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7 *Attorney for Dan Fischer*

8 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
9 IN AND FOR THE COUNTY OF MOHAVE

10 STATE OF ARIZONA,  
11 Plaintiff,

12 v.

13 WARREN STEED JEFFS,  
14 Defendant.

Case No. CR-2007-743 & CR-2007-953

MEMORANDUM OF NON-PARTY  
WITNESS DAN FISCHER IN  
OPPOSITION TO DEFENDANT'S  
MOTION FOR DEPOSITION OF  
WITNESSES SAM BROWER AND DAN  
FISCHER

Hon. Steven F. Conn

15 Third-party witness Dan Fischer, by way of a special and limited appearance, through the  
16 undersigned counsel, hereby respectfully submits his memorandum in opposition to defendant's  
17 motion to order Dan Fischer to be deposed under oath pursuant to Rule 15.3 of the Arizona Rules  
18 of Criminal Procedure.

19 INTRODUCTION

20 Without proffering any evidentiary support whatsoever, Warren Jeffs claims that Dr. Dan  
21 Fischer, a Utah resident who is not listed as a witness in this criminal proceeding, has a personal  
22 vendetta against him and the FLDS Church and has conspired with Utah private investigator Sam  
23 Brower, the Utah law firm of Hoole & King and other enemies of the Church to financially co-opt  
24 various ex-FLDS members and encourage them to become false accusers against Mr. Jeffs in  
25 Arizona.<sup>1</sup>

26 <sup>1</sup> Warren Jeffs "prefatory note" and his assertion that the Diversity Foundation is "primarily a tax avoidance scheme"  
27 (Jeff's memo at page 6) is nothing more than a reckless, unsupported and gratuitous attack on the Diversity  
28 Foundation and would be defamatory absent the privilege that protects in-court statements. Diversity is a legitimate  
charitable organization which has no first hand, personal knowledge related to the guilt or innocence of Mr. Jeffs.  
Diversity's status and legal structure is completely irrelevant to the criminal prosecution of Mr. Jeffs and should be  
ignored by the court and stricken from record.

1 Contrary to the claims of Mr. Jeffs in his motion papers, Dr. Fischer has not hidden the  
2 financial and other support he has provided to many ex-FLDS members. On the contrary,  
3 Dr. Fischer consented to an interview on the record in which he freely and fully testified about the  
4 support he and the Diversity Foundation have provided to numerous ex-FLDS members and  
5 answered extensive questions about his relationship and communications with said persons.

6 What few questions Dr. Fischer declined to answer in his interview related to  
7 communications he had in the context of acting as a designated client representative for certain  
8 ex-FLDS individuals who are parties to civil litigation against Mr. Jeffs in the State of Utah.  
9 Warren Jeffs now seeks to invade the privileged communications between the law firm of Hoole  
10 & King and their clients not by deposing the clients or the lawyers, but by deposing the client's  
11 designated representative ... Dr. Fischer. This end run around the attorney-client privilege is  
12 specifically proscribed by well established common law and by Utah Rule of Evidence *Rule 504*  
13 *(a)* which is the controlling law on this issue and which classifies as privileged and confidential  
14 those communications "made for the purpose of facilitating the rendition of professional legal  
15 services to the client between the client and the client's representatives, lawyers, lawyer's  
16 representatives, and lawyers representing others in matters of common interest... in any  
17 combination (emphasis added)."<sup>2</sup>

18 As demonstrated below, defendant's motion to depose Dr. Fischer should be denied for  
19 two independent reasons. First, defendant has failed to satisfy the conditions of Rule 15.3 of the  
20 Arizona Rules of Criminal Procedure. Second, defendant seeks to impermissibly invade the  
21 attorney-client privilege which protects the communications between Dr. Fischer and Hoole &  
22 King (and its private investigator) and between Dr. Fischer and Hoole & King's clients.

23 An understanding of the parties involved and their relationship with one another is  
24 necessary to properly analyze defendant's motion.  
25  
26

27  
28 <sup>2</sup> Utah Rule of Evidence 504 (a) is consistent with U.S. Supreme Court standard 503 which reflects federal common law regarding attorney-client communications.

1 STATEMENT OF RELEVANT FACTS

2 1. THE DIVERSITY FOUNDATION

3 The Diversity Foundation ("Diversity") was organized as a Utah non-profit corporation in  
4 2000<sup>3</sup>, years before Warren Jeffs was first criminally indicted on charges of sexual misconduct  
5 involving minors.<sup>4</sup>

6 Diversity was granted exempt status by the Internal Revenue Service under IRC §501(c)  
7 (3) in June, 2001 and operates as a private foundation.<sup>5</sup>

8 Diversity's purposes include, among other things, providing humanitarian assistance to  
9 those who have been the victim of domestic violence and abuse, particularly women and children  
10 who are extracting themselves from polygamist relationships on the Utah/Arizona border and  
11 elsewhere. Women and children in polygamist relationships often have no independent means of  
12 financial support, no formal education and no outside resources and often feel forced to remain in  
13 abusive relationships. Diversity assists those women and children who have fled (or been  
14 expelled from) polygamist relationships and who are attempting to transition back into regular  
15 society. Diversity provides the essential resources to help them live independently, including  
16 food, clothing, housing, transportation, education and medical assistance, including psychological  
17 counseling. All told, Diversity has assisted more than 230 women and children who have been  
18 expelled from or who have voluntarily left the FLDS community, including paying for the  
19 education and integration into society of dozens of boys.

20 The IRS has specifically reviewed the aforementioned activities and has found them  
21 consistent with Diversity's purposes and exempt status.<sup>6</sup>

22 \_\_\_\_\_  
23 <sup>3</sup> The organizational documents are available for public inspection at the Utah State Department of Commerce  
([commerce.state.ut.us](http://commerce.state.ut.us))

24 <sup>4</sup> In June of 2005, Warren Jeffs was indicted in Arizona on charges of sexual misconduct with a minor. The charges  
25 were ultimately dismissed when the complaining witness/victim ultimately refused to cooperate and testify against  
26 the charged defendants. In September of 2007, Warren Jeffs was tried and found guilty of two counts of rape as an  
accomplice in the State of Utah. In July of 2008, Warren Jeffs was indicted in the State of Texas on Felony sexual  
assault charges relating to relationships with underage girls. This charge is still pending.

27 <sup>5</sup> See <http://www.IRS.Gov/charities/charitable/article> for a general discussion of private foundations and their  
operation and reporting obligations.

28 <sup>6</sup> In January, 2004, Diversity tax counsel (not Hoole & King) wrote to IRS and described the charitable activities  
being expended on behalf of the ex-FLDS community and specifically asked the IRS to "confirm" that the activities

1 While a significant percentage of Diversity's financial support over the years has come  
2 from donations from a single company (Ultradent Products, Inc.), it has received donations from  
3 hundreds of different contributors, both individuals and companies.<sup>7</sup>

4 Diversity makes annual public filings with the Internal Revenue Service disclosing  
5 various financial information, including expenditures and receipts. Diversity has a full time  
6 Executive Director and is operated by a three person Board of Trustees and a larger advisory  
7 board.

8 2. DR. DAN FISCHER

9 Dr. Dan Fischer is a successful dentist and a founder of Ultradent Products, Inc. a dental  
10 supply and equipment manufacturer. Dr. Fischer is a 40% equity owner of Ultradent and a  
11 director of The Diversity Foundation.<sup>8</sup>

12 Dr. Fischer is a former polygamist and member of the FLDS Church.<sup>9</sup> He left the Church  
13 in 1996 when he became concerned about the abusive practices of the Church, particularly with  
14 respect to assigned marriages. At the time of Dr. Fischer's departure from the FLDS Church, the  
15 Church was headed by Rulon Jeffs, the father of Warren Jeffs. Dr. Fischer has had no contact  
16 with Warren Jeffs since 1996.

17 Dr. Fischer is considered an apostate within the FLDS community and he has been an  
18 outspoken critic of the abusive practices of the FLDS Church.<sup>10</sup> Because of his work with  
19 Diversity and his own personal statements and actions, Dr. Fischer is well known within the  
20

21  
22 described were for exempt purposes and would not adversely affect Diversity's tax exempt status. In March, 2004  
23 the IRS specifically advised that the activities described did not adversely affect Diversity's exempt status and that  
24 the exemption letter issued to Diversity continued in effect.

25 <sup>7</sup> Diversity Foundation's annual form 990-PF filings providing this information was voluntarily provided to counsel  
26 for Warren Jeffs in advance of the personal interview of Dr. Fischer.

27 <sup>8</sup> Fischer Interview, page 20

28 <sup>9</sup> Dr. Fischer at one time had three wives all married to him "by appointment" by the FLDS Church leadership. Dr.  
Fischer was legally married to his second wife 35 years ago and is monogamous.

<sup>10</sup> As but one example, Dr. Fischer gave testimony in July of 2008 before the United States Judiciary Committee  
which was holding hearings on polygamist practices within the FLDS Church. See also, various newspaper reports  
in the *Salt Lake Tribune* and *Deseret News* quoting Dr. Fischer about the abusive practices of the FLDS Church,  
particularly relating to child abuse.

1 ex-FLDS community as a person who can be trusted and who will assist persons who have left  
2 the FLDS Church in their transition to regular society.

3 Over the years, Dr. Fischer has spent tens of thousands of dollars of his personal funds  
4 supplementing the support provided by The Diversity Foundation.

5 Dr. Fischer is not listed on the witness lists in this case by either the state or the defendant.

6 3. THE LAW FIRM OF HOOLE & KING

7 Hoole & King is a Salt Lake City law firm which has provided legal services to a number  
8 of ex-FLDS members, including some persons who are listed as state witnesses in this criminal  
9 proceeding. These services have included, among other things, legal advice regarding personal  
10 legal issues and representation in civil litigation against the FLDS Church and its leaders for  
11 recovery of properties owned by expelled FLDS members and fraudulently transferred by FLDS  
12 Church leaders, for alienation of affections arising from the forced dissolution of families ordered  
13 by FLDS leaders, and for battery, sexual abuse of children and intentional infliction of emotional  
14 distress caused by the forced marriages of underage children.

15 Hoole & King has represented various ex-FLDS members in approximately six civil  
16 actions filed in the State of Utah over a period of five years. Hoole & King does no legal work  
17 for Diversity or Dr. Fischer.

18 4. THE RELATIONSHIP BETWEEN DIVERSITY AND HOOLE & KING

19 In September of 2004 Diversity retained the Hoole & King law firm to act as co-counsel  
20 for six young men who had been expelled from the FLDS Church. These young men, dubbed by  
21 the media as the "Lost Boys," had previously filed a civil action in Utah against the FLDS Church  
22 and were represented by a Chicago lawyer.<sup>11</sup>

23 Although Diversity agreed to pay the legal fees incurred in the "Lost Boys" litigation,  
24 Hoole and King's clients were the individual named plaintiffs and not Diversity. Diversity was  
25 designated as a client representative, but played no part in the handling of the "Lost Boys"  
26 litigation and was not consulted regarding litigation strategy, settlement discussions or client

27 \_\_\_\_\_  
28 <sup>11</sup> Although Hoole & King was initially retained as local counsel, the firm eventually became lead counsel when the Chicago lawyer, Joanne Suder, withdrew.

1 decision-making<sup>12</sup>. Diversity was sent redacted monthly billing statements by Hoole & King<sup>13</sup>,  
2 but was not otherwise provided regular reports on the status of the litigation. The Fee and  
3 Engagement Agreement entered into between Hoole & King, their clients and Diversity is  
4 attached hereto as Exhibit "A," a copy of which is filed under seal to preclude any possible  
5 waiver of any privileges.<sup>14</sup>

6 Over the years, Hoole & King also provided legal assistance to other ex-FLDS members.  
7 Diversity recognized that in addition to financial support needed for food, housing, clothing and  
8 education, many ex-FLDS members trying to integrate back into society had need of legal  
9 services. Consequently, Diversity agreed to pay for said legal services under the same terms as  
10 the "Lost Boys" litigation. Diversity played no role in (a) deciding whether Hoole & King would  
11 undertake any specific representation, (b) deciding whether to initiate legal action on behalf of  
12 said persons, or (c) giving instructions or input on how said litigation, if filed, should be  
13 conducted or resolved. Often, Diversity would learn of an action being filed to assist an ex-FLDS  
14 member only after commencement of said litigation. On occasion, an ex-FLDS member would  
15 come to Diversity seeking with all manner of legal problems assistance and Diversity would refer  
16 them to Hoole & King and other lawyers, as appropriate.

17 5. THE RELATIONSHIP BETWEEN DAN FISCHER AND HOOLE & KING

18 Dan Fischer has two separate, but related relationships with Hoole & King: as a client  
19 representative and as a non-testifying expert consultant.

20 Because Dan Fischer was a person trusted by ex members of the FLDS Church (many of  
21 whom were minors) he had been designated by these ex members as their representative to  
22 communicate with Hoole & King on their behalf on legal matters. See illustrative affidavits of  
23 Hoole & King clients attesting to the appointment of Dr. Fischer as a client representative,  
24

25 <sup>12</sup> The Lost Boys litigation was settled in March of 2007. Diversity was not involved in the settlement negotiations  
26 and decision to settle.

27 <sup>13</sup> The Hoole & King billing statements sent to Diversity for payment were extensively redacted to avoid disclosure  
28 of attorney-client communications.

<sup>14</sup> The engagement agreement is filed in camera for the Court's review so as to preserve all applicable privileges.  
Smiles for Diversity (one of the signatories of the agreement) was a dba of the Diversity Foundation.

1 attached as Exhibit "B." (The originals of the affidavits are being filed by the Hoole & King law  
2 firm.) This designation as a "client representative" was in accordance with *Rule 504(a)* of the  
3 Utah Rules of Evidence. Consequently, Dr. Fischer would occasionally convey information back  
4 and forth between Hoole & King and its clients.<sup>15</sup>

5 Because Dr. Fischer was a long-time member of the FLDS polygamist community (a very  
6 cloistered and secretive society) he had an extensive knowledge and understanding of the FLDS  
7 Church, its teachings and practices and of the FLDS cultural in general. Accordingly, he was also  
8 retained in November of 2004 as a non-testifying expert consultant by Hoole & King.

9 The ex-FLDS members for whom legal services were rendered by Hoole & King were  
10 aware that Diversity was paying Hoole & King's fees and consented to said arrangement in  
11 accordance with *Rule 1.8(f)* of the Rules of Professional Conduct. See Exhibit "A."

12 6. THE RELATIONSHIP BETWEEN DIVERSITY AND SAM BROWER

13 Sam Brower was an investigator hired by Hoole & King in connection with Hoole & King  
14 providing legal services to expelled members of the FLDS community. Diversity played no part  
15 in the hiring of Sam Brower and Diversity gave no instructions to Brower nor did it receive  
16 regular reports from Brower regarding his investigations. Diversity paid for the services rendered  
17 by Sam Brower as part of the payment of legal services from Hoole & King.

18 7. THE PERSONAL INTERVIEW OF DAN FISCHER AND PROFFERED  
19 STIPULATION

20 On March 18, 2009 Dr. Dan Fischer, both in his personal capacity and as a representative  
21 of Diversity, voluntarily submitted to an interview by counsel for Warren Jeffs. In addition, prior  
22

23 \_\_\_\_\_  
24 <sup>15</sup> Dr. Fischer described his role as a client representative in his interview as follows:

- 25 Q. [By Mr. Picarreta]: Now, give me your understanding of your role as client representative.  
26 A. [By Dr. Fischer]: I believe my role would be simply to help transfer information from Hoole &  
27 King to their clients and potentially in words that they might better understand.  
28 Q. And have you done that?  
A. I believe so.

28 Fisher interview, page 42, a copy of which was filed with the Court by defendant in connection with his Rule 15.3  
Motion.

1 to his interview, Dr. Fischer voluntarily produced numerous documents and other information in  
2 response to requests from Mr. Jeff's counsel.

3 Dr. Fischer was interviewed for several hours and while not formally sworn, agreed to  
4 give and did give truthful testimony.<sup>16</sup>

5 Dr. Fischer answered extensive questions regarding the following subjects:

- 6 • The formation and operation of Diversity.
- 7 • The structure and operation of Ultradent Products, a major donor to Diversity.
- 8 • Donations to Diversity from Ultradent and others.
- 9 • Loans and other financial support by Diversity to ex-FLDS members and why the  
10 loans were made.
- 11 • Financial support to ex-FLDS members by Dr. Fischer personally.
- 12 • Contact and communications between Dr. Fischer and various ex-FLDS members  
in contexts other than various Utah civil lawsuits.
- 13 • The financial benefits, if any, provided by Diversity to a list of potential witnesses  
14 in this criminal proceeding.
- 15 • The hiring of the Hoole & King law firm.
- 16 • Dr. Fisher and Diversity's relationship with Hoole & King.
- 17 • Billing statements received by Diversity from Hoole & King.
- 18 • Dr. Fisher's designation and function as a client representative and by whom.
- 19 • Dr. Fisher's role, if any, in referring various accusers of Warren Jeffs to the law  
firm of Hoole & King.
- 20 • Dr. Fisher and Diversity's lack of involvement in the prosecution of various Utah  
21 civil litigation matters filed by Hoole & King on behalf of certain ex-FLDS  
members.
- 22 • Dr. Fischer's statements about his personal feelings concerning Warren Jeffs.
- 23 • Why Dr. Fischer left the FLDS Church.

24 When counsel for Warren Jeffs asked Dr. Fischer to reveal communications between Dr.  
25 Fischer and the Hoole & King law firm (and its private investigator, Sam Brower) counsel for  
26 Hoole & King objected on privilege grounds and consequently Dr. Fischer did not answer.

27  
28 <sup>16</sup> Fischer Interview, pages 6-7.

1 Similarly, when counsel for Warren Jeffs asked Dr. Fischer to reveal communications between  
2 Dr. Fischer and the clients of Hoole & King, he was likewise instructed not to answer.

3 In an effort to be cooperative, counsel for Hoole & King offered to withdraw his objection  
4 so Dr. Fischer could answer the pending questions if (1) answering questions about his  
5 communications with Hoole & King would not be considered a broader subject matter waiver, (2)  
6 the questions regarding his communications with Hoole & King clients were unrelated to the  
7 pending civil matters the clients had filed against Warren Jeffs and (3) the interview would be  
8 sealed so as others not a party to the proposed stipulation could not argue any waiver had  
9 occurred.<sup>17</sup>

10 Counsel for Warren Jeffs refused to accept the proposed stipulation.

11 The interview of Dr. Fischer was concluded and all counsel stipulated that (1) except for  
12 questions relating to areas to which an objection had been interposed, the interview was finished  
13 and (2) any motion to compel further testimony from Dr. Fischer would be limited to “areas that  
14 relate to the objections.” Fischer interview, pages 153-155.

## 15 ARGUMENT

### 16 I. DEFENDANT HAS NOT MADE THE REQUISITE SHOWING TO SUPPORT A 17 RULE 15.3 ORDER TO TAKE THE DEPOSITION OF DR. DAN FISCHER

18 Rule 15.3 of the Arizona Rules of Criminal Procedure allows a Court to order a deposition  
19 of a person only after three conditions are established by the moving party:

- 20 1. The person’s testimony is “material to the case or necessary adequately to prepare  
21 a defense”;
- 22 2. The person was not a witness at the preliminary hearing; and
- 23 3. The person “will not cooperate in granting a personal interview.”

24 In the instant case, Warren Jeffs has failed to satisfy the first and third conditions.  
25  
26  
27

28 <sup>17</sup> Fischer Interview, pages 38-40



1 interview. If the defense wants to argue that this financial support somehow undercuts the  
2 credibility of a particular state witness, they have all the factual information necessary to make  
3 such an argument. The sought-after information – privileged communications between Hoole &  
4 King and Dr. Dan Fischer is simply not “necessary to adequately prepare a defense.”

5 B. Dan Fischer Has Cooperated In Granting A Personal Interview.

6 Warren Jeffs has also failed to show that Dr. Fischer has not cooperated in granting a  
7 personal interview, a prerequisite for a Rule 15.3 order. It is undisputed that Dr. Fischer  
8 voluntarily scheduled a personal interview, produced numerous documents prior to the interview  
9 in response to requests from counsel, and answered the vast majority of the questions posed to  
10 him. Respecting the sanctity of privileged attorney-client communications is hardly the lack of  
11 cooperation contemplated by Rule 15.3. The Rule has been properly invoked where a witness  
12 refused to be interviewed unless other witnesses are allowed to be present (Kirkendall v. Fischer,  
13 27 Ariz. App. 210, 553 P.2d 243 (1976)) and where a case worker refused to be interviewed at all  
14 (Murphy v. County of Maricopa, 142 Ariz. 273, 689 P.2d 532 (1984)). However, defendant has  
15 cited no authority for the proposition that the assertion of an attorney-client privilege rises to the  
16 level of non-cooperation required by Rule 15.3.

17 The rationale underlying Rule 15.3 is to “effectuate the constitutional right of cross  
18 examination contained in the confrontation clause of the Sixth Amendment of the United States  
19 Constitution. Murphy v. County of Maricopa, *supra*, citing State v. Jessen, 134 Ariz. 458, 657  
20 P.2d 871 (1982). Here, Dr. Fischer is not an accuser of Warren Jeffs. And, the state’s witnesses  
21 who received financial support from Dr. Fischer or Diversity (e.g. \_\_\_\_\_) and  
22 Richard Holm) can certainly be cross examined about the financial support they received from  
23 Dr. Fischer or Diversity without invading the attorney-client privilege arising from their civil  
24 litigation in Utah.

25 In sum, it is neither “material” nor “necessary” to Warren Jeffs’ defense here in Arizona  
26 to know what Dr. Fischer discussed with one of Warren Jeffs’ criminal accusers (or her lawyer)  
27 regarding an unrelated Utah civil lawsuit.

28

1 H. THE INFORMATION SOUGHT IS PROTECTED, ATTORNEY CLIENT  
2 COMMUNICATION

3 It is generally recognized that the attorney-client privilege protects not only direct  
4 communications between the attorney and his client, but also protects communications between  
5 the attorney and agents of a client. Upjohn Co. v. United States, 449 U.S. 383 (1981); United  
6 States v. Schwimmer, 892 F.2d 237 (2nd Cir. 1989), cert. denied, 502 U.S. 810 (1991); In re:  
7 Bieter Co., 16 F.3d 929 (8th Cir. 1994).

8 In the federal system, this concept is reflected in Supreme Court Standard 503 which  
9 specifically provides that the attorney-client privilege extends to communications between a  
10 lawyer and a "representative of the client" where the communication is "... made for the purpose  
11 of facilitating the rendition of professional legal services ...."<sup>18</sup>

12 In the state judicial system, numerous states have formally recognized, either by statute or  
13 evidentiary rule, the concept of a client representative and brought the relationship within the  
14 protections of the attorney-client privilege.<sup>19</sup>

15 While Arizona has not expressly addressed the concept of a client representative, Utah has  
16 and Utah law is controlling as discussed below.

17 A. The Communications Between Dr. Fischer and Hoole & King Are Privileged  
18 Under Utah Law

19 Utah Rule of Evidence 504(a)(4) specifically provides that communications between a  
20 lawyer and a "representative of the client" are protected by the attorney-client privilege. The rule  
21 defines a client representative as "one having authority to obtain professional legal services, or to  
22 act on advice rendered pursuant thereto, on behalf of the client, or one specifically authorized to  
23

24 <sup>18</sup> Supreme Court Standard 503 was not adopted by Congress when submitted in 1972. Congress rejected all  
25 proposed privilege rules when it adopted the Federal rules of Evidence, choosing to leave this area of federal law for  
26 development under common law principles. Nonetheless, Standard 503 has been recognized by commentators and  
27 judicial decisions alike as being an accurate definition of the federal common law of attorney-client privilege. See  
28 Weinstein Federal Evidence § 503; U.S. v. Spector, 793 F.2d 932 (8<sup>th</sup> Cir. 1986); Hope for Families and Community  
Services, Inc. v. Warren, 2009 WL 1066525 (M.D. Ala. 2009); In re: Copper Market Antitrust Litigation, 200 F.R.D.  
213 (S.D.N. 2001).

<sup>19</sup> See, e.g., Neb. Rev. Stat. § 27-503; Kentucky Rule of Evidence 503; Haw. R. Evid. 503(b)(3); Tex. R. Civ. Evid.  
503(a)(2).

1 communicate with the lawyer concerning a legal matter.”<sup>20</sup> By adopting Rule 504(a), the State  
2 of Utah has clearly and unequivocally stated that a certain class of communications between its  
3 residents, as demonstrated below, weight heavily in favor of applying Utah’s law on privileges.  
4 In this instance, Dr. Fischer clearly falls within the definition of a client representative. Dr.  
5 Fischer was designated by various ex-FLDS members to act on their behalf, to retain the law firm  
6 of Hoole & King and to communicate with the lawyers at Hoole & King concerning their legal  
7 matters.

8 Defendant does not contest the client representative concept or the fact that Dr. Fischer  
9 was designated a client representative. Rather, he argues that Rule 504(a) is inapplicable because,  
10 unlike Utah, Arizona has not expressly recognized the client representative privilege. Jeffs’  
11 Memo at p. 13. This argument misses the mark and ignores the context in which the privileged  
12 communications took place, which is that the client representative relationship involving Dr.  
13 Fischer was (1) established in Utah (2) between Utah residents and (3) to facilitate the rendering  
14 of legal services in Utah litigation. Moreover, the communications between Dr. Fischer and the  
15 clients for whom he served as a representative and the communications between Dr. Fischer and  
16 the Hoole & King law firm, all occurred in Utah. These factors, as demonstrated below, compel  
17 this Court to apply Utah’s law on privileges regardless of whether Arizona protects  
18 communications with a client representative.<sup>21</sup>

19 B. The Utah Law On Privileges Governs And Should Be Applied By This Court In  
20 The Deposition Of Dr. Fischer

21 In resolving conflict of law questions, Arizona courts follow the Restatement of Conflict  
22 of Laws (Bates v. Superior Ct., 156 Ariz. 46, 749 P.2d 1367 (1988)), and are “committed to the  
23

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24 <sup>20</sup> Rule 504(a) has been expressly recognized and applied by the Courts of Utah. See, e.g. Moler v. CW  
Management, 190 P2d 1250 (2008) (holding that a representative of the client, for purposes of attorney-client  
privilege, can be a natural person.

25 <sup>21</sup> Defendant also argues that even if Utah’s client representative privilege is recognized it should be ignored because  
26 privileges “would not apply to communications which are made in furtherance of a crime or fraud” (Jeff Memo at  
27 p. 14). The “crime” or “fraud” claimed by defendant is that the Diversity Foundation is not a legitimate tax exempt  
28 charity, but was created to finance Dr. Fischer’s and Hoole & King’s “efforts to harm” Warren Jeffs. This  
outrageous argument should be ignored by the Court not only because defendant offers no evidentiary support  
whatsoever for the claim, but also because there is no evidence whatsoever that Dr. Fischer’s communications with  
Hoole & King or Hoole & King’s clients had anything to do with the creation or operation of Diversity.

1 principle that the local law of the state which has the most significant relationship with the  
2 occurrence and with the parties determines their rights and liabilities..." Gordon v. Kramer, 124  
3 Ariz. 442, 604 P.2d 1153 (1980). When such an analysis is applied in considering defendant's  
4 motion, it is clear that the State of Utah has the "most significant relationship" to the parties  
5 involved and the issue before the court, *i.e.* should the attorney-client privilege extend to  
6 representatives of Utah clients. Here, Utah lawyers were engaged to represent Utah residents in  
7 civil actions filed in the State of Utah. The person designated by the Utah litigants to act as their  
8 client representative – Dan Fischer – is a Utah resident and all the conversations at issue occurred  
9 in Utah.

10 Section 139 of the Restatement (Second) of Conflict of Laws specifically addresses  
11 privileged communications. The comments to Section 139 provide guidance on when a court  
12 should apply a privilege recognized in a foreign state, but not in the forum state. Comment d sets  
13 forth a four factor test to consider in this regard. The four factors are:

- 14 1. The number and nature of the contacts that the state of the forum has with the  
15 parties and with the transaction involved.
- 16 2. The relative materiality of the evidence that is sought to be excluded.
- 17 3. The kind of privilege involved.
- 18 4. Fairness to the parties.

19 Each of these factors militate in favor of applying Utah's privilege law.

20 Regarding the "contacts" analysis, it is undeniable that Arizona has few contacts with the  
21 parties to the communications at issue or to the communications themselves, all of which  
22 occurred in Utah by and between Utah residents for the purposes of advancing Utah legal actions.  
23 Under such circumstances, the Restatement notes that the interests of the state with the most  
24 significant relationships in having the evidence excluded should prevail.

25 Regarding the second factor (materiality), Restatement comment d notes that "the forum  
26 will be more inclined to give effect to the foreign privilege and to exclude the evidence if the  
27 facts that would be established by this evidence would be unlikely to effect the result of the case  
28 or could be proved in some other way." Here, the communications between Hoole & King and

1 Dr. Fischer about Utah civil litigation matters have no direct relevance to proving or disproving  
2 the criminal charges against Warren Jeffs in Arizona. At best, they may be arguably relevant to  
3 show bias or improper motive by some of the state's witnesses. This impeachment evidence,  
4 however, could be proved in some other way and is duplicative and therefore not material to the  
5 outcome of this case.<sup>22</sup>

6 Regarding the third factor (the "kind of privilege"), the privilege at issue here -- the  
7 attorney client privilege in general and the privilege for client representatives in particular -- is  
8 widely recognized. In this context, the Restatement comment notes that "the forum will be more  
9 inclined to give effect to a foreign privilege that is well established and recognized in many states  
10 than to a privilege that is relatively novel and recognized in only a few states."

11 Finally, the "fairness" factor (factor 4) weighs heavily in favor of applying Utah privilege  
12 law. In considering the factor of "fairness," the Restatement comment notes that "the forum will  
13 be more inclined to give effect to a privilege if it was probably relied upon by the parties." Here,  
14 the parties to the communications at issue knowingly established a client representative  
15 relationship for the purpose of invoking the protections of the Utah recognized privilege.  
16 Comment d also notes that "a further question bearing on the question of fairness is whether the  
17 privilege belongs to a person who is not a party to the action." Under those circumstances, the  
18 comment notes that "the forum will be more inclined to recognize the privilege and to exclude the  
19 evidence than it would be in a situation where the privilege is claimed by a person who is a party  
20 to the action." Emphasis added. Here, Dr. Fischer is not a party to Warren Jeffs' criminal  
21 proceeding and, indeed, is not even listed as a witness.

22 Comment e to the Restatement also provides guidance for this Court. Comment e  
23 observes that the state which has the most significant relationship with a communication "will  
24 usually be the state where the communication took place." All of the communications between  
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27 <sup>22</sup> The fact that Dr. Fischer and Diversity have provided some state witnesses with financial and other support is  
28 clearly established by the testimony Dr. Fischer did give in his personal interview and document he voluntarily  
provided.

1 Hoole & King and Dr. Fischer and between Dr. Fischer and Hoole & King's clients occurred in  
2 the state of Utah.

3 This Court should follow the lead of other state courts which have followed the  
4 Restatement analysis and recognized and applied privileges which exist in the home state of a  
5 witness, but not in the forum state where the action is pending.<sup>23</sup>

6 The Supreme Court of Texas, in Ford Motor Co. v. Leggat, 904 S.W.2d 643 (1995), was  
7 faced with a question similar to the question facing this Court, i.e. whether to defer to a broader  
8 attorney-client privilege recognized in another state, but not in the forum state. At issue was the  
9 discoverability of a report by Ford's general counsel to Ford's Policy & Strategy Committee and  
10 technical data prepared by Ford engineers at the request of outside counsel. Under Michigan law  
11 (where the communications took place) the information was protected by the attorney-client  
12 privilege. Under the law of the forum state (Texas) the matter was not as clear.

13 The Texas court looked to the Restatement of Conflicts and held that the scope of the  
14 attorney-client privilege "... will be governed by the law of the state with the most significant  
15 relationship to the communication." Ford Motor Co. at 647. The court concluded that Michigan  
16 "as the state where the communication took place" was the state with the most significant  
17 relationship and observed that in a case of a privilege designed to encourage open  
18 communications, like the attorney-client privilege, the interest of the state with the most  
19 significant relationship to the communication should always outweigh the forum state's desire to  
20 admit the testimony. Id. (citing Sterk, Testimonial Privilege: An Analysis of Horizontal Choice  
21 of Law Problems, 61 Minn. L. Rev. 461, 463 n.8).

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<sup>23</sup> See, e.g., Ex parte Sparrow, 14 F.R.D. 351 (N.D. Ala. 1953), where a plaintiff filed a libel action in New York and sought to require an Alabama newspaper reporter to answer questions in his deposition about the identity of his sources of information. The State of Alabama recognized a reporter's privilege protecting the identity of sources while New York did not. In recognizing and applying the Alabama privilege, the Court noted that "it is not a matter of judicial concern that the legislature of Alabama was either prudent or unwise in clothing the sources of a journalist's information with secrecy." Sparrow at 353.

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C. Any Deposition Of Dan Fischer Would Necessarily Occur In Utah Pursuant To A Subpoena Issued By A Utah Court Applying Utah Privilege Rules.

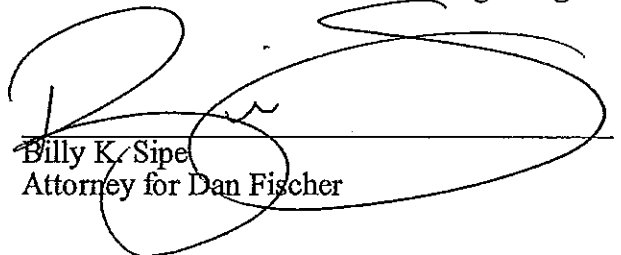
This Court has no personal jurisdiction over Utah resident Dan Fischer and, as a non-party, cannot compel his attendance in Arizona of a deposition or trial in this matter. Presumably, if a Rule 15.3 order were entered regarding Fischer, defendant would request a Utah court to issue a subpoena for Dan Fischer to appear at a deposition in the State of Utah.

When a privilege is asserted at a deposition that occurs in a forum other than the one in which the trial is pending, the general rule is to apply the privilege of the state in which the deposition is being taken. See Weinsteins Federal Evidence § 501.02[4] and cases cited therein. This rule makes sense, given that the court which issued the subpoena is the court where any motion to enforce a subpoena or to compel an answer to a deposition question would be brought.

**CONCLUSION**

For the reasons set forth above defendant's motion for a Rule 15.3 order regarding Dan Fischer should be denied.

Dated: September 8, 2009



Billy K. Sipe  
Attorney for Dan Fischer

4849-2940-4420.1

1 *Original filed this date*  
2 *with Clerk of the Court:*  
Mohave County Superior Court:

3 *Copy of the foregoing*  
4 *delivered this date to:*  
5 Honorable Steven F. Conn  
6 Mohave County Superior Court  
Division III

7 Matthew J. Smith, Esq.  
8 Mohave County Attorney  
Mohave County Attorney's Office

9  
10 *Copy of the foregoing mailed*  
*this 8 day of September, 2009, to:*

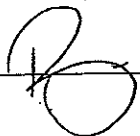
11 Michael L. Piccarreta  
12 145 South Sixth Avenue  
Tucson, AZ 85701-2007

13 Richard A. Wright  
14 300 S. Fourth Street, Suite 701  
Las Vegas, Nevada 84101

15 Sam Brower  
16 Sam Brower Investigations  
444 S. Main St.  
17 Cedar City, UT 84720

18 Roger Hoole, Esq.  
4276 South Highland Drive  
Salt Lake City, UT 84124

19  
20 Randy L. Dryer  
Parsons Behle & Latimer  
21 One Utah Center  
201 South Main Street, Suite 1800  
22 Salt Lake City, UT 84111

23 By  \_\_\_\_\_  
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## **EXHIBIT B**



5. To find local counsel we asked a Salt Lake dentist and business man, Dr. Dan Fischer, who had lived most of his life in the FLDS Church, but had successfully left it years earlier, to help us find attorneys to represent us in Utah. We asked Dr. Fischer because he and the Diversity Foundation with which he is involved had helped scores of boys, young men and even some families who had been expelled or left the FLDS Church start their difficult transition into society.

6. Dr. Fischer assisted us as our representative in the process of selecting local counsel and introduced us in September of 2004 to the Salt Lake City law firm of Hoole & King, L.C., which we soon retained.

7. Hoole & King, however, was unfamiliar with the FLDS Church and the work that Dr. Fischer and the Diversity Foundation was doing to help former FLDS people who had been displaced and who needed financial, medical and educational assistance. Our attorneys needed to be able to consult with Dr. Fischer on our behalf and we agreed. We also agreed to have Hoole & King hire private investigator, Sam Brower, to assist us in relation to the Lost Boys case.

8. As clients of Hoole & King we designated Dr. Fischer and the Diversity Foundation as our client representatives in connection with our representation by Hoole & King, L.C. and gave Dr. Fischer and the Diversity Foundation authority to act on advice provided by Hoole & King in our behalf. We further gave Dr. Fischer and the Diversity Foundation authority to confidentially communicate with Hoole & King regarding the legal matters for which we engaged Hoole & King.

9. When Hoole & King undertook our representation in relation to the UEP Trust probate case, which was brought in 2005, we broadened the authority we had given Dr. Fischer and the Diversity Foundation to include authority to act on advice provided by Hoole & King in our behalf and similarly gave them authority to communicate confidentially with Hoole & King regarding that legal matter.

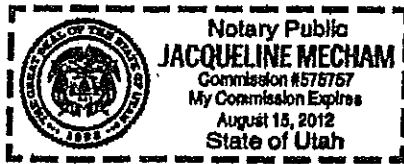
10. We met in person on occasion with Hoole & King and Dr. Fischer, and from time to time have communicated through Dr. Fischer with Hoole & King and also received information and communications from Hoole & King through Dr. Fischer.


11. In designating Dr. Fischer and the Diversity Foundation as our client representatives and in participating in these communications, we have relied on the laws of Utah which protect the client representative relationship as part of the attorney-client privilege.

DATED this 4 day of September, 2009.

  
RICHARD JESSOP REAM

SUBSCRIBED and SWORN to before me this 4<sup>th</sup> day of September, 2009.



  
NOTARY PUBLIC



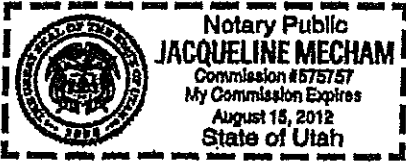
5. Accordingly, when I became a client of Hoole & King, I designated Dr. Fischer and the Diversity Foundation as my client representatives in connection with my representation by Hoole & King, L.C. and gave Dr. Fischer and the Diversity Foundation authority to act on advice provided by Hoole & King in my behalf. I further gave Dr. Fischer and the Diversity Foundation authority to communicate confidentially with Hoole & King regarding the legal matters for which I engaged Hoole & King.

6. From time to time I have communicated through Dr. Fischer with Hoole & King and also received information and communications from Hoole & King through Dr. Fischer regarding my representation.

7. In designating Dr. Fischer and the Diversity Foundation as my client representatives, I have relied on the laws of Utah, which protect that relationship as part of the attorney-client privilege.

DATED this 4 day of September, 2009.

SUBSCRIBED and SWORN to before me this 4<sup>th</sup> day of September, 2009.



*Jacqueline Mecham*  
\_\_\_\_\_  
NOTARY PUBLIC

AFFIDAVIT OF

STATE OF UTAH                    )  
  ss  
COUNTY OF SALT LAKE    )

I, \_\_\_\_\_, being first duly sworn, state the following:

1. I have personal knowledge of the facts stated herein.
2. I am the victim-witness in a criminal proceeding captioned State of Arizona v. Warren Steed Jeffs, Case No. CR-2007-743, which was brought in the Superior Court of the State of Arizona by the Mohave County Attorneys Office. As stated in the public record, this proceeding is based on my underage, "spiritual marriage" to \_\_\_\_\_ as performed by Warren Jeffs when I was part of the Fundamentalist Church of Jesus Christ of Latter Day Saints ("FLDS Church").
3. After I left the FLDS Church, I retained the law firm of Hoole & King, L.C. to assist me in dealing with law enforcement, and later, after I began cooperating with law enforcement, I further engaged Hoole & King to help me and my family enter an informal witness protection program.
4. Hoole & King was already representing other former FLDS people with financial and other assistance from the Diversity Foundation. I wanted my attorneys to be able to consult with the Diversity Foundation and Dr. Dan Fischer about my legal representation, including witness protection, and I authorized them to do so. I also authorized my attorneys to use private investigator Sam Brower to assist them, as needed, in relation to my representation.
5. Accordingly, when I became a client of Hoole & King, I designated Dr. Fischer and the Diversity Foundation as my client representatives in connection with my representation by Hoole & King, L.C. and gave Dr. Fischer and the Diversity Foundation authority to act on advice provided

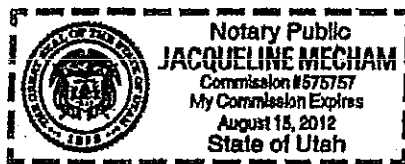
by Hoole & King in my behalf. I further gave Dr. Fischer and the Diversity Foundation authority to communicate confidentially with Hoole & King regarding the legal matters for which I engaged Hoole & King.

6. From time to time I have communicated through Dr. Fischer with Hoole & King and also received information and communications from Hoole & King through Dr. Fischer regarding my representation.

7. In designating Dr. Fischer and the Diversity Foundation as my client representatives, I have relied on the laws of Utah, which protect that relationship as part of the attorney-client privilege.

DATED this 4<sup>th</sup> day of September, 2009.

SUBSCRIBED and SWORN to before me this 4<sup>th</sup> day of September, 2009.



*Jacqueline Meham*  
\_\_\_\_\_  
NOTARY PUBLIC