



advise them regarding Synergy's financial condition and later acted improperly when trying to collect its loan.

[3] Respondents issued written discovery requests, which Cornerstone answered. In response to requests for production of documents, Cornerstone produced in excess of 11,000 pages of documents.

[4] Cornerstone did not produce documents which were protected by the attorney-client privilege or FDIC-privilege. Instead, Cornerstone prepared and provided a privilege log which sets forth by category and bates number the privileged documents which were being withheld.

[5] Respondents moved to compel Cornerstone to produce documents that Cornerstone had withheld from production on the basis of privilege. Cornerstone resisted the motion by claiming that the documents requested by Respondents relate to Cornerstone's attorney providing (1) legal advice to Cornerstone; and/or (2) preparing and providing information to the FDIC (which is privileged under federal law).

[6] A hearing on Respondents' motion to compel was held on April 8, 2016. During that hearing, the District Court made oral findings and legal conclusions regarding the requested documents. The District Court denied the motion to compel as to 662 documents (privileged communications during the time period after litigation was commenced). The District Court granted the motion to compel and ordered that Cornerstone produce the remaining 97 documents (privileged communications created before litigation was commenced).

[7] Cornerstone requested that the Court review the 97 documents that it claimed were privileged. The District Court denied the request to conduct an *in-camera* review of those 97 documents.

[8] On April 12, 2016, the District Court entered an order granting Respondents' motion to compel discovery from Cornerstone. The April 12, 2016 order requires that Cornerstone produce unredacted and complete copies of all documents and attachments identified on Cornerstone's privilege log. The order requires that the documents be produced within two days.

### Issue

[9] I. Whether the Supreme Court should issue a supervisory writ to the District Court because the District Court erroneously ordered Cornerstone to produce privileged documents without conducting an *in-camera* review.

### Analysis

[10] The Court has authority to issue supervisory writs under N.D. Const. art. VI, § 2 and N.D.C.C. § 27-02-04. The Court's authority is exercised on a case-by-case basis and cannot be invoked as a matter of right. State ex rel. Roseland v. Herauf, 2012 ND 151, ¶ 3, 819 N.W.2d 546. The Court exercises its discretionary authority to rectify errors and prevent injustice "in extraordinary cases in which no adequate alternative remedy exists." Western Horizons Living Centers v. Feland, 2014 ND 175, ¶ 6, 853 N.W.2d 36.

[11] An order compelling a party to disclose information subject to the attorney-client privilege is not directly appealable. Id. Accordingly, a party faced with such an order "has no immediate recourse but to answer the requests or be held in contempt." Id. ¶ 7.

[12] Recognizing that once privileged disclosures are made "they cannot be 'unmade,'" the Supreme Court has granted similar petitions for a supervisory writ. See id.; Reems ex rel. Reems v. Hunke, 509 N.W.2d 45, 47 (N.D. 1993); Jane H. v. Rothe, 488 N.W.2d

879, 881 (N.D. 1992). As in the afore-cited cases, a petition for supervisory writ is warranted here.

[13] The 97 documents were not disclosed to Respondents because they were protected by the attorney-client privilege or other privileges. Rule 502(b) of the North Dakota Rules of Evidence provides that “a client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client.” The privilege applies “to protect confidential communications between clients or their representatives and their lawyer or their lawyer’s representatives and exists “to provide clients the freedom to discuss personal matters with their lawyer and to encourage clients or their representatives to freely communicate with their lawyer or their lawyer’s representative without fear of disclosure.” Western Horizons Living Centers v. Feland, 2014 ND 175, ¶ 16, 853 N.W.2d 36.

[14] Cornerstone properly preserved its claim of privilege and declined to produce the documents on the basis of privilege. In compliance with Rule 26(b)(5) of the North Dakota Rules of Civil Procedure, Cornerstone expressly made the claim of privilege by describing the nature of information it was not producing through the creation of a privilege log. Cornerstone then requested that the Court review the documents so it could decide the claim of privilege.

[15] Despite properly asserting the privilege, providing a privilege log, and requesting an *in camera* review, the District Court ordered that the privileged documents be produced without conducting an *in camera* review. If Cornerstone complies with the District Court’s order, it will have no recourse on appeal, as the Respondents will have already reviewed the privileged documents.

[16] Accordingly, Cornerstone seeks a supervisory writ from the Court, directing the District Court to reverse an order compelling production of documents from Cornerstone.<sup>1</sup>

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<sup>1</sup> Cornerstone is separately filing a motion for enlargement of time to file a brief in support of the petition.