of the documents at issue, the motion for discovery is **allowed** for the reasons discussed below.

Background

At the time of the events giving rise to the indictments, defendants Howard, Raposo, and Billadeau were correctional officers at Bridgewater State Hospital ("BSH"). Messier was a 23 year old paranoid schizophrenic who initially was a pre-trial detainee committed to BSH by the Dudley District Court for a determination of criminal responsibility with respect to an assault charge. At the time of Messier's death, BSH was in the process of filing a civil commitment petition against him pursuant to G.L. c. 123, § 18(a) on the ground that he was in need of hospitalization due to his mental illness.

On May 4, 2009, Messier assaulted a correctional officer at BSH, resulting in a struggle by four officers to restrain him. Messier continued to fight the officers as they escorted him to the Intensive Treatment Unit, where a nurse authorized the use of four point restraints. Messier violently struggled as seven officers, including Howard, Raposo and Billadeau, attempted to restrain him. Howard and Raposo exerted their body weight against Messier's back in an effort to control him, causing Messier's upper body to bend forward and touch his outstretched legs. The officers eventually managed to get him into four point restraints. However, five minutes later, a nurse was

unable to obtain Messier's blood pressure and efforts to resuscitate him were unsuccessful. He was declared dead at Brockton Hospital. The autopsy report lists his cause of death as "cardiopulmonary arrest during physical restraint, with blunt impact to head and compression of chest, while in an agitated state."

In 2012, Messier's estate filed a wrongful death and civil rights violation lawsuit against the Commonwealth and nine individually named correctional officers, including Howard, Raposo and Billadeau ("the Officers"). The Officers requested and received representation by the Commonwealth pursuant to G.L. c. 258, the Tort Claims Act. They were represented by Assistant Attorney General Mark Sutliff, who also represented the Commonwealth and BSH. After depositions were taken, the Attorney General sought to settle the case. On September 27, 2013, AAG Sutliff circulated a memorandum to the General Counsel of the Department of Correction ("the Department"), the General Counsel of the Executive Office of Public Safety, and other attorneys at the Attorney General's Office analyzing the claims in the lawsuit, recommending settlement, and requesting settlement authority of $500,000 ("the Internal Case Appraisal"). The parties were scheduled to proceed to mediation. On October 2, 2013, AAG Sutliff submitted a memorandum to the mediator, setting forth the mediation position of the Commonwealth, BSH and the Officers ("the Mediation Memo"). The wrongful death lawsuit eventually ended in a $3 million settlement. However, by February 4, 2014, the circumstances of Messier's death had provoked further inquiry from Governor Patrick and others. In March of 2014, the Attorney General withdrew its representation of the Officers. Thereafter, a Special Assistant Attorney General, Martin Murphy, was appointed to investigate the case. Following an inquest, a Suffolk County Grand Jury indicted the Officers on April 30, 2015 and the indictments were transferred to Plymouth County.

Discussion

The Officers seek an order that the Attorney General produce the case files prepared and maintained by AAG Sutliff during his representation of them in the wrongful death lawsuit. Specifically, the Officers seek discovery of the Internal Case Appraisal and the Mediation Memo as necessary for their defense in the criminal cases.[1] Their theory is that these documents may reveal a conflict of interest under Rule 1.7 of the Rules of Professional Conduct or a breach of confidential client information in violation of Rule 1.6 that could be used to support a motion to dismiss the indictments for prosecutorial misconduct. The Attorney General takes the position that these documents are confidential, constitute work product, were created for internal use only, and are not part of the Officers' client files to which they are entitled. Prior to ruling on this motion, this Court ordered the production of the Internal Case Appraisal and the Mediation Memo for in camera review.

Potential Ethical Violation

The Officers theorize that discovery of the documents at issue is necessary to their defense because the documents may reveal evidence of an ethical violation that would furnish grounds to dismiss the indictments. Rule of Professional Conduct 1.6 provides in relevant part: "A lawyer shall not reveal confidential information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the

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[1]The Officers also sought production of an April 15, 2014 Settlement Approval Request from AAG Sutliff to General Counsel for the Office for Administration and Finance. However, Howard concedes in his Supplemental Memo that he is not entitled to this document as part of his case file because the Attorney General was no longer representing the Officers at the time the document was created and circulated.

representation . . ." Mass. R. Prof. C. 1.6(a).[2] In addition, Rule 1.9(c) provides:

> A lawyer who has formerly represented a client in a matter . . . shall not thereafter, unless the former client consents after consultation:
>
> (1) use confidential information relating to the representation to the disadvantage of the former client, to the lawyer's advantage, or to the advantage of a third person, except as Rule 1.6, Rule 3.3, or Rule 4.1[3] would permit or require with respect to a client; or
>
> (2) reveal confidential information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

Mass. R. Prof. C. 1.9(c). The Officers cite Rule 1.7, which relates to conflicts of interest and prevents a lawyer from representing a client if that representation would be directly adverse to another client or would be materially impaired by the lawyer's responsibilities to another client. See Mass. R. Prof. C. 1.7. A conflict of interest on the part of a prosecutor may arise when the prosecutor formerly was employed by the defendant. *Commonwealth* v. *Colon*, 408 Mass. 419, 431 (1990); *Pisa* v. *Commonwealth*, 378 Mass. 724, 729 (1979). Here, there is no actual conflict of interest because the special prosecutor never represented the Officers in the wrongful death suit and is presumably independent of the Attorney General. Cf. *Feeney* v. *Commonwealth*, 373 Mass. 359, 366-268 (1977) (because AG represents individual state officers and agencies but also must act in public interest, AG not constrained by parameters of traditional attorney-client relationship and may appeal action against state officers even where that appeal conflicts with desire of officers as clients);

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[2]This rule is subject to four narrow exceptions, none of which apply here. See Mass. R. Prof. C. 1.6(b).

[3]Rule 1.6 protects the confidentiality of a client's confidential information, Rule 3.3 requires candor toward the tribunal, and Rule 4.1 requires truthfulness in statements to third parties.

State v. *Klattenhoff*, 801 P.2d 548, 552 (Haw. 1990) (AG can represent state employee in civil matters while investigating and prosecuting him in criminal matters as long as such representation does not prejudice employee in criminal matter). Nonetheless, if the Attorney General used confidential information obtained when representing the Officers in the wrongful death suit to decide to prosecute them or shared that information with those investigating and prosecuting the criminal matter, it would implicate Rule 1.6(a) and Rule 1.9(c).

Even if the documents at issue were to reveal a breach of confidentiality, the Officers would still face an uphill battle to get the indictments dismissed because of prosecutorial misconduct. See *Commonwealth* v. *Gardner*, 467 Mass. 363, 368-369 (2014) (threshold for obtaining dismissal of indictment for egregious prosecutorial misconduct is high); *Commonwealth* v. *Washington W.*, 462 Mass. 204, 215 (2012) (dismissal of indictment is warranted only where prosecutorial misconduct causes such irremediable prejudice to defendant that fair trial of indictment is no longer possible); *Commonwealth* v. *Hine*, 393 Mass. 564, 572 (1984) (dismissal is proper prophylactic remedy for prosecutorial misconduct only in exceptional circumstances). However, the improbability of their success does not vitiate the need to determine whether they are entitled to the requested discovery.

Former Client's Right to Attorney's Case File

The Officers contend that they are entitled to receive the Internal Case Appraisal and Mediation Memo as part of their client case file. The Attorney General argues, however, that those documents are privileged as work product and are not part of the file to which a former client is entitled. This issue appears to be one of first impression in Massachusetts. However, the majority view among courts and State legal ethics advisory bodies is that upon termination of the attorney-

client relationship, absent good cause for withholding documents, the client has presumptive full access to the attorney's entire file on a represented matter. See *Iowa Supreme Ct. Atty. Disciplinary Bd.* v. *Gottschalk*, 729 N.W.2d 812, 820 (Iowa 2007); *Swift, Currie, McGhee & Hiers* v. *Henry*, 276 Ga. 571, 572-573 (Ga. 2003); *Averill* v. *Cox*, 761 A.2d 1083, 1092 (N.H. 2001); *Sage Realty Corp.* v. *Proskauer Rose*, 689 N.E.2d 879, 881 (N.Y. 1997); *Maleski by Chronister* v. *Corporate Lite Ins. Co.*, 641 A.2d 1, 6 (Pa. Cmwth. 1994); *S.E.C.* v. *McNaul*, 277 F.R.D. 439, 444-445 (D. Kan. 2011); *Resolution Trust Corp.* v. *H-----, P.C.*, 128 F.R.D. 647, 648-649 (N.D. Tex. 1989). See also Restatement (Third) of Law Governing Lawyers § 46 (2000).[4] Courts adopting the "entire file" approach have refused to recognize a property right of the attorney in the client file that is superior to that of the client. *Sage Realty Corp.* v. *Proskauer Rose*, 689 N.E.2d at 882. See also *Girl Scouts - Western Oklahoma, Inc.* v. *Barringer-Thomson*, 252 P.3d 844, 849 (Okla. 2011); *Swift, Currie, McGhee & Hiers* v. *Henry*, 276 Ga. at 572-573 (client, not attorney, is considered to be true "owner" of client file).

This expansive view of the client's right to the contents of the attorney's file accords with the lawyer's ethical obligations of openness and conscientious disclosure to a client. *Sage Realty Corp.* v. *Proskauer Rose*, 689 N.E.2d at 882. That obligation "is not furthered by the attorney's ability to cull from the client's file documents generated through fully compensated representation, which the attorney unilaterally decides the client has no right to see . . ." *Sage Realty Corp.* v.

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[4]A minority of jurisdictions have concluded that the "end product" of the attorney's services belongs to the client, but the "work product" leading to the creation of the end product, such as internal legal memoranda and preliminary drafts, remains the attorney's property. See *Sage Realty Corp.* v. *Proskauer Rose*, 689 N.E.2d at 881-882; *In re ANR Advance Transp. Co., Inc.*, 302 B.R. 607, 614 (E.D. Wisc. 2003).

Proskauer Rose, 689 N.E.2d at 882-883. See also *Iowa Supreme Ct. Atty. Disciplinary Bd.* v. *Gottschalk*, 729 N.W.2d at 820 (attorney cannot unilaterally refuse to provide certain documents created in course of representation).

This "entire file" approach is consistent with Mass. R. Prof. C. 1.16(e), which provides that when a client requests his file:

> (4) if the lawyer and the client have not entered into a contingent fee agreement, the client is entitled only to that portion of the lawyer's work product (as defined in subparagraph (6) below) for which the client has paid.
>
> (5) if the lawyer and the client have entered into a contingent fee agreement, the lawyer must provide copies of the lawyer's work product (as defined in subparagraph (6) below).
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> (6) for purposes of this paragraph (e), work product shall consist of documents and tangible things prepared in the course of the representation of the client by the lawyer . . . Examples of work product include without limitation, legal research, records of witness interviews, reports of negotiations, and correspondence.

Mass. R. Prof. C. 1.16(e). Subsection e departs from the Model Rule and attempts to clarify a former client's right of access to his case file. See Mass. R. Prof. C. 1.16, 2015 Comment [10]. Here, the Attorney General represented the Officers as public employees pursuant to the Tort Claims Act, and thus, this is not a case where a contingent fee arrangement was possible, nor is it one where the client paid anything for any of the lawyer's services. See G.L. c. 258, § 6 ("The public attorney shall defend all civil actions brought against a public employer or public employee of the commonwealth pursuant to this Chapter."); G.L. c. 258, § 1 ("In the case of the Commonwealth, [public attorney] shall be the attorney general . . ."); G.L. c. 258, § 2 (public attorney shall defend public employee acting in scope of employment as long as employee provides reasonable cooperation; if there is conflict of interest, Commonwealth shall reimburse employee for reasonable

defense costs). However, Rule 1.16 makes clear that a former client is entitled to access to work product in his case file, although the attorney may withhold work product for which fees are still owed. See Constance Vecchione, "The Ex-Files" (available at www.mass.gov/obcbbo/articles.htm). This Court concludes that, consistent with Mass. R. Prof. C. 1.16(e), general principles of fiduciary duty,[5] and the majority "entire file" approach, the Officers presumptively are entitled to the Internal Case Appraisal and Mediation Memo as part of their client case file.

The Attorney General's Objections

The Attorney General contends that the Internal Case Appraisal and Mediation Memo are protected from disclosure by the work product doctrine, the attorney-client privilege, and the mediation privilege. Under the "entire file" approach, an attorney may refuse to give the former client documents relating to representation if there is a substantial ground for the refusal. Good cause for non-production includes that disclosure would violate a duty of non-disclosure owed to a third party or otherwise imposed by law. See Restatement (Third) of Law Governing Lawyers § 46, cmt. c; *Sage Realty Corp.* v. *Proskauer Rose*, 689 N.E.2d at 883. In addition, the Attorney General contends that the documents at issue are internal review documents that need not be disclosed under the "entire file" approach.

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[5]See, e.g., *Berman* v. *Coakley*, 243 Mass. 348, 354-355 (1923) (attorney-client relationship is highly fiduciary in nature and attorney owes client utmost honesty and fidelity to client's best interests).

Work Product Doctrine

The Attorney General argues that the Internal Case Appraisal and Mediation Memo are protected by the work product doctrine. That doctrine protects an attorney's written materials and mental impressions, opinions, and legal theories, establishing a zone of privacy for strategic litigation planning to prevent one party from piggybacking on the adversary's preparation. *Commissioner of Revenue* v. *Comcast Corp.*, 453 Mass. 293, 312-314 (2009); *Commonwealth* v. *Fall River Motor Sales, Inc.*, 409 Mass. 302, 308 (1991). However, those jurisdictions that follow the majority "entire file" approach reject any assertion of work product privilege against the former client. See *Swift, Currie, McGhee & Hiers* v. *Henry*, 276 Ga. at 573; *S.E.C.* v. *McNaul*, 277 F.R.D. at 445; *Resolution Trust Corp.* v. *H-----, P.C.*, 128 F.R.D. at 649. See also *Polin* v. *Wisehart & Koch*, 2002 WL 1033807 at *1 (S.D.N.Y.) (federal work product privilege cannot be invoked by attorney to withhold from former client work product created in representing that client). An attorney cannot assert the work product privilege against a former client seeking to obtain documents created during the course of the representation because the crux of the privilege is non-disclosure to one's adversary. See *Ashcroft & Gerel* v. *Shaw*, 728 A.2d 798, 814-815 (Md. App. 1999); *Spivey* v. *Zant*, 683 F.2d 881, 885 (5th Cir. 1982); *In re ANR Advance Transp. Co., Inc.*, 302 B.R. at 615-616. See also *In re Standard Fin. Mgmt. Corp.*, 79 B.R. 97, 98 (D. Mass. 1987) (noting that work product privilege is based on adversarial relationship and designed to protect client's rightful interests). This Court concludes that the rationale for the work product doctrine does not apply where, as here, a former client seeks documents in his case file.

Attorney-Client Privilege

The Attorney General also argues that the Internal Case Appraisal is protected by the attorney-client privilege, which shields from the view of third parties all confidential communications between a client and his attorney undertaken for the purpose of obtaining legal advice. See *DaRosa* v. *New Bedford*, 471 Mass. 446, 463 (2015); *Commissioner of Revenue* v. *Comcast Corp.*, 453 Mass. at 303.[6] The attorney-client privilege belongs to the client, not the attorney. *Suffolk Constr. Co., Inc.* v. *Division of Capital Asset Mgmt.*, 449 Mass. 444, 456 (2007). See also Mass. G. Evid. § 502(c) (2015) (attorney can claim privilege only on behalf of client). Moreover, the privilege does not apply to communications relevant to an issue of breach of duty between an attorney and client. Mass. G. Evid. § 502(d)(3) (2015). Thus, the Attorney General cannot assert the attorney-client privilege against the Officers with respect to their own communications.

Nonetheless, the Attorney General contends that the attorney-client privilege applies because the Internal Case Appraisal was addressed by AAG Sutliff to the General Counsel of the Department, the General Counsel of the Executive Office of Public Safety, other attorneys at the Attorney General's Office and the Office for Administration and Finance, seeking to obtain settlement authority for the wrongful death case. The Attorney General argues that the Officers cannot obtain communications between AAG Sutliff and counsel for co-defendant Department without a waiver from the Department. However, the Attorney General cites no authority for this proposition, and she bears the burden of demonstrating that the privilege applies. See *Clair* v. *Clair*, 464 Mass. 205, 214

[6] In producing the Internal Case Appraisal for in camera review, the Attorney General did not identify the specific statements or portions of the document she believes to be privileged.

(2013).

It is unclear whether a waiver is required here, given that this is not a case where a third party is seeking discovery of confidential communications, and there likely was substantial cooperation between AAG Sutliff for BSH and the Officers and counsel for the Department. Cf. Restatement (Third) of Law Governing Lawyers § 75 (2000); *Hanover Ins. Co.* v. *Rapo & Jepsen Ins. Serv., Inc.*, 449 Mass. 609, 613-617 (2007) (discussing joint defense and common interest doctrines). This Court's in camera review failed to discern any communications that are patently confidential and privileged as to the Department, nor has the Attorney General specifically identified such communications. In any event, it is this Court's view that under the circumstances of this case, which involve former clients' access to their files, the appropriate remedy would be to redact any confidential communications, not to withhold the documents from the Officers.

Mediation Privilege

The Attorney General next contends that the Mediation Memo is privileged pursuant to G.L. c. 233, 23C, which provides in relevant part:

> Any communication made in the course of and relating to the subject matter of any mediation and which is made in the presence of such mediator by any participant, mediator or other person shall be a confidential communication and not subject to disclosure in any judicial or administrative proceeding . . . .

G.L. c. 233, § 23C. There is a dearth of case law interpreting and applying this statute, but it has been deemed to confer blanket confidentiality without any exceptions. See *Leary* v. *Geoghan*, 2002 WL 32140255 at *2-3 (Mass. App. Ct.) (Cohen, J.) (statute precluded calling mediator to testify about whether parties had reached final agreement on all terms of settlement). See also *Logistics*

Info. Sys. v. *Braunstein*, 432 B.R. 1, 9 (D. Mass. 2010) (judge properly excluded creditor's settlement offer as privileged under G.L. c. 233, § 23C). This Court will assume, without deciding, that statements made in a written position paper are communications "made in the presence of such mediator."

Nonetheless, the mediation privilege can be waived. See *Bobrick* v. *United States Fid. & Guar. Trust*, 439 Mass. 652, 658 n. 11 (2003) (plaintiff waived mediation privilege by alleging unfair settlement practices against insurer). Waiver of the mediation privilege appears to be similar to an at issue waiver in the context of the attorney-client privilege. See *Clair* v. *Clair*, 464 Mass. at 219. Here, the Officers seek disclosure of the Mediation Memo to pursue a potential claim of misconduct by their former attorney. Cf. *Commonwealth* v. *Silva*, 455 Mass. 503, 529 (2009); *Commonwealth* v. *Brito*, 390 Mass. 112, 119 (1983) (attorney-client privilege is deemed waived when client assails attorney's conduct). This is not a case where one party to mediation seeks disclosure of confidential communications for use against the other party, or where an outside party seeks disclosure of confidential mediation communications. Rather, it is a case of former clients seeking production from their files of a document prepared by counsel on their behalf. Under these circumstances, this Court concludes that the Attorney General should not be permitted to invoke G.L. c. 233, § 23C to prevent disclosure of the Mediation Memo to the Officers as former clients.

Internal Review Exception

Finally, the Attorney General contends that under the "entire file" approach, the Internal Case Appraisal and Mediation Memo need not be disclosed because they fall into the narrow exception to production for internal review documents. When a former client seeks access to his case file, a

lawyer may refuse to disclose certain documents reasonably intended only for internal review where "[t]he need for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation warrants keeping such documents secret from the client involved." Restatement (Third) of Law Governing Lawyers § 46, cmt. c. Examples of such documents include a memorandum discussing issues such as which lawyer should be assigned to a case, whether a lawyer should withdraw due to client misconduct, and the firm's possible malpractice liability to the client. *Id.* See also *Sage Realty Corp.* v. *Proskauer Rose*, 689 N.E.2d at 883 (examples include documents containing firm's assessment of client or preliminary impressions of factual and legal issues presented by representation); *Lippe* v. *Bairnco Corp.*, 1998 WL 901741 at *2 (S.D.N.Y. 1998) (attorney notes, internal research memo, new matter memo, and conflicts of interest memo were protected from disclosure to client). Such documents are "recorded for the purpose of giving internal direction to facilitate performance of the legal services entailed in that representation" and are unlikely to be of significant value to the client or a successor attorney. *Id.* According to the Restatement, the court may order even these internal review documents to be produced when discovery rules so provide. See Restatement (Third) of Law Governing Lawyers § 46, cmt. c.

In camera review of the Internal Case Appraisal reveals that it does involve mere internal administrative matters or a preliminary assessment of the case. Nor was it not kept in house; rather, it was circulated to the General Counsel of the Department, the General Counsel of the Executive Office of Public Safety, and the Director of Administration and Finance in order to obtain settlement authority for the wrongful death suit. The Internal Case Appraisal is not the type of document as to which "[t]he need for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation warrants keeping such documents secret from the client

involved." Restatement (Third) of Law Governing Lawyers § 46, cmt. c. Similarly, the Mediation Memo is an advocacy document prepared in the course of representing the Officers in the wrongful death suit that was circulated to the mediator. It is not an internal review document but rather, falls within the range of typical work product to which the Officers, as former clients, are entitled.

For all these reasons, this Court concludes that the Officers are entitled to discovery of the Internal Case Appraisal and the Mediation Memo. However, acknowledging that this decision involves novel issues under Massachusetts law, this Court will stay its order for thirty days to enable the Attorney General to appeal if she so desires.

Order

The Attorney General shall promptly produce to Derek Howard, John Raposo, and George Billadeau the September 27, 2013 memo authored by Assistant Attorney General Sutliff, and the October 2, 2013 letter from Assistant Attorney General Sutliff to the mediator. On its own motion, the court **stays** this order for thirty days. If the Attorney General appeals this order, the materials submitted in camera shall be transmitted to such appellate court where the matter may be entered; if not, they shall be returned to the Attorney General.

Robert C. Cosgrove
Justice of the Superior Court

May 2, 2016