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BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

KRISTIN K. MAYES - CHAIRMAN
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2009 JUN -1 P 3:41

AZ CORP COMMISSION
DOCKET CONTROL

IN THE MATTER OF THE FORMAL
COMPLAINT OF ACCIPITER
COMMUNICATIONS, INC., AGAINST
VISTANCIA COMMUNICATIONS, L.L.C.,
SHEA SUNBELT PLEASANT POINT, L.L.C.,
AND COX ARIZONA TELCOM, LLC.

DOCKET NO. T-03471A-05-0064

**COX'S REVISED SUBMISSION OF PRIVILEGED DOCUMENTS FOR IN CAMERA
REVIEW IN RESPONSE TO PROCEDURAL ORDER DATED FEBRUARY 12, 2009**

In a Procedural Order dated February 12, 2009 ("2/12/09 Procedural Order"), Cox Arizona
Telcom, LLC ("Cox") was ordered to de-privilege documents, and to remove duplicative
documents, that it had listed on its privilege log and submitted for *in camera* review. Attached to
this filing is a modified privilege log prepared in a good faith effort to comply with the 2/12/09
Procedural Order. Moreover, in conjunction with this filing, Cox is submitting the privileged
documents identified on the modified privilege log to the Administrative Law Judge. Finally, Cox
will be providing the de-privileged documents to Commission Staff.

As a matter of policy, Cox asserts the attorney-client privilege over communications and
other documents involving legal counsel that are undertaken in the furtherance of giving or
providing legal advice. As set forth more fully in its briefing of February 23, 2007, and March 21,
2007, regarding the attorney-client privilege, Cox objects that its privileged communications are
being subject to scrutiny in a proceeding that is based on a third-party complaint filed against Cox
that Cox has settled with the complainant.

Arizona Corporation Commission

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1 To defend itself against Staff's unfiled claims for fines and other penalties, and to rebut
2 assertions by Staff that Cox created and proposed the private easement arrangement at issue here -
3 - assertions which are clearly unfounded given undisputed evidence presented at hearings on this
4 matter confirming that the developer proposed the private easement arrangement to Cox based on
5 form documents that it purchased from an out-of-state attorney -- Cox *has been forced* to proffer
6 testimony of in-house counsel and business personnel that Staff now claims constitutes a waiver of
7 the privilege. Cox's proffered testimony -- which was entirely consistent with the documents and
8 the developer's testimony -- showed that Cox had originally prepared traditional agreements, that
9 the developer rejected the traditional agreements and presented Cox with agreements based on a
10 private easement arrangement, and that the developer and its legal counsel assured Cox that the
11 private easement arrangement had been found legal elsewhere.

12 Staff has asserted that Cox's proffered testimony waived the attorney-client privilege under
13 the holding of *State Farm Mut. Auto. Ins. Co. v. Lee*, 199 Ariz. 52, 13 P.3d 1169. As Cox set forth
14 more fully in its briefing, *State Farm* held only that waiver occurs where a party "assert[s] that it
15 acted after investigating the law and reaching a well-founded belief that the law permitted the
16 action it took." *Id.* at 60, 13 P.3d at 1177. Cox here has stated the very opposite: that it did *not*
17 conduct an independent investigation of the law but, instead, relied on assurances from the
18 developer that the private easement arrangement had been found lawful. Certainly, privileged
19 documents that have no bearing on any supposed "investigation of law" by legal counsel cannot,
20 by any stretch of the imagination, be considered waived under *State Farm*.

21 Despite its belief that it has not waived the attorney-client privilege over the documents on
22 its privilege log, Cox, in good faith, did not object to Staff's request and the March 27, 2008
23 Procedural Order that it submit all of the privileged documents on its log for *in camera* review.
24 Accordingly, Cox made a good faith submission for *in camera* review, which was subsequently
25 revised based on additional Procedural Orders.

26 Now, however, the 2/12/09 Procedural Order objects that Cox's fulsome submission for *in*
27 *camera* review contains duplicative documents. Cox informs the ALJ that, in order to avoid any

1 objections by Staff that Cox had not fully complied with an *in camera* review, Cox submitted to
2 the ALJ the privilege log that it had produced to Staff, as well as all documents over which it had
3 asserted the privilege and listed on the privilege log. Such documents were necessarily
4 duplicative, because as is expected of parties when gathering documents for litigation, Cox had
5 gathered documents from many different employees who were involved in the matter, many of
6 whom had documents that were identical or nearly identical to documents collected from other
7 employees. Because identical or nearly identical documents were gathered from different sources
8 at Cox's offices, the privilege log produced to Staff (and, thus, submitted to the ALJ) contains
9 multiple entries for what are essentially identical documents. But the documents themselves are
10 not duplicative documents in that they bear different production numbers and, as such, Cox
11 understood that those documents were required to be listed separately on the privilege log.

12 The 2/12/09 Procedural Order also objects to the listing as privileged of certain unspecified
13 documents that included legal counsel. Cox informs the ALJ that, in order to avoid arguments
14 from Staff that Cox had waived the privilege by producing documents involving legal counsel -- a
15 concern which is well founded given the history of this case -- Cox asserted the privilege over all
16 documents involving legal counsel that could in any way be asserted to relate to the furtherance of
17 giving or receiving legal advice. Cox believes that its decisions regarding listing of privileged
18 documents were appropriate and made in good faith.

19 Although Cox disagrees with the 2/12/09 Procedural Order, Cox has made additional, good
20 faith efforts to address this privilege dispute in this filing and related submissions. Thus, without
21 waiving the attorney-client privilege as to those documents over which Cox continues to assert the
22 privilege, Cox makes a revised submission for *in camera* inspection.

23 First, Cox hereby submits for *in camera* review a revised privilege log (attached as Exhibit
24 A hereto) with the corresponding privileged documents. In accordance with the instructions of the
25 2/12/09 Procedural Order that "no documents or communications [be] needlessly duplicated in the
26 submission," Exhibit A does not contain an entry for each numbered document over which Cox is
27 asserting the privilege. Rather, without waiving the privilege over duplicate documents bearing

1 different production numbers, Exhibit A attempts to list only one numbered document for each
2 "document or communication" over which Cox asserts the privilege. Also, the 2/12/09 Procedural
3 Order requires a chronological listing, but since many documents contain multiple email
4 communications bearing different dates, a chronological listing of the separate emails contained
5 within each document would result in different entries for any given document being scattered
6 throughout the log. Accordingly, for the convenience of the ALJ, **Exhibit A** lists only documents,
7 not each separate email within a document, but identifies the number of emails contained within
8 the document.

9 Second, Cox is providing the Administrative law Judge with copies of the documents
10 identified in the attached privilege log.

11 Third, Cox will produce to Staff those documents that are being de-privileged in
12 accordance with the instructions of the 2/1/209 Procedural Order. By de-privileging documents
13 under order of the Commission, Cox does not waive the privilege as to other documents over
14 which it continues to assert the privilege.

15 RESPECTFULLY SUBMITTED this 1st day of June, 2009.

16 COX ARIZONA TELCOM, LLC.

17
18 By  _____
19 Michael W. Patten
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22 Phoenix, Arizona 85004
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and

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Original and 13 copies of the foregoing
filed this 1st day of June 2008 with:

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Copy of the foregoing hand-delivered/mailed
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EXHIBIT

"A"

Cox's Privilege Log For June 1, 2009 Submission for *In Camera* Inspection

- Listing Only Non-Duplicative Documents, in Chronological Order Based on Date of the Latest Entry (Top Entry) in Email String¹ -

	Bates #Begin	Bates #End	Beg Attach	End Attach	Date	Owner/Author/ Recipient	Type	Description	Produced w/ Redaction	Basis for Privilege	Purpose
1.	Cox005328	Cox005353	N/A	N/A	2002/00/00	Trickey, L*	Draft Agreement	Shea Sunbelt Pleasant Point, LLC & CoxCom, Inc. Property Access Agreement	No	Attorney/Client	In furtherance of providing legal advice
2.	Cox005429	Cox005450	N/A	N/A	2002/00/00	Trickey, L*	Draft Agreement	Shea Sunbelt Pleasant Point, LLC & CoxCom, Inc. Property Access Agreement	No	Attorney/Client	In furtherance of providing legal advice
3.	Cox005764	Cox005788	N/A	N/A	2002/00/00	Trickey, L*	Draft Agreement	Shea Sunbelt Pleasant Point, LLC & CoxCom, Inc. Property Access Agreement	No	Attorney/Client	In furtherance of providing legal advice
4.	Cox005839	Cox005863	N/A	N/A	2002/00/00	Trickey, L*	Draft Agreement	Shea Sunbelt Pleasant Point, LLC & CoxCom, Inc. Property Access Agreement	No	Attorney/Client	In furtherance of providing legal advice
5.	Cox006779	Cox006809	N/A	N/A	2002/00/00	Trickey, L*	Draft Agreement	Shea Sunbelt Pleasant Point, LLC & CoxCom, Inc. Co-Marketing Agreement	No	Attorney/Client	In furtherance of providing legal advice
6.	Cox006810	Cox006838	N/A	N/A	2002/00/00	Trickey, L*	Draft Agreement	Shea Sunbelt Pleasant Point, LLC & CoxCom, Inc. Co-Marketing Agreement	No	Attorney/Client	In furtherance of providing legal advice
7.	Cox007141	Cox007168	N/A	N/A	2002/00/00	Hightower, J*	Draft Agreement	Shea Sunbelt Pleasant Point, LLC & CoxCom, Inc. Co-Marketing Agreement	No	Attorney/Client	In furtherance of providing legal advice
8.	Cox007999	Cox008026	N/A	N/A	2002/00/00	Humphrey, L*	Draft Agreement	Shea Sunbelt Pleasant Point, LLC & CoxCom, Inc. Co-Marketing Agreement	No	Attorney/Client	In furtherance of providing legal advice
9.	Cox008179	Cox008207	N/A	N/A	2002/00/00	Hightower, J*	Draft Agreement	Shea Sunbelt Pleasant Point, LLC & CoxCom, Inc. Co-Marketing Agreement	No	Attorney/Client	In furtherance of providing legal advice
10.	Cox010394	Cox010420	N/A	N/A	2002/00/00	Hightower, J*	Draft Agreement	Shea/Sunbelt Holdings & Coxcom, Inc. Co-Marketing Agreement	No	Attorney/Client	In furtherance of providing legal advice
11.	Cox010431	Cox010457	N/A	N/A	2002/00/00	Hightower, J*	Draft Agreement	Shea Sunbelt Pleasant Point, LLC & CoxCom, Inc. Co-Marketing Agreement	No	Attorney/Client	In furtherance of providing legal advice

¹ Cox is listing only non-duplicative documents in accordance with the February 12, 2009 Procedural Order. However, Cox continues to assert the privilege over all versions of privileged documents, even if not listed on this log due to the fact that such listing would be deemed to constitute a duplication.

* indicates that person named is an attorney or paralegal

	Bates #Begin	Bates #End	Beg Attach	End Attach	Date	Owner/Author/Recipient	Type	Description	Produced w/ Redaction	Basis for Privilege	Purpose
12.	Cox012864	Cox012887	N/A	N/A	2002/00/00	Trickey, L*	Partial Draft Agreement	Shea Sunbelt Pleasant Point, LLC & CoxCom, Inc. Property Access Agreement	No	Attorney/Client	In furtherance of providing legal advice
13.	Cox005296	Cox005297	N/A	N/A	2002/09/16	Kelley, M; Padilla, M*; Carter, R; Arthurs, T; Drake, P; Walker, J	E-mail chain containing 3 emails	Re Surprise Farms Agreement	No	Attorney/Client	In furtherance of providing/ receiving legal advice
14.	Cox012515	Cox012515	N/A	N/A	2002/09/26	Kelley, M; Duggan, K*; Drake, P; Humphrey, L*; Arthurs, T; Crosby, S; Carter, R; Padilla, M*	E-Mail chain containing 2 emails	Re Vistancia	No	Attorney/Client	In furtherance of providing/receiving legal advice
15.	Cox012585	Cox012585	N/A	N/A	2002/09/30	Drake, P; Duggan, K*; Arthurs, T; Crosby, S;	E-mail chain containing 2 emails	Re Status Request	No	Attorney/Client	In furtherance of providing/receiving legal advice
16.	Cox012599	Cox012599	Cox012600	Cox012627	2002/10/01	Drake, P; Duggan, K*; Arthurs, T	E-mail	Vistancia draft 10-1-02	No	Attorney/Client	In furtherance of receiving legal advice
17.	Cox012600	Cox012627	N/A	N/A	2002/10/01	Drake, P; Arthurs, T	Draft Agreement	Shea/Sunbelt Holdings & CoxCom, Inc. Co-Marketing Agreement	No	Attorney/Client	In furtherance of receiving legal advice
18.	Cox006186	Cox006187	N/A	N/A	2002/10/11	Trickey, L*; Sjostrom, D; Duggan, K; Drake, P	E-mail chain containing 5 emails	Legal Language Help - Important	No	Attorney/Client	In furtherance of providing/receiving legal advice
19.	Cox009630	Cox009630	Cox009631	Cox009657	2002/10/15	Hightower, J*; Drake, P; Arthurs, T; Smith, T	E-mail chaining 2 emails	Fw Vistancia Agreement Attached	No	Attorney/Client	In furtherance of providing legal advice
20.	Cox009631	Cox009657	N/A	N/A	2002/10/15	Hightower, J*; Smith, T	Agreement	Redlined Vistancia Agr.	No	Attorney/Client	In furtherance of providing legal advice

	Bates #Begin	Bates #End	Beg Attach	End Attach	Date	Owner/Author/Recipient	Type	Description	Produced w/ Redaction	Basis for Privilege	Purpose
21.	Cox012595	Cox012598	N/A	N/A	2002/10/21	Drake, P; Hightower, J*; Duggan, K*; Arthurs, T; Humphrey, L*; Crosby, S; Carter, R	E-mail chain containing 5 emails	Re Vistancia	No	Attorney/Client	In furtherance of providing/receiving legal advice
22.	Cox005317	Cox005317	N/A	N/A	2002/10/30	Padilla, M*; Kelley, M; Arthurs, T; Walker, J	E-mail chain containing 2 emails	Re Vestancia	Yes	Attorney/Client	In furtherance of providing/receiving legal advice
23.	Cox010463	Cox010464	N/A	N/A	2002/10/30	Hightower, J*; Arthurs, T; Drake, P;	E-mail chain containing 4 emails	Re Vistancia	No	Attorney/Client	In furtherance of providing/receiving legal advice
24.	Cox005468	Cox005470	N/A	N/A	2002/11/06	Carter, R; Drake, P; Young, S; Arthurs, T; Kelley, M; North, J; Humphrey, L*; Trickey, L*	E-mail chain containing seven emails	Re Verrado Commercial Access	No	Attorney/Client	In furtherance of providing/receiving legal advice, and discusses comments received from legal counsel
25.	Cox013123	Cox013128	N/A	N/A	2002/11/06	Trickey, L*; Hightower, J*; Kelley, M; Housen, H*;	E-mail chain containing 8 emails	Fw Vistancia Agreement	No	Attorney/Client	In furtherance of providing/receiving legal advice
26.	Cox010384	Cox010384	N/A	N/A	2002/11/11	Hightower, J*; Drake, P; Arthurs, T	E-mail chain containing 3 emails	Shea/Sunbelt Holdings	No	Attorney/Client	In furtherance of providing/receiving legal advice
27.	Cox012837	Cox012837	N/A	N/A	2002/11/22	Trickey, L*; Kelley, M	E-mail (1)	Re Vistancia	Yes	Attorney/Client	In furtherance of providing legal advice
28.	Cox005367	Cox005367	N/A	N/A	2002/12/02	Kelley, M; Trickey, L*; Housen, H*	E-mail (1)	Fw Open items for Vistancia Commercial Access Agreement	Yes	Attorney/Client	In furtherance of receiving legal advice
29.	Cox012809	Cox012809	Cox012810	Cox012835	2002/12/04	Trickey, L*; Kelley, M	E-mail	Vistancia	No	Attorney/Client	In furtherance of providing legal advice
30.	Cox012810	Cox012835	N/A	N/A	2002/12/04	Trickey, L*	Draft Agreement	Shea/Sunbelt Pleasant Point, LLC & CoxCom, Inc. Property Access Agreement	No	Attorney/Client	In furtherance of providing
31.	Cox007687	Cox007687	N/A	N/A	2002/12/09	Hightower, J*; Arthurs, T	E-mail chain containing 3 emails	MOA	No	Attorney/Client	In furtherance of providing/receiving legal advice

	Bates #Begin	Bates #End	Beg Attach	End Attach	Date	Owner/Author/Recipient	Type	Description	Produced w/ Redaction	Basis for Privilege	Purpose
32.	Cox007698	Cox007698	N/A	N/A	2002/12/09	Hightower, J*; Arthurs, T	E-mail chain containing 2 emails	Re Vistancia Recordation Language	Yes	Attorney/Client	In furtherance of providing/receiving legal advice
33.	Cox013121	Cox013122	N/A	N/A	2002/12/09	Trickey, L*; Hightower, J*; Arthurs, T;	E-mail chain containing 5 emails	Vistancia Recordation Language	Yes	Attorney/Client	In furtherance of providing/receiving legal advice
34.	Cox004559	Cox004591	N/A	N/A	2003/00/00	Trickey, L*	Draft Agreement	Shea Sunbelt Pleasant Point, LLC & CoxCom, Inc. Co-Marketing Agreement	No	Attorney/Client	In furtherance of providing legal advice
35.	Cox004592	Cox004624	N/A	N/A	2003/00/00	Trickey, L*	Draft Agreement	Shea Sunbelt Pleasant Point, LLC & CoxCom, Inc. Co-Marketing Agreement	No	Attorney/Client	In furtherance of providing legal advice
36.	Cox005207	Cox005235	N/A	N/A	2003/00/00	Trickey, L*	Draft Agreement	Shea Sunbelt Pleasant Point, LLC & CoxCom, Inc. Property Access Agreement	No	Attorney/Client	In furtherance of providing legal advice
37.	Cox005251	Cox005278	N/A	N/A	2003/00/00	Trickey, L*	Draft Agreement	Shea Sunbelt Pleasant Point, LLC & CoxCom, Inc. Property Access Agreement	No	Attorney/Client	In furtherance of providing legal advice
38.	Cox005716	Cox005735	N/A	N/A	2003/00/00	Trickey, L*	Partial Draft Agreement	Shea Sunbelt Pleasant Point, LLC & CoxCom, Inc. Property Access Agreement	No	Attorney/Client	In furtherance of providing legal advice
39.	Cox005737	Cox005763	N/A	N/A	2003/00/00	Trickey, L*	Draft Agreement	Shea Sunbelt Pleasant Point, LLC & CoxCom, Inc. Property Access Agreement	No	Attorney/Client	In furtherance of providing legal advice
40.	Cox005864	Cox005892	N/A	N/A	2003/00/00	Trickey, L*	Draft Agreement	Shea Sunbelt Pleasant Point, LLC & CoxCom, Inc. Property Access Agreement	No	Attorney/Client	In furtherance of providing legal advice
41.	Cox005917	Cox005943	N/A	N/A	2003/00/00	Trickey, L*	Draft Agreement	Shea Sunbelt Pleasant Point, LLC & CoxCom, Inc. Property Access Agreement	No	Attorney/Client	In furtherance of providing legal advice
42.	Cox005965	Cox006006	N/A	N/A	2003/00/00	Trickey, L*	Draft Agreement	Shea Sunbelt Pleasant Point, LLC & CoxCom, Inc. Co-Marketing Agreement	No	Attorney/Client	In furtherance of providing legal advice
43.	Cox012937	Cox012967	N/A	N/A	2003/00/00	Trickey, L*	Draft Agreement	Shea Sunbelt Pleasant Point, LLC & CoxCom, Inc. Co-Marketing Agreement	No	Attorney/Client	In furtherance of providing legal advice
44.	Cox012369	Cox012370	N/A	N/A	2003/01/05	Arthurs, T; Trickey, L*; Hightower, J*; Carter, R; Crosby, S; Kelley, M	E-mail chain containing 2 emails	Vistancia Changes	No	Attorney/Client	In furtherance of receiving legal advice

	Bates #Begin	Bates #End	Beg Attach	End Attach	Date	Owner/Author/Recipient	Type	Description	Produced w/ Redaction	Basis for Privilege	Purpose
45.	Cox000666	Cox00667	N/A	N/A	2003/01/17	Trickey, L*; Arthurs, T; Kelley, M; Drake, P	E-mail chain containing 3 emails	Vistancia Update	No	Attorney/Client	In furtherance of providing/receiving legal advice
46.	Cox010171	Cox010171	Cox010173	Cox010199	2003/01/29	Arthurs, T; Drake, P; Trickey, L*; Kelley, M	E-mail chain containing 5 emails	Fw Vistancia Residential Agreement, with attached draft red-lined agreement	No	Attorney/Client	In furtherance of providing/receiving legal advice
47.	Cox012927	Cox012927	N/A	N/A	2003/03/18	Trickey, L*; Kelley, M; Arthurs, T	E-mail chain containing 2 emails	Re Vistancia Changes	No	Attorney/Client	In furtherance of providing/receiving legal advice
48.	Cox012923	Cox012926	N/A	N/A	2003/03/19	Trickey, L*; Arthurs, T; Kelley, M; Hightower, J*; Carter, R; Drake, P; Crosby, S;	E-mail chain containing 5 emails	Re Vistancia Changes	No	Attorney/Client	In furtherance of providing/receiving legal advice
49.	Cox010057	Cox010058	N/A	N/A	2003/04/06	Arthurs, T; Drake, P; Trickey, L*	E-mail (1)	Vistancia: Cox Agreements	Yes	Attorney/Client	In furtherance of providing/receiving legal advice
50.	Cox008369	Cox008369	N/A	N/A	2003/08/15	Christle, T; Humphrey, L*; Boyle, S; McIntyre, B	E-mail chain containing 6 emails	Fw Vistancia Remote Hub Site	Yes	Attorney/Client	In furtherance of receiving legal advice
51.	Cox007996	Cox007997	N/A	N/A	2003/08/27	Humphrey, L*; Christle, T; Trickey, L*; Boyle, S	E-mail chain containing 4 emails	Re Vistancia Remote Hub Site	Yes	Attorney/Client	In furtherance of providing/receiving legal advice
52.	Cox007647	Cox007647	N/A	N/A	2003/09/15	DiNunzio, M; Christle, T	E-mail	Vistancia	No	Attorney/Client	Discusses comments received from legal counsel
53.	Cox006242	Cox006243	N/A	N/A	2003/10/22	Trickey, L*; Dryer, P; Christle, T; Kelley, M;	E-mail chain containing 3 emails	Re Revised Agreements	Yes	Attorney/Client	In furtherance of providing legal advice
54.	Cox007694	Cox007695	N/A	N/A	2003/10/22	Trickey, L*; Christle, T; Kelley, M	E-mail chain containing 2 emails	Re Revised Agreements	Yes	Attorney/Client	In furtherance of providing legal advice

	Bates #Begin	Bates #End	Beg Attach	End Attach	Date	Owner/Author/Recipient	Type	Description	Produced w/ Redaction	Basis for Privilege	Purpose
55.	Cox006550	Cox006551	N/A	N/A	2003/10/23	Trickey, L*; Dryer, P; Christle, T; Kelley, M	E-mail chain containing 5 emails	Re Revised Agreements	Yes	Attorney/Client	In furtherance of providing legal advice
56.	Cox004954	Cox400954	N/A	N/A	2004/01/06	Johnson, N; Monturo, C; Benton, R*	E-mail chain containing 2 emails	Cox Services Interest Form	No	Attorney/Client	In furtherance of providing legal advice
57.	Cox006115	Cox006116	N/A	N/A	2005/02/03	Padilla, M*; Trickey, L*; Crosby, D*; Hightower, J*; Patten, M*	E-mail chain containing 4 emails	Fw Accipiter Complaint against Cox and Vistancia	No	Attorney/Client	In furtherance of providing legal advice