

IN THE UNITED STATES DISTRICT COURTS  
FOR THE EASTERN DISTRICT OF CALIFORNIA  
AND THE NORTHERN DISTRICT OF CALIFORNIA  
UNITED STATES DISTRICT COURT COMPOSED OF THREE JUDGES  
PURSUANT TO SECTION 2284, TITLE 28 UNITED STATES CODE

RALPH COLEMAN, et al.,

Plaintiffs,

V.

ARNOLD SCHWARZENEGGER,  
et al.,

## Defendants.

NO. CIV S-90-0520 LKK JFM P

## THREE-JUDGE COURT

MARCIANO PLATA, et al.,

## Plaintiffs,

V.

ARNOLD SCHWARZENEGGER,  
et al.,

## Defendants.

NO. C01-1351 TEH

## **THREE-JUDGE COURT**

ORDER DENYING  
DEFENDANTS' MOTION FOR  
RECONSIDERATION OF THE  
MAGISTRATE JUDGE'S  
APRIL 14, 2008 ORDER

The defendants have moved for reconsideration of the magistrate judge's April 14,

2008 order compelling discovery. As explained below, the court denies the motion.

## I. BACKGROUND

By order on April 14, 2008, the magistrate judge granted plaintiffs' motion to compel production of numerous documents that the defendants had claimed were protected by attorney-client or attorney work product privileges.

1       Discovery disputes on this issue originated with plaintiffs' September 5, 2007 request  
2 for production. Defendants served their first response to this request on October 25, 2007,  
3 which contained assertions of privilege for many of the documents. Defendants' Responses  
4 to Plaintiffs' First Set of Requests for Production of Documents, October 26, 2007.  
5 Subsequently, the parties agreed by stipulation to a schedule for defendants' rolling  
6 production of responsive, non-privileged documents and the creation of privilege logs.  
7 Nevertheless, on November 30, 2007, the plaintiffs moved to compel production of  
8 documents for which plaintiffs claimed defendants' assertions of privilege were inadequate.  
9 The magistrate judge granted the motion, which was later stayed by the three-judge court.

10       On December 14, 2007, the three-judge court ordered the defendants to revise their  
11 privilege logs and granted them additional time to do so. The magistrate judge granted a  
12 further extension of time, and defendants served their final, revised privilege logs on  
13 February 15, 2008.<sup>1</sup>

14       Disputes between the parties persisted regarding whether certain documents withheld  
15 by the defendants were privileged. On March 7, 2008, the parties filed a joint statement of  
16 disputed documents. The magistrate judge's April 14, 2008 order resolved the disputes  
17 concerning those documents for which the defendants asserted attorney-client or attorney  
18 work product privilege, ordering the production of many of the documents.

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## 20 **II. STANDARD**

21       Federal Rule of Civil Procedure 72(a) provides that non-dispositive pretrial matters  
22 may be decided by a magistrate judge, subject to reconsideration by the district judge. *See*  
23 *also* Local Rule 72-303(f). The district judge shall, upon reconsideration, modify or set aside

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26       <sup>1</sup> The magistrate judge's order states that the revised privilege logs were filed on  
27 February 22, 2008, but the court's review of the docket shows that the logs were actually  
28 filed on February 15, 2008, in compliance with the magistrate judge's January 29, 2008  
order. Defendants did, however, file a second copy of their revised privilege logs on  
February 22, 2008 in the *Coleman* case.

1 any part of the magistrate judge's order which is "found to be clearly erroneous or contrary  
 2 to law." *Id.*; *see also* 28 U.S.C. § 636 (b)(1)(A).

3 Discovery motions are non-dispositive pretrial motions within the scope of Rule 72(a)  
 4 and 28 U.S.C. § 636(b)(1)(A), and thus subject to the "clearly erroneous or contrary to law"  
 5 standard of review. *Rockwell Intern., Inc. v. Pos-A-Traction Industries, Inc.*, 712 F.2d 1324,  
 6 1325 (9th Cir. 1983) (per curiam). "A finding is 'clearly erroneous' when although there is  
 7 evidence to support it, the reviewing court on the entire evidence is left with the definite and  
 8 firm conviction that a mistake has been committed." *United States v. United States Gypsum*  
 9 *Co.*, 333 U.S. 364, 395 (1948); *Anti-Monopoly, Inc. v. General Mills Fun Group, Inc.*, 684  
 10 F.2d 1316, 1318 (9th Cir. 1982).

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12 **III. ANALYSIS**

13 The defendants seek reconsideration of the magistrate judge's order compelling  
 14 production of forty-four documents<sup>2</sup> for which defendants had asserted the attorney-client  
 15 privilege. The magistrate judge, after conducting an in camera review of all of the withheld  
 16 documents, concluded that one of these documents could not be withheld because its content  
 17 was not the type protected by the privilege, that three of these documents were authored or  
 18 received by an outsider to the attorney-client relationship, and that the remaining forty  
 19 documents were not privileged although an attorney had been copied in the communication.

20 For the reasons stated herein, the court denies the motion for reconsideration.

21

22 **A. Legal Framework**

23 Preliminarily, there appears to be no dispute that the magistrate judge employed the  
 24 correct standard for evaluating the claimed attorney-client privilege. The attorney-client  
 25 privilege protects communications between the client and his attorney. *Admiral Ins. v.*  
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27 <sup>2</sup>In their motion, defendants repeatedly state that they are moving for reconsideration  
 28 of the magistrate judge's order compelling production of forty-five documents, though  
 defendants only list forty-four documents in their motion.

1 *United States Dist. Ct. for Dist. of Ariz.*, 881 F.2d 1486, 1492 (9th Cir. 1989). The privilege  
 2 attaches “(1) [w]here legal advice of any kind is sought (2) from a professional legal adviser  
 3 in his capacity as such, (3) the communications relating to the purpose, (4) made in  
 4 confidence (5) by the client, (6) are at this instance permanently protected (7) from disclosure  
 5 by himself or by the legal adviser, (8) unless the protection be waived.” *Id.* The party  
 6 asserting the privilege has the burden to show that the privilege applies and the privilege is to  
 7 be strictly construed. *In re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir. 1992);  
 8 *Dowling v. Am. Hawaii Cruises, Inc.*, 971 F.2d 423, 425 (9th Cir. 1992). Accordingly, a  
 9 communication between individuals or clients does not become privileged by virtue of an  
 10 attorney being copied or forwarded the communication, *see, e.g., In re Gabapentin Patent*  
 11 *Litigation*, 214 F.R.D. 178, 186 (D.N.J. 2003), and the privilege is waived when the party  
 12 attempting to assert the privilege has already voluntarily disclosed the information to a party  
 13 not covered by the privilege. *Weil v. Investment/Indicators, Research Mgmt., Inc.*, 647 F.2d  
 14 18 (9th Cir. 1981).

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## 16 B. The Forty-Four Documents Ordered Produced

17 As stated, the magistrate judge identified three categories of documents for which  
 18 defendants’ assertion of privilege failed: those whose content was not protected by the  
 19 privilege, those authored or received by an outsider to the attorney-client relationship, and  
 20 those that were not privileged although an attorney had been copied in the communication.  
 21 The court considers each of these in turn.

### 22 1. Documents the Content of Which Was Not the Type Protected by the 23 Attorney-Client Privilege

24 Defendants challenge the magistrate judge’s determination that document E00028654  
 25 must be produced because the content of the document was not the type of legal advice  
 26 protected by the privilege.<sup>3</sup> This document is an e-mail send by Jim Martone, Department of

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27 <sup>3</sup>The magistrate judge noted that in the privilege logs, an attorney was listed as neither  
 28 the author nor the recipient of the document, but in camera review of the document revealed  
 that this was an error.

1 Finance Program Budget Manager, to Karen Finn, Department of Finance Budget Analyst.<sup>4</sup>  
 2 The subject of the document is the costs and financing for the 50-bed facility. There is  
 3 nothing in the email to suggest that the magistrate judge acted clearly erroneously or contrary  
 4 to law in concluding that the contents of the email are not “legal advice” of the type for  
 5 which the privilege attaches, although an attorney had been included in the communication.

6 **2. Documents Authored or Received by an Outsider to the Attorney-Client  
 7 Relationship**

8 Defendants also challenge the magistrate judge’s conclusion that three documents are  
 9 not privileged because they were authored or received by an outsider to the attorney-client  
 relationship. These documents are E00045948, E00082860, and E00083812.

10 Document E00045948 was described in defendants’ privilege log as having been  
 11 authored by Deputy Attorney General Lisa Tillman and received by, among others, Susan  
 12 Turner of the organization Center for Evidence-Based Corrections. Ms. Turner has never  
 13 been shown to be a client of Ms. Tillman’s nor does it appear that defendants assert that she  
 14 was. Instead, defendants appear to argue in their motion for reconsideration that the  
 15 privilege log was inaccurate, and that the document was actually received by a CDCR  
 16 employee.

17 Be that as it may, it does not establish that the magistrate judge’s order was clearly  
 18 erroneous or contrary to law. Motions to reconsider are not vehicles permitting the  
 19 unsuccessful party to “rehash” arguments previously presented. *See Costello v. United States*  
 20 *Government*, 765 F. Supp. 1003, 1009 (C.D. Cal. 1991). Nor is a motion to reconsider  
 21 justified on the basis of new evidence available prior to the court’s ruling. *See Fay Corp. v.*  
 22 *BAT Holdings One, Inc.*, 651 F. Supp. 307, 309 (W.D. Wash. 1987), *aff’d*, 896 F.2d 1227  
 23 (9th Cir. 1990). This is particularly true in this case, where defendants asserted an attorney-  
 24 client privilege for over two hundred documents (and the deliberative process privilege for  
 25 over 4,000 documents). Given the volume of documents for which the privilege is asserted,  
 26 the magistrate judge’s reliance on the accuracy of the privilege logs was unavoidable. That

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 28 <sup>4</sup>It appears, based on review of the document, that messages to and from attorney Ben  
 Rice are included in an email string within the document.

1 the defendants failed to create accurate entries in that log in the first instance does not imply  
 2 that the magistrate judge's order was clearly erroneous or contrary to law.

3       Similarly, the court cannot conclude that the magistrate judge's order was clearly  
 4 erroneous or contrary to law with regard to documents E00082860 and E00083812. These  
 5 documents were authored by Joan Petersilia and sent to attorney Ben Rice. The magistrate  
 6 judge concluded that the defendants had not shown that Mr. Rice had an attorney-client  
 7 relationship with Dr. Petersilia, as the evidence tendered to the court showed that the latter  
 8 was an independent contractor of the defendants and employed by the University of  
 9 California, Irvine. While defendants are correct in noting that privilege logs need not be so  
 10 detailed as to create an undue burden on the party creating them, the party asserting a  
 11 privilege must provide at a minimum adequate information to assess the applicability of the  
 12 privilege. *Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court for the Dist. of Mont.*, 408  
 13 F.3d 1142, 1147-48 (9th Cir. 2005). Here, the defendants had the opportunity to show that  
 14 an attorney-client relationship existed between Mr. Rice and Dr. Petersilia. Their failure to  
 15 do so does not render the magistrate judge's order clearly erroneous or contrary to law.

16       **3. Documents Not Privileged But Copied to an Attorney**

17       Because of the narrowness of the attorney-client privilege, it is axiomatic that a  
 18 communication between individuals is not transformed into a privileged one simply by virtue  
 19 of an attorney being copied on the communication. *See, e.g., In re. Gabapentin Patent Litig.*,  
 20 214 F.R.D. at 186; *see generally Admiral Ins.*, 881 F.2d at 1492 (the privilege only applies to  
 21 those communications made for the purpose of seeking legal advice). The magistrate judge  
 22 concluded that forty documents<sup>5</sup> did not contain the type of communications protected by the  
 23 privilege, notwithstanding that the communication was copied to an attorney. In their motion  
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 27       <sup>5</sup>These are documents E00011245, E00028650, E00028651, E00028979, E00030571,  
 28       E00030572, E00030573, E00030574, E00030575, E00030576, E00030577, E00030578,  
      E00030579, E00044272, E00044626, E00045983, E00046148, E00047253, E00047256,  
      E00047271, E00047453, E00047456, E00047489, E00047512, E00047820, E00048579,  
      E00082874, E00084308, E00084449, E00084450, E00084453, E00084455, E00084456,  
      E00084574, E00084575, E00084576, E00084577, E00085393, E00097579, E00097584.

1 for reconsideration, defendants assert that the magistrate judge's determination was in error,  
2 because he did not state specifically why the privilege did not apply to each document.

3 An absence of detailed discussion does not meet the "clearly erroneous or contrary to  
4 law" standard; instead, the defendants must show that "although there is evidence to support  
5 [a finding], the reviewing court on the entire evidence is left with the definite and firm  
6 conviction that a mistake has been committed." *United States v. United States Gypsum Co.*,  
7 333 U.S. at 395. Here, the court's review of the privilege logs and in camera inspection of  
8 the documents at issue supports the magistrate judge's determination.

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10 **C. Deliberative Process Privilege**

11 For nineteen of the documents covered by the magistrate judge's order, the defendants  
12 contend that reconsideration is appropriate because "Defendants previously asserted  
13 application of the deliberative process privilege" for these documents.<sup>6</sup> *See* Defendants'  
14 Request for Reconsideration at 5-9. In fact, in their privilege log, defendants asserted the  
15 deliberative process privilege for none of these documents. *See* Privilege Log, February 15,  
16 2008. Although defendants apparently corrected this in a March 2008 email to the plaintiffs,  
17 defendants did not assert the deliberative process privilege for these documents before the  
18 magistrate judge. As explained *supra*, a party's failure to assert in a timely manner facts or  
19 argument that were available to it in the first instance does not meet the standard for  
20 reconsideration. *See Fay Corp.*, 651 F. Supp. at 309; *see also Burlington N. & Sante Fe Ry.*  
21 *Co.*, 408 F.3d at 1149-50 (a party waives a privilege when, *inter alia*, it does not assert the  
22 privilege in a timely manner). Moreover, in their motion for reconsideration, defendants fail  
23 to make even a *prima facie* showing that the deliberative process applies to the nineteen  
24 documents. As such, the court cannot conclude that the magistrate judge's order compelling  
25 their production was clearly erroneous or contrary to law.

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27 <sup>6</sup>These are documents E00082874, E00030578, E00030579, E00030577, E00030576,  
28 E00030575, E00030574, E00030573, E00030572, E00030571, E00084449, E00084450,  
E00084453, E00084455, E00084456, E00084574, E00084575, E00084576, E00084577.

1     **D. Motion to Stay**

2         Defendants alternatively move to stay the magistrate judge's order. A district court  
3         has discretion to stay its order, pending appeal, upon consideration of, "(1) whether the stay  
4         applicant has made a strong showing that he is likely to succeed on the merits; (2) whether  
5         the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will  
6         substantially injure the other parties interested in the proceeding; and (4) where the public  
7         interest lies." *Hilton v. Braunschweig*, 481 U.S. 770, 776 (1987). The Ninth Circuit conceives  
8         this standard as "two interrelated legal tests" operating along a continuum. *Lopez v. Heckler*,  
9         713 F.2d 1432, 1435 (9th Cir. 1983). At one end of the continuum, the moving party may  
10         succeed if it shows that there is a probability of success on the merits as well as a possibility  
11         of irreparable injury. *Golden Gate Restaurant Ass'n. v. City and County of San Francisco*,  
12         512 F.3d 1112, 1115-16 (9th Cir. 2008). At the other end, the moving party may succeed if it  
13         shows that it has raised "serious legal questions" and that "the balance of hardships tips  
14         sharply in its favor." *Id.* at 1116 (quoting *Lopez*, 713 F.2d at 1435). Finally, the district  
15         court must consider the public interest implicated by the grant of the stay; this consideration  
16         is distinct from the harm to the parties in the court's grant or denial of a stay. *Natural Res.*  
17         *Def. Council, Inc. v. Winter*, 502 F.3d 859, 863-64 (9th Cir. 2007).

18         Defendants have made no showing that a stay is merited in this case. Indeed, if  
19         defendants seek a stay for the purpose of appealing the magistrate judge's order to the Ninth  
20         Circuit, it is unlikely that the Circuit court would conclude that the magistrate judge's order  
21         is a final, appealable order (*see* case no. 08-15083, Order, April 16, 2006 (denying  
22         defendants' appeal of a discovery order for lack of jurisdiction)).

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1 **IV. CONCLUSION**

2 For the reasons stated herein, the defendants' motion for reconsideration or,  
3 alternatively, for a stay of the magistrate judge's April 14, 2008 order is DENIED.

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5 **IT IS SO ORDERED.**

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7 Dated: 06/17/08

/s/

8 STEPHEN REINHARDT  
9 UNITED STATES CIRCUIT JUDGE  
NINTH CIRCUIT COURT OF APPEALS

10 

11 Dated: 06/17/08

12 LAWRENCE K. KARLTON  
13 SENIOR UNITED STATES DISTRICT JUDGE  
EASTERN DISTRICT OF CALIFORNIA

14 

15 Dated: 06/17/08

16 THELTON E. HENDERSON  
17 SENIOR UNITED STATES DISTRICT JUDGE  
NORTHERN DISTRICT OF CALIFORNIA

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