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PHIL McGRANE, Clerk
By BETH MASTERS
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO, Plaintiff, v. AARON ANSON VON EHLINGER Aka AARON ANSON EHLINGER Defendant.	**NOTICE OF APPEARANCE AND MOTION TO QUASH SUBPOENA** Case No. CR01-21-34839

Erika Birch, an individual, and Annie Hightower, an individual, hereby enter their appearances through counsel, T. Guy Hallam of the firm Strindberg Scholnick Birch Hallam Harstad Thorne ("SBHT"), and move pursuant to ICR 47 and ICR 17, to quash subpoenas for trial testimony.

ARGUMENT

This *Motion to Quash Subpoena* is based upon (1) improper service of the subpoena pursuant to ICR 17; (2) compliance with the subpoena would be unreasonable or oppressive pursuant to ICR 17; and (3) to the extent the Defendant intends to use the identification and/or designation of Ms. Birch and Ms. Hightower as witnesses in the criminal trial as a means by which to exclude them from the trial, such designation would be solely to harass or oppress. This *Motion* is supported by the argument and authority contained herein.

1. Standard Applicable to a Motion to Quash.

Under Idaho Criminal Rule 17, this Court has wide latitude to determine that the requested information sought by subpoena is "unreasonable or oppressive." *State v. Loera*, 167 Idaho 533, 538 (2020). As part of this discretionary analysis,[1] the Court may consider whether a party is undertaking a "fishing expedition" along with what the "relevance" or "materiality" of the testimony and/or information might be in the instant matter. *Loera*, 167 Idaho at 538. With third parties involved, as is the case with the subpoenas to Ms. Birch and Ms. Hightower, the Court may consider "whatever information it deems necessary to determine whether a request is unreasonable or oppressive," including whether the subpoena "'fails to allow time for compliance, requires disclosure of privileged or other protected matter and no exception or waiver applies, or subjects a person to undue burden.'" *Id.* (citing I.R.C.P. 45).

2. Defendant Must Meet a Threshold Burden to Show Relevance or Materiality.

It is not clear what basis Defendant has to call either Ms. Birch or Ms. Hightower as witnesses in his criminal trial. Thus, some threshold proffer by the Defendant related to relevancy or materiality of the proposed testimony should be undertaken, as neither Ms. Birch nor Ms. Hightower were present when the sexual assault occurred. Absent meeting this threshold, Defendant's subpoena to Ms. Birch and Ms. Hightower is clearly a simple fishing expedition and should be quashed. *Lorea*, *supra*.

3. The Subpoena Fails to Provide Sufficient Time for Compliance.

Despite apparently identifying Ms. Birch and Ms. Hightower as potential defense witnesses in pretrial disclosures, Defendant failed to serve either Ms. Birch or Ms. Hightower with a

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[1] *See State v. Joy*, 155 Idaho 1, 12 (2013).

subpoena for trial testimony until presumably[2] the first day of trial. Defendant's apparent reliance upon a requested continuance in trial is insufficient grounds to delay service and notice to Ms. Birch and Ms. Hightower. The service of the subpoenas on the first day of trial and/or during trial fails to allow either potential witness time for compliance.

4. Defendant Cannot Compel Testimony Protected by the Attorney-Client Privilege.

Assuming Defendant can meet some threshold of relevance for the proffered testimony, it is worth noting that both Ms. Birch and Ms. Hightower are attorneys for the victim. Both attorneys represented the victim during the Idaho Legislature's House Ethics Committee hearing regarding a complaint against Defendant (then-House member) in April of 2021. Both Ms. Birch and Ms. Hightower have continued to provide representation to the victim since then. Thus, any communications between the victim and Ms. Birch or Ms. Hightower would be attorney-client privileged communications. In short, neither the victim, nor her attorneys, can be compelled to testify as to those communications. Idaho Rule of Evidence 502(b). *See also Lorea*, *supra*; Idaho Code § 9-203(2) ("An attorney cannot, without the consent of [her] client, be examined as to any communication made by the client to [her], or [her] advice given thereon in the course of professional employment.").

Further, Ms. Hightower's services have been paid for by a federal funding source which requires compliance with certain confidentiality conditions contained within federal law. Specifically, a special condition contained in the federal funding required:

> "The recipient [of the federal funds] agrees to comply with the provisions of 34 U.S.C. § 12291(b)(2), nondisclosure of confidential or private information, which includes creating and maintaining documentation of compliance, such as policies

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[2] Although neither Ms. Birch nor Ms. Hightower have yet to be officially served at the time of the drafting of this Motion, they understand that subpoenas have been issued and service attempts have been made.

> and procedures for release of victim information. The recipient also agrees to ensure that all subrecipients ("subgrantees") at any tier meet these requirements.

The federal law which governs, 34 U.S.C. 12291(b)(2) provides, in pertinent part:

> **2) NONDISCLOSURE OF CONFIDENTIAL OR PRIVATE INFORMATION**
>
> **(A) In general**
>
> In order to ensure the safety of adult, youth, and child victims of domestic violence, dating violence, sexual assault, or stalking, and their families, grantees and subgrantees under this subchapter shall protect the confidentiality and privacy of persons receiving services.
>
> **(B) Nondisclosure**
>
> Subject to subparagraphs (C) and (D), grantees and subgrantees shall not—
>
> **(i)** disclose, reveal, or release any personally identifying information or individual information collected in connection with services requested, utilized, or denied through grantees' and subgrantees' programs, regardless of whether the information has been encoded, encrypted, hashed, or otherwise protected; or
>
> **(ii)** disclose, reveal, or release individual client information without the informed, written, reasonably time-limited consent of the person (or in the case of an unemancipated minor, the minor and the parent or guardian or in the case of legal incapacity, a court-appointed guardian) about whom information is sought, whether for this program or any other Federal, State, tribal, or territorial grant program, except that consent for release may not be given by the abuser of the minor, incapacitated person, or the abuser of the other parent of the minor.
>
> If a minor or a person with a legally appointed guardian is permitted by law to receive services without the parent's or guardian's consent, the minor or person with a guardian may release information without additional consent.

Federal law requires Ms. Hightower to maintain confidentiality and precludes sharing of information related to her representation of the sexual assault victim, absent Court order.[3]

Moreover, Ms. Birch was retained as co-counsel with Ms. Hightower in representing the victim through the legislative proceedings as part of the same grant. Thus, these confidentiality provisions likely apply to her as well.

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[3] 34 U.S.C. 12291(b)(2)(C).