

Business Law Bulletin OF VIRGINIA

Lawyers Weekly
10 Milk Street, Suite 1000
Boston, MA 02108

 DOLAN MEDIA
COMPANY

Volume 1, Number 1

NEWS YOU NEED TO RUN YOUR BUSINESS

APRIL 2008

Fired CFO gets copies of all documents he wrote

BY PAUL FLETCHER

A former chief financial officer who sued after being fired is entitled to copies of all documents he authored, received and reviewed or had access to while he worked at the company.

The Supreme Court of Virginia has never addressed this issue of civil procedure and evidence law, the judge noted.

In *Rush v. Sunrise Senior Living Inc.*, Bradley B. Rush filed a breach of contract and defamation suit against his ex-company, a McLean-based developer and operator of senior citizen assisted living communities. Rush, who was CFO for 22 months, claimed he was fired for being a whistleblower to the Securities and Exchange Commission, among other things. The company said he violated its policies.

Rush filed a lengthy list of documents he wanted to see last fall; Sunrise claimed, attorney-client

privilege in an effort to short-circuit his request. This privilege protects any communication between a lawyer and a client.

Rush filed a motion to compel production of the information.

One of the requests sought "all documents created, received and reviewed or maintained by Mr. Rush during his employment."

This particular request caught the attention of Fairfax Circuit Judge Robert W. Wooldridge Jr., who wrote that the Supreme Court of Virginia has yet to address "whether the attorney-client privilege applies against a former officer or director as to documents created" while he worked at the defendant company.

Other jurisdictions have handled the issue, Wooldridge said, with results going both ways. Courts in a few states, such as Colorado and Delaware, have given the ex-employee the documents, figuring he already knew the content of his own communications with lawyers for the organization.

Other courts, such as those in Wisconsin and New York, have rejected access to the information, upholding the privilege.

The judge cited a well-known treatise on the law of evidence. For the privilege to attach to the information, the element of confidentiality must be maintained.

That made the difference for Wooldridge, and he wrote the privilege does not apply to the information in this case, since no effort was made to keep it confidential from Rush while he worked at Sunrise.

On the other hand, the privilege may still apply to documents that were not intended for his eyes while he was CFO or were not reasonably accessible to him.

Given the volume of material sought, the judge appointed Fairfax lawyer Joel M. Birken as a special commissioner to review all the other material enumerated in Rush's requests. That information will subject to another hearing at a later date, the judge said.