

**IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION**

GOLDEN BETHUNE-HILL, *et al.*,

Plaintiffs,

v.

VIRGINIA STATE BOARD OF ELECTIONS,  
*et al.*,

Defendants.

Civil Action No. 3:14-cv-00852-REP-  
GBL-BMK

**PLAINTIFFS' OBJECTIONS TO DEFENDANT-INTERVENORS' DEPOSITION  
DESIGNATIONS OF CHRISTOPHER MARSTON**

**I. INTRODUCTION**

Defendant-Intervenors served Plaintiffs with rebuttal designations of the Deposition of Christopher M. Marston on June 23, 2015. *See* Declaration of Bruce Spiva ("Spiva Decl."), Ex. A. Plaintiffs object to Defendant-Intervenors' designations on Page 47, line 15 through Page 48, line 15 of Mr. Marston's deposition, where Mr. Marston, a consultant hired by the Virginia House of Delegates Republican Caucus during the 2010-2011 redistricting cycle, references that he (and the other hired consultants) relied on the advice of counsel when assessing whether their proposed redistricting plans violated the Voting Rights Act. To the extent that Defendant-Intervenors have designated this section of Mr. Marston's deposition to suggest that Mr. Marston relied upon the advice of counsel in connection with this redistricting effort, they have waived the attorney-client privilege protecting the communications regarding this issue between Mr. Marston and the other consultants and their counsel. Plaintiffs respectfully request that the Court

either (a) require Defendant-Intervenors to produce those communications promptly, or (b) withdraw this designation.

## II. ARGUMENT

The attorney client privilege protects communications involving advice given by an attorney to a client. *Fisher v. United States*, 425 U.S. 391, 403 (1976). However, courts across the country have repeatedly held that a party who asserts a defense of advice of counsel<sup>1</sup> waives the attorney-client privilege and must produce all communications with counsel related to the subject matter of the advice being sought. *See Hunt v. Blackburn*, 128 U.S. 464, 470-71 (1888) (party waived attorney-client privilege when she advanced a defense that she was deceived and misadvised by her attorney); *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 863 (3d Cir. 1994) (“A defendant may also waive the privilege by asserting reliance on the advice of counsel as an affirmative defense.”); *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992) (“Where a party raises a claim which in fairness requires disclosure of the protected communication, the privilege may be implicitly waived.”); *JJK Mineral Co., LLC v. Swiger*, 292 F.R.D. 323 (N.D. W. Va. 2013) (“[T]he assertion of the advice of counsel defense waives the attorney client privilege with respect to communications between counsel and client with respect to the subject matter of the advice being sought”).

Here, Defendant-Intervenors designated the following section of Mr. Marston’s deposition:

Q: How did you determine whether a minority group or minority groups would have a lesser opportunity to elect a candidate of their choice?

---

<sup>1</sup> It is, of course, hardly a defense to race-based redistricting that the map drawer relied on “legal advice” to improperly utilize race as a predominate factor in drawing district boundaries. If race was the predominant factor, and the plan was not narrowly tailored, then it necessarily fails constitutional muster. No “advice of counsel” can save the plan under such circumstances. *See Ala. Leg. Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015).

A: We didn't have a hard-and-fast rule to determine that. As with many things in the law, it's a bit of a judgment call. I don't recall how many court decisions I read, but I couldn't get the same answer out of all of them as to what I needed to do, so we did our best and sought legal advice to see if what we were doing appeared to be compliant.

Q: Did you do -- when I say did "you" do, I mean did you do or direct or interact with one of your consultants who was doing any data analysis to determine whether a proposed plan would cause retrogression?

A: Yes.

Q: Tell me about that.

A: As we were preparing a plan and when we finished a plan, *we would ask our attorneys for their opinion as to whether or not they thought that there was retrogression and, more importantly, whether it could be precleared.*

Q: I guess I'm asking more of a factual question, which is, how did you use the data to determine whether or not there was retrogression?

A: *So we would prepare a list of the 100 districts and then racial composition and consult with our attorneys to see what they thought about whether or not we could successfully get the plan precleared.*

Spiva Decl., Ex. A. (emphasis added).

Mr. Marston's statements reflect the fact Mr. Marston and the various other consultants retained by the Virginia House of Delegates Republican Caucus during the 2010-2011 House of Delegates redistricting cycle apparently relied, at least in part, on the advice of counsel to determine whether their proposed redistricting plans would result in retrogression or otherwise comply with the Voting Rights Act. To the extent that Defendant-Intervenors have designated the above section of Mr. Marston's deposition to stake out an advice of counsel defense in this case, Plaintiffs object to this designation unless Defendant-Intervenors are willing to produce all communications containing the advice of counsel relied on by Mr. Marston and the other

consultants relating to their proposed plans and whether they resulted in retrogression or otherwise complied with the Voting Rights Act.

Prior to filing this Objection, Plaintiffs conferred with Defendant-Intervenors regarding the designation at issue. Defendant-Intervenors have informed Plaintiffs that they will not withdraw the designation “in light of the fact that no inquiries were made at the time of the deposition about the legal advice at issue.” *See* Spiva Decl., Ex. B. But that’s hardly required where, as here, it was not clear that Intervenor-Defendants would be *offering* such testimony until the designations were identified on June 23, 2015, long after the conclusion of the deposition. The law is clear: Intervenor-Defendants cannot have it both ways. They may either shield these communications under the privilege or waive the privilege and assert the defense. They cannot do both.

### **III. CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that this Court either (a) require Defendant-Intervenors to produce all communications between Mr. Marston and the other consultants and their counsel containing legal assessments and/or advice regarding whether the consultants’ proposed plans complied with the Voting Rights Act or (b) disallow the deposition designation at issue.

DATED: June 26, 2015

By: /s/ Aria C. Branch

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**CERTIFICATE OF SERVICE**

On June 26, 2015, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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GOLDEN BETHUNE-HILL, *et al.*,

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VIRGINIA STATE BOARD OF ELECTIONS,  
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VIRGINIA HOUSE OF DELEGATES, *et al.*,

Intervenor-Defendants.

Civil Action No. 3:14-cv-00852-REP-  
GBL-BMK

**DECLARATION OF BRUCE V. SPIVA**

I, Bruce V. Spiva, swear under penalty of perjury that the following is true and correct.

1. I am a partner with the law firm of Perkins Coie LLP in Washington, D.C. I am one of the attorneys representing the Plaintiffs in this matter.

2. I represent the Plaintiffs in this lawsuit and, in that capacity, noted and then took the deposition of Christopher M. Marston on May 18, 2015.

3. Intervenor-Defendants' deposition counter-designations of Mr. Marston's testimony suggest that Intervenor-Defendants intend to take the position that Mr. Marston and the other hired consultants to the House Republican Caucus relied upon "advice of counsel" during the redistricting process. I have attached a true and correct copy of the relevant counter-designation as Exhibit A hereto. My colleague, Ms. Branch, raised this issue with counsel for Intervenor-Defendants in a telephone conference on June 26, 2015. She suggested that



Intervenor-Defendants *either* (a) waive the privilege and produce the advice that Mr. Marston and the House of Delegates allegedly relied upon (if they wished to submit this portion of this deposition), *or* (b) withdraw the designation. Intervenor-Defendants declined both suggestions. I have attached as Exhibit B to this declaration a true and correct copy of counsel's confirming email.

4. During the course of the deposition, counsel for the Intervenor-Defendants objected to several questions and instructed Mr. Marston not to answer on the grounds of the attorney-client privilege. I have attached true and correct copies of excerpts from the deposition to this declaration as Exhibit C. See Transcript at p. 11, ln. 3 - p 12, ln. 11; p. 85, ln. 16 - p. 86, ln. 3; p. 87, ln. 2 - 13; p. 141, ln. 2 - p. 143, ln. 8; p. 147, ln. 10 - p. 152, ln. 10. I did not quarrel with those objections or instructions at the time.

I declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge and belief and that this declaration was executed on the 26th day of June, 2015, in Washington, D.C.

DATED: June 26, 2015

        /s/ Bruce V. Spiva          
BRUCE SPIVA

**CERTIFICATE OF SERVICE**

On June 26, 2015, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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*Attorneys for Plaintiffs*

Exhibit A

Exhibit A

DEPOSITION OF CHRISTOPHER MICHAEL MARSTON  
CONDUCTED ON MONDAY, MAY 18, 2015

45

1 American Community Survey.

2 Q For what purpose did you collect that data?

3 A To support our redistricting efforts,

4 including compliance with the Voting Rights Act.

5 Q I take it from that answer that some of the

6 data you collected was data regarding race?

7 A Yes.

8 Q When you say to facilitate compliance with

9 the Voting Rights Act, tell me what you mean by that.

10 A So I mean exactly that, compliance with the

11 Voting Rights Act. It imposes requirements on states,

12 particularly those that require or required

13 preclearance from a Court or the Department of

14 Justice, and there are a host of judicial decisions

15 and administrative guidelines from the Department of

16 Justice regarding what it requires to be precleared,

17 and you have to provide data in that process.

18 Q The demographic data that you collected, did

19 you use that in the map drawing function?

20 A Yes.

21 Q In what way did you use that data, the race

22 data?

46

1 A Along with political data, population data

2 and the like, it was part of the data view we would

3 have as we would draw districts so we could have

4 descriptive characteristics of districts as we drew

5 them.

6 Q Why did that matter, what the race data was,

7 in terms of the drawing of the districts?

8 A The Voting Rights Act imposes various

9 requirements about racial composition of districts,

10 and we needed to know if we were complying.

11 Q What is your understanding of the

12 requirements that the Voting Rights Act imposes in

13 terms of redistricting?

14 A Four years on, my recollection is a little

15 rusty. I know you can't have retrogression, and I

16 know that -- that's pretty much what I know.

17 Q Fair enough.

18 What's your understanding of the term

19 "retrogression"?

20 A My recollection is that it means that a

21 minority group can't have a less of an opportunity to

22 elect a candidate of their choice than under a prior

47

1 plan.

2 Q The data collection and analysis you've been

3 referring to, at least with regard to race, was that

4 aimed at determining whether the map would cause

5 retrogression?

6 A Yes.

7 Q How did you determine whether a minority

8 group or minority groups would have a lesser

9 opportunity to elect a candidate of their choice?

10 A We didn't have a hard-and-fast rule to

11 determine that. As with many things in the law, it's

12 a bit of a judgment call.

13 I don't recall how many court decisions I

14 read, but I couldn't get the same answer out of all of

15 them as to what I needed to do, so we did our best and

16 sought legal advice to see if what we were doing

17 appeared to be compliant.

18 Q Did you do -- when I say did "you" do, I

19 mean did you do or direct or interact with one of your

20 consultants who was doing any data analysis to

21 determine whether a proposed plan would cause

22 retrogression?

48

1 A Yes.

2 Q Tell me about that.

3 A As we were preparing a plan and when we

4 finished a plan, we would ask our attorneys for their

5 opinion as to whether or not they thought that there

6 was retrogression and, more importantly, whether it

7 could be precleared.

8 Q I guess I'm asking more of a factual

9 question, which is, how did you use the data to

10 determine whether or not there was retrogression?

11 A So we would prepare a list of the 100

12 districts and their racial composition and consult

13 with our attorneys to see what they thought about

14 whether or not we could successfully get the plan

15 precleared.

16 Q Did you do any other data analysis or

17 gathering other than creating a list of the 100

18 districts and the racial composition in terms of

19 trying to determine whether there would be

20 retrogression?

21 A I gathered, but never used, information

22 about election contests that featured a Black and a

**Exhibit B**

**Exhibit B**

**Roberts, Rachel M. (Perkins Coie)**

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**Subject:** RE: Bethune-Hill, et al. v. Virginia State Board of Elections, et al: Plaintiffs' Discovery Designations

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**From:** McKnight, Katherine L. [<mailto:kmcknight@bakerlaw.com>]  
**Sent:** Friday, June 26, 2015 3:26 PM  
**To:** Branch, Aria C. (Perkins Coie)  
**Cc:** Hamilton, Kevin J. (Perkins Coie); Spiva, Bruce V. (Perkins Coie); Spear, Ryan M. (Perkins Coie); Braden, E. Mark; Tony F. Troy ([TTroy@eckertseamans.com](mailto:TTroy@eckertseamans.com)); [DGlass@eckertseamans.com](mailto:DGlass@eckertseamans.com); [jbrundage@eckertseamans.com](mailto:jbrundage@eckertseamans.com); Raile, Richard; Stafford, William B. (Ben) (Perkins Coie); Walrath, Jennifer M.  
**Subject:** RE: Bethune-Hill, et al. v. Virginia State Board of Elections, et al: Plaintiffs' Discovery Designations

Dear Aria,

It was nice speaking with you. We received your second e-mail sent at roughly 2:40pm, but not the first. Though we discussed this on the phone, for a clear record, here are our responses.

Regarding your objection to the Marston testimony, we will not withdraw that designation. Moreover, and particularly in light of the fact that no inquiries were made at the time of the deposition about the legal advice at issue, we do not think it is appropriate now to produce the documents and communications containing that advice of counsel.

Regarding the new and additional designations made for the purpose of context, could you identify (either with a different color highlighting or by page and line) the new designations you propose? We cannot readily identify the new designations as all of Plaintiffs' designations are now highlighted in yellow. On these new designations, considering today's deadline, we reserve the right to object to these new designations until after we have had an opportunity to review them and meet and confer with you.

Thanks very much,

Kate

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**From:** Branch, Aria C. (Perkins Coie) [<mailto:ABranch@perkinscoie.com>]  
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**To:** Walrath, Jennifer M.  
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**Subject:** RE: Bethune-Hill, et al. v. Virginia State Board of Elections, et al: Plaintiffs' Discovery Designations

Resending the email below in case the attachments did not go through because the file sizes were too big. Thanks.

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**Subject:** RE: Bethune-Hill, et al. v. Virginia State Board of Elections, et al: Plaintiffs' Discovery Designations

Jennifer,

We have reviewed Defendant-Intervenors' additional designations to the Tyler and Marston depositions.

Plaintiffs have highlighted in yellow additional designations in the Tyler deposition to put Defendant-Intervenors' designations in context. Please review the attached and let us know if these additional designations are agreeable.

Additionally, Plaintiffs are planning to object to Defendant-Intervenors' designation on page 47, line 15 through page 48, line 15 of the Marston deposition unless Defendant-Intervenors are willing to produce the documents and communications containing advice of counsel (regarding retrogression) that Mr. Marston references in that section. However, if Defendant-Intervenors withdraw the designation at issue, Plaintiffs will not assert any objection.

Please let us know your thoughts as soon as possible as objections to designations are due today.

Thanks,  
Aria

**Aria Branch | Perkins Coie LLP**

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Exhibit C

Exhibit C





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Transcript of **CHRISTOPHER MICHAEL MARSTON**

**Date:** May 18, 2015

**Case:** BETHUNE-HILL, ET AL v. VIRGINIA STATE BOARD OF  
ELECTIONS, ET AL

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DEPOSITION OF CHRISTOPHER MICHAEL MARSTON  
CONDUCTED ON MONDAY, MAY 18, 2015

9

1       **A Okay. Thank you.**

2       **Q Any reason why you can't give accurate and**

3 **truthful testimony this morning?**

4       **A No.**

5       **Q Oh, one other thing I guess I should**

6 **mention, if I ask you a question that you don't**

7 **understand, please let me know and I'll do my best to**

8 **rephrase it. If you answer, though, I'll assume that**

9 **you understand the question that I'm asking.**

10       Does that sound all right to you?

11       **A Yes.**

12       **Q Great.**

13       Should have started with this one. Can you

14 please state your full name for the record?

15       **A Christopher Michael Marston.**

16       **Q What's your residence address?**

17       **A 110 Shooters, S-H-O-O-T-E-R-S, Court,**

18 **Alexandria, Virginia, 22314.**

19       **Q Mr. Marston, what did you do to prepare for**

20 **today's deposition?**

21       **A I met with counsel last week.**

22       **Q Which counsel did you meet with?**

10

1       **A Mr. Braden and Ms. Walrath.**

2       **Q Was there anybody else present other than**

3 **Ms. Walrath and Mr. Braden?**

4       **A Mr. Bensen.**

5       **Q Who is Mr. Bensen?**

6       **A Clark Bensen is a -- I suppose he describes**

7 **himself as a demographer. He's a redistricting data**

8 **guy would be how I would refer to him.**

9       **Q Who does he work for?**

10       **A He's self-employed.**

11       **Q What's the name of his company, or if it is**

12 **a company?**

13       **A I believe it's called Polidata,**

14 **P-O-L-I-D-A-T-A.**

15       **Q Did you review any documents when you met**

16 **with Mr. Braden and Ms. Walrath?**

17       **A Yes.**

18       **Q What documents did you review?**

19       **A Several documents that were in the**

20 **production of materials for my e-mail. From my**

21 **e-mail.**

22       **Q Do you recall specifically any documents**

11

1 that you reviewed?

2       **A No. If I saw them, I would recognize them.**

3       **Q Let me ask, why was Mr. Bensen present at**

4 **the deposition preparation session?**

5       **A I don't know.**

6       **Q What did you all discuss?**

7       MS. WALRATH: I'm going to object on the

8 grounds of attorney/client privilege.

9       MR. SPIVA: You're instructing him not to

10 answer?

11       MS. WALRATH: I am instructing him not to

12 answer.

13       MR. SPIVA: That's fine. I guess I would

14 just ask a question, I mean is there some basis for

15 Mr. Bensen within the privilege?

16       MS. WALRATH: There is.

17       MR. SPIVA: Can you state that?

18       MR. BRADEN: He works for us, works for

19 Baker & Hostetler.

20       MS. WALRATH: He works for us.

21       MR. SPIVA: He's like a consulting expert?

22       MR. BRADEN: He's also a lawyer.

12

1       MR. SPIVA: I take it he's not an attorney

2 at Baker Hostetler, is he?

3       MR. BRADEN: But he's employed by

4 Baker Hostetler in this matter.

5       MS. WALRATH: We can discuss this further

6 off the record if you would like.

7       MR. SPIVA: I do want to get the basics on

8 the record. I mean, is he an employee of

9 Baker Hostetler?

10       MR. BRADEN: No. He works for

11 Baker Hostetler as a consultant.

12       MR. SPIVA: Oh, he's a consultant to

13 Baker Hostetler, okay.

14 BY MR. SPIVA:

15       **Q Mr. Marston, this is going to be marked as**

16 **Exhibit 1, and the Court Reporter will put a sticker**

17 **on it and we'll give it to you.**

18       (Exhibit 1 was marked for identification and

19 is attached to the transcript.)

20       **Q Mr. Marston, you've been handed what's been**

21 **marked Exhibit 1, which is the subpoena that was**

22 **served on you -- or it might have been served on your**

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1 **Yeah, I'm sure Delegate Bell had a reason**  
 2 **for asking it. It's certainly relevant for purposes**  
 3 **of submitting for preclearance to have comparison of**  
 4 **Black voting age populations.**  
 5 Q Actually, did you have any involvement in  
 6 the Virginia congressional redistricting?  
 7 **A Only to the extent that I answered questions**  
 8 **like this providing public data. I didn't do any line**  
 9 **drawing or anything else.**  
 10 Q In terms of the Virginia House  
 11 redistricting, did you provide similar data, Black  
 12 voting age population data, comparing one map to the  
 13 other to the individuals involved in that?  
 14 **A I'm sure that I did.**  
 15 Q What was the reason for providing that kind  
 16 of data?  
 17 **A It related to preclearance by Justice or the**  
 18 **Court. That information needs to be included in**  
 19 **analysis you send along with preclearance requests.**  
 20 Q Let me shift gears a little bit. You  
 21 mentioned a couple of trainings that you had attended.  
 22 Have you presented or given any

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1 redistricting-related trainings yourself?  
 2 **A I assert attorney/client privilege on behalf**  
 3 **of my clients with regard to that question.**  
 4 Q Well, in this capacity, one of them has to  
 5 assert the privilege, but I guess the question I'm  
 6 asking, before you get into what was said, is just  
 7 a -- can answer it with a yes or no, which is, have  
 8 you ever provided any redistricting trainings?  
 9 **A Yes.**  
 10 Q When have you done that?  
 11 **A In 2010 or '11, or both.**  
 12 Q Who did you provide the training to?  
 13 **A My client.**  
 14 Q Who was your client?  
 15 **A The House Republican Caucus.**  
 16 Q Were you engaged as an attorney for the  
 17 House Republican Caucus?  
 18 **A Yes.**  
 19 Q Do you have an engagement letter --  
 20 **A No.**  
 21 Q -- with them?  
 22 **A No.**

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1 Q How did you come to an agreement to be an  
 2 attorney for the House Republican Caucus?  
 3 **A Speaker Howell asked me to provide legal**  
 4 **advice as an attorney to the Caucus and I agreed.**  
 5 Q I take it that some of the advice you  
 6 provided to the Caucus was not specifically in terms  
 7 of these trainings but in terms of the whole  
 8 redistricting process, some of it was not legal  
 9 advice?  
 10 **A That is correct.**  
 11 Q How did you draw a line between advice that  
 12 you were providing -- legal advice that you were  
 13 providing as an attorney as opposed to policy advice  
 14 or --  
 15 **A If it involved a client asking a legal**  
 16 **opinion on a matter, it was legal advice; if it did**  
 17 **not, it was not.**  
 18 Q What was the subject of the redistricting  
 19 training that you provided to the House Republican  
 20 Caucus in 2010 and 2011?  
 21 **A Legal issues in redistricting.**  
 22 Q Did you provide them with any written

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1 materials?  
 2 **A Yes.**  
 3 Q Was it more than one document or just one  
 4 document?  
 5 **A I believe it was a single-page memo with a**  
 6 **talking points note card attached.**  
 7 Q Who was on the To line of the single-page  
 8 memo?  
 9 **A The members of the House of Delegates and**  
 10 **the Republican Caucus.**  
 11 Q So all of the Republican members of the  
 12 House of Delegates?  
 13 **A Correct.**  
 14 Q I take it that you provided this training  
 15 also verbally?  
 16 **A Correct.**  
 17 Q Was there more than one session or just one  
 18 session?  
 19 **A With regard to that specific memo, just one**  
 20 **session. I believe that there may have been two times**  
 21 **when I addressed them as their attorney as a group.**  
 22 Q Who was present at these meetings where you

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1 addressed them as their attorney?  
 2 **A Just Republican members, the Republican**  
 3 **Caucus, delegates only.**  
 4 Q There were no staffers there?  
 5 **A No.**  
 6 Q No consultants?  
 7 **A No.**  
 8 Q Who else was the single-page memo  
 9 distributed to, if anyone, other than members of the  
 10 House Republican Caucus?  
 11 **A No one.**  
 12 Q Who else was the talking points note card  
 13 distributed to other than the members of the House  
 14 Republican Caucus?  
 15 **A No one.**  
 16 Q What did you discuss in the single-page memo  
 17 of legal issues in redistricting that you provided to  
 18 the Republican Caucus?  
 19 MS. WALRATH: Objection on the grounds of  
 20 attorney/client privilege. That has been withheld in  
 21 this case.  
 22 MR. SPIVA: Are you instructing him not to

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1 answer?  
 2 MS. WALRATH: I am instructing him not to  
 3 answer.  
 4 MR. SPIVA: That, I assume, is on the  
 5 privilege log or one of the privilege logs?  
 6 MS. WALRATH: It is.  
 7 MR. SPIVA: Okay.  
 8 BY MR. SPIVA:  
 9 Q What did you discuss in -- actually, let me  
 10 step back for a minute.  
 11 You mentioned I think three sessions total;  
 12 one related to the memo and two that weren't  
 13 specifically related to the memo; is that accurate?  
 14 **A I believe I said two.**  
 15 Q Oh, two total.  
 16 **A Yes.**  
 17 Q When did those occur?  
 18 **A One was at the House members' fundraising**  
 19 **retreat at the Homestead, which would have been in the**  
 20 **Spring of 2010. The second would have been at a**  
 21 **members' planning retreat in the Fall of 2010.**  
 22 Q What did you discuss in -- well, take them

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1 one at a time.  
 2 What did you discuss in your presentation to  
 3 the House members' fundraising retreat in the Spring  
 4 of 2010?  
 5 MS. WALRATH: Objection on the grounds of  
 6 attorney/client privilege, and I instruct the witness  
 7 not to answer.  
 8 Q What did you discuss in your presentation to  
 9 the members of the planning retreat in the Fall of  
 10 2010?  
 11 MS. WALRATH: Again, objection on the  
 12 grounds of attorney/client privilege, and I instruct  
 13 the witness not to answer.  
 14 MR. SPIVA: It's a little formalistic, but I  
 15 have to get a clear instruction. We can decide later  
 16 whether or not we fight about it.  
 17 Q Mr. Marston, do you carry professional  
 18 liability insurance to provide legal advice?  
 19 **A I do.**  
 20 MR. SPIVA: If you guys are ready for lunch,  
 21 why don't we take a lunch break and come back.  
 22 (Luncheon recess taken at 11:53 a.m.)

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1 AFTERNOON SESSION (1:16 p.m.)  
 2 BY MR. SPIVA:  
 3 Q Mr. Marston, earlier we talked about the  
 4 concept of retrogression; do you recall?  
 5 **A Yes.**  
 6 Q Tell me if I'm mis-summarizing, but I think  
 7 you confirmed that you understood that to mean that  
 8 there should be no retrogression in the ability of the  
 9 minority community in majority-minority districts to  
 10 be able to elect the candidates of their choice.  
 11 Is that a fair summary of what you said?  
 12 **A I'm not sure I was that specific.**  
 13 Q Is that your understanding of what the  
 14 term --  
 15 **A It seems about right.**  
 16 Q I know you already said that you never did a  
 17 racially polarized voting analysis and weren't aware  
 18 of one having been done, but I want to ask you a  
 19 slightly broader question, which is, did you undertake  
 20 to evaluate in any way the ability of the minority  
 21 community in majority-minority districts to be able to  
 22 elect the candidates of their choice?

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1 **A He is a member of the House of Delegates.**

2 Q What was the nature of the -- were you

3 providing Mr. Peace with legal advice in this e-mail?

4 **A I'm sure that I was.**

5 Q Do you recall what the nature of that advice

6 was?

7 MS. WALRATH: Objection. Attorney/client

8 privilege. I will instruct the witness not to answer.

9 And also just to -- for the benefit of the

10 record here, this is an e-mail that was at issue in

11 the motions practice in the Page case and was reviewed

12 in camera and ordered redacted by Judge Payne.

13 MR. SPIVA: I mean, the problem is, the

14 privilege log doesn't have anything in the re -- the

15 subject line.

16 MS. WALRATH: That is because the e-mail

17 does not have anything in the re subject line. The

18 subject line is the actual subject line of the e-mail.

19 That was not redacted in this e-mail. It literally is

20 just re.

21 MR. SPIVA: This doesn't tell you anything

22 about the general nature of it. I mean, typically

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1 with a privilege log -- I mean, in order to validly

2 assert the privilege, you have to at least give a

3 general sense of the nature -- obviously, not the

4 specifics of the communications -- but the nature of

5 it so one can assess whether it actually is legal

6 advice.

7 MS. WALRATH: Well, this is the subject of a

8 pending motion, I believe, but I'll also represent to

9 you, this is something that Judge Payne has already

10 ordered be redacted for attorney/client privilege in a

11 related proceeding.

12 MR. SPIVA: If it's the subject of our

13 pending Motion to Compel, then --

14 MS. WALRATH: At least in terms of the

15 assertion issue that you raise --

16 MR. SPIVA: Right.

17 MS. WALRATH: -- and the nature of this

18 e-mail.

19 MR. SPIVA: Okay.

20 MS. WALRATH: So to the extent that you have

21 questions about that, I just want to let you know

22 that's -- first of all, it's already been ordered by a

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1 Federal judge also in this case that it be redacted,

2 and he's found it to be privileged, and also that the

3 assertion issues are at issue in the Motion to Compel.

4 Those are just facts I'm putting out in

5 general for asserting the attorney/client privilege.

6 MR. SPIVA: Well, you've instructed him not

7 to answer.

8 MS. WALRATH: I have.

9 BY MR. SPIVA:

10 Q Then Delegate Peace writes back to you on

11 3/24/2011 that, "We're doing a joint piece."

12 Who is he talking about he's doing a joint

13 piece with?

14 **A From the context, I believe it's**

15 **Chris Jones.**

16 Q What does he mean by "a joint piece"?

17 **A An article or a column in a newspaper signed**

18 **by both of them.**

19 Q And was the subject -- I'm not asking for

20 the particulars -- but the subject of your original

21 e-mail a newspaper article or column?

22 **A I don't recall.**

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1 MR. SPIVA: You can instruct him not to

2 answer if you want to, I think I'm entitled to explore

3 that. I mean, if he's given him advice about a

4 newspaper article, it's relevant to the privilege

5 dispute.

6 Anyhow, you've already answered that you

7 don't recall.

8 Let me have about five minutes and we may be

9 done.

10 THE WITNESS: Okay.

11 (Break taken at 2:44 p.m.)

12 (Back on the record at 3:00 p.m.)

13 BY MR. SPIVA:

14 Q Mr. Marston, we discussed earlier the

15 potential 13 majority-minority member plan that was

16 proposed by the Governor's Commission.

17 Did you have any discussions about that plan

18 with anyone?

19 **A Yes.**

20 Q Who did you discuss it with?

21 **A I spoke to at least one of the Commissioners**

22 **about it, and I communicated with other folks, largely**

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1 **members who had questions about what the Commission**  
 2 **had proposed. And I just relayed information in those**  
 3 **conversations.**  
 4 Q Who was the Commissioner that you spoke  
 5 with?  
 6 A **Cameron Quinn.**  
 7 Q What was the nature of your discussion?  
 8 A **I called her to get a heads-up on what was**  
 9 **coming out before it came out.**  
 10 Q Was there anything further to it other than  
 11 that?  
 12 A **Not to my recollection.**  
 13 Q Then you spoke with other members about this  
 14 13 minority-majority plan. Which other members did  
 15 you speak with?  
 16 A **I know there's communication in what was**  
 17 **produced with Delegate David Englin, where he just**  
 18 **asked for a comparison of BVAP across a number of**  
 19 **different plans, including some of the Commission's**  
 20 **recommendations.**  
 21 **I don't have a specific recollection of any**  
 22 **other conversations; although, generally I recall**

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1 **talking to people about the fact that the Commission**  
 2 **plans existed and what their general makeup was.**  
 3 Q Do you recall anything else about your  
 4 communications with Delegate Englin about the  
 5 comparison in terms of BVAP?  
 6 A **No, it was just an e-mail exchange where he**  
 7 **requested data and I sent it to him.**  
 8 Q Let me give you what will be marked as  
 9 Exhibit 24.  
 10 (Exhibit 24 was marked for identification  
 11 and is attached to the transcript.)  
 12 Q This is a chain of I guess three e-mails.  
 13 Maybe it's two e-mails. No, I'm --  
 14 A **Maybe it's four.**  
 15 Q Maybe it's four, okay.  
 16 I'll tell you what, let me ask you about the  
 17 one on the first page of the exhibit that's towards  
 18 the bottom. It says from Chris Marston to  
 19 Jason Torchinsky, it cc's a number of people, it's  
 20 dated February 19, 2011, subject: Redist. Call.  
 21 You say, "4:30 is fine for me."  
 22 Did you send that e-mail?

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1 **A I did.**  
 2 Q Were you on the chain that starts below  
 3 that, that has a redaction for attorney/client  
 4 privilege on it?  
 5 A **I don't have a specific recollection of it,**  
 6 **and the header information's not here, but I suspect I**  
 7 **was.**  
 8 Q Who is Jason Eig?  
 9 A **Eig. He was counsel to the Governor.**  
 10 Q Was the Governor one of your clients?  
 11 A **No.**  
 12 Q Do you know what the nature of the  
 13 information is that's redacted from this e-mail?  
 14 MS. WALRATH: Objection. Attorney/client  
 15 privilege, as it says in the redaction. I will  
 16 instruct the witness not to answer.  
 17 MR. SPIVA: Is he one of the recipients of  
 18 this e-mail?  
 19 MS. WALRATH: As answered, he said he  
 20 believed he was.  
 21 A **Yeah, I'm not sure.**  
 22 MR. SPIVA: I mean, you're going to instruct

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1 him however you're going to instruct him, but I'd just  
 2 ask, if the Governor is not his client, how a  
 3 communication that included him could be privileged?  
 4 MS. WALRATH: This is on the redaction log,  
 5 and although the redaction log was produced subsequent  
 6 to filing the Motion to Compel at the request of  
 7 Kevin Hamilton, there are similar e-mails at issue in  
 8 the Motion to Compel that is on file right now  
 9 pending.  
 10 MR. SPIVA: Okay.  
 11 BY MR. SPIVA:  
 12 Q What is the general nature of the  
 13 communications that's redacted here?  
 14 MS. WALRATH: Objection. Attorney/client  
 15 privilege. I'm going to instruct the witness not to  
 16 answer.  
 17 I just don't see the purpose of asking these  
 18 questions. There's a reason as well if not  
 19 attorney/client privileged.  
 20 MR. SPIVA: I just don't have any basis to  
 21 believe that it is attorney/client privilege.  
 22 MS. WALRATH: That's perfectly fine, it's

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1 being litigated right now. As of today, though, it's  
 2 redacted for attorney/client privilege.  
 3 BY MR. SPIVA:  
 4 Q Let me ask you, in the e-mail that's  
 5 redacted, did you communicate attorney/client  
 6 privileged information to a client?  
 7 MS. WALRATH: Objection. Form. He did not  
 8 write this e-mail, but he may answer.  
 9 **A I didn't write this e-mail.**  
 10 Q So I take it the response is no, right?  
 11 **A No, I did not.**  
 12 Q Did Mr. -- somebody pronounce it for me.  
 13 **A Eig.**  
 14 Q Eig -- did he summarize attorney/client  
 15 advice from you to a client in this e-mail?  
 16 MS. WALRATH: Objection. Attorney/client  
 17 privilege. I'm going to instruct the witness not to  
 18 answer.  
 19 I get where you're going with this, but it  
 20 is right now subject to a Motion to Compel, and I will  
 21 continue to instruct the witness not to answer  
 22 regarding the subject covered in this redaction.

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1 MR. SPIVA: But I asked him a yes-or-no  
 2 question which is, did Mr. Eig convey attorney/client  
 3 information -- attorney/client advice from him in this  
 4 e-mail.  
 5 MS. WALRATH: As his attorney, I will refer  
 6 you to the privilege redaction log which states the  
 7 nature of what is redacted.  
 8 MR. SPIVA: But I want to know from him, so  
 9 I'm going to ask it again. You can do whatever you  
 10 want to do, but I think I'm entitled to know this.  
 11 BY MR. SPIVA:  
 12 Q Did Mr. Eig convey attorney/client  
 13 privileged information -- sorry, attorney/client  
 14 advice from you to one of your clients in this e-mail?  
 15 MS. WALRATH: I am going to object on two  
 16 grounds. One, it asks for a legal conclusion, but  
 17 also it is attorney/client privileged and instruct the  
 18 witness not to answer.  
 19 MR. SPIVA: I don't think it asks for a  
 20 legal conclusion; all I did was say, did he convey  
 21 your advice to a client in his e-mail. Do what you  
 22 think is --

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1 MS. WALRATH: I will just say that's a  
 2 different question than the one that was asked, so if  
 3 you'd like to rephrase the question and ask it the way  
 4 you really want it to be on the record as being asked,  
 5 then we will object as appropriate.  
 6 MR. SPIVA: I think that was the way I asked  
 7 it, but let me just -- to make it clear.  
 8 BY MR. SPIVA:  
 9 Q Did Mr. Eig convey attorney/client advice of  
 10 yours in the e-mail?  
 11 MS. WALRATH: And I will object and assert  
 12 attorney/client privilege and instruct the witness not  
 13 to answer. I believe everything you need to know is  
 14 in the log, but ...  
 15 MR. SPIVA: But I want to know it from him.  
 16 MS. WALRATH: I instruct him not to answer.  
 17 So there you go.  
 18 MR. SPIVA: All right.  
 19 Q Well, the only other thing I'd ask, did  
 20 this -- the call that's the subject of this e-mail  
 21 chain, did that occur?  
 22 **A I don't have a specific recollection, but I**

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1 **suspect that it did.**  
 2 Q Do you recall what the subject of the call  
 3 was?  
 4 MS. WALRATH: Objection. Attorney/client  
 5 privilege. And I will instruct the witness not to  
 6 answer beyond what is already visible in the face of  
 7 the document.  
 8 MR. SPIVA: So you're not going to let him  
 9 talk about what was discussed on the call?  
 10 MS. WALRATH: Correct.  
 11 Q Who was on the call, to your recollection?  
 12 **A I don't have a specific recollection. I**  
 13 **assume that the folks who are indicated in the e-mail**  
 14 **as recipients were on the call.**  
 15 Q There's a Jill Holtzman Vogel. Is she  
 16 somebody's attorney in this chain?  
 17 **A That's an interesting question. She's a**  
 18 **State Senator. She's also an attorney.**  
 19 Q I see.  
 20 Mr. Eig, he was counselor to the  
 21 then-Governor, I take it?  
 22 **A Correct.**