



Alerts

Plaintiff's Malpractice Suit Placed Attorney-Client Communications With Subsequent Counsel "At Issue" and Plaintiff Thus Waived Privilege

September 28, 2011

Lawyers for the Profession® Alert

Lyon Financial Services, Inc. v. Vogler Law Firm, P.C., 2011 WL 3880948 (S.D. Ill. 2011)

Brief Summary

A federal district court granted a motion by defendants, a law firm and two of its lawyers, to compel the production of attorney-client communications and work-product between plaintiff former client and its subsequent counsel, finding that the former client's legal malpractice action against prior counsel placed its otherwise protected communications with subsequent counsel "at issue" and that the former client thus waived any privilege.

Complete Summary

Defendants represented the former client in an action in Illinois state court. Due to alleged professional misconduct during discovery, the former client discharged defendants and retained a second law firm as trial counsel. A jury returned a verdict against the former client for \$67,926,728.31. After trial, the former client retained a third law firm for the appeal. The case settled while on appeal.

The former client sued defendants for legal malpractice. Defendants filed a third-party complaint against the second and third law firms, seeking to indemnify them for contribution. They also sought the production of attorney-client communications and work product between the former client and the second and third law firms.

The court noted that Illinois state law governed the attorney-client privilege in this case and that the privilege might be waived either expressly or impliedly. Courts have held that in order to implicitly waive the attorney-client privilege, a party "must affirmatively put at issue the specific communication, document or information to which the privilege attaches." *Dexia Credit Local v. Rogan*, 231 F. R.D. 268, 275 (N.D. Ill. 2004). The Third Circuit Court of Appeals has found that placing a privileged communication "at issue" occurs when "the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney client communication." *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 863 (3d Cir.1994).

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The court then noted that in *Fishel & Kahn, Ltd. v. van Straaten Gallery, Inc.*, 189 Ill.2d 579, 727 N.E.2d 240 (2000), a law firm sued a former client for attorneys' fees. The former client then filed a counterclaim for legal malpractice. Seeking to aid its affirmative defense to that claim, the law firm alleged that the former client implicitly waived the attorney-client privilege between itself and subsequent counsel by placing their communications "at issue" as a result of filing the counterclaim for legal malpractice. Reasoning that the former client had not waived the attorney-client privilege, the *Fishel & Kahn* court noted that the law firm's alleged malpractice was "complete" prior to its former client hiring new counsel or the filing of that underlying action.

Here, the former client argued that it did not implicitly waive the attorney-client privilege when it filed the action. The court disagreed. First, the complaint sought damages for the amount of the verdict rendered after trial and after defendants had ceased their representation of the former client. The court concluded that because the specific party, if any, that caused the former client's trial loss remained unresolved, the former client implicitly placed its attorney-client communications with subsequent counsel "at issue" by introducing a "factual or legal issue in [this] case" that must be determined by invading the attorney-client privilege.

Second, the former client argued that defendants' negligence, alone, "hamstrung" subsequent counsel with "no chance" to alter the eventual outcome at trial. The court found that implicit within that argument was the fact that the alleged legal malpractice of which it accused defendants, or at least the effects thereof, must have continued beyond the duration of defendants' representation. This contradicted the argument that the alleged legal malpractice was "prior to and independent from" subsequent counsel's involvement. Whether it was day 1 or day 100 of trial, subsequent counsel would have been affected by the alleged legal malpractice.

Finally, the court rejected the former client's arguments for reasons of fundamental fairness. If the former client's arguments were accepted and the motion to compel denied, defendants would be effectively precluded from challenging the causation and actual damages prongs for legal malpractice. The court would not permit the former client to use the attorney-client privilege as both a "sword" to strengthen its legal malpractice claim and as a "shield" to protect that claim from affirmative defenses. The court held that because the former client's legal malpractice claim placed its attorney-client communications with subsequent counsel "at issue," the withheld documents had to be produced to defendants. The court reached the same conclusion as to documents withheld based upon the work-product doctrine.

Significance of Opinion

This decision underscores the fact that a legal malpractice action against former counsel may place otherwise protected attorney-client communications with the plaintiff's other lawyers "at issue" in the litigation, which waives the privilege (and work-product doctrine). A waiver generally occurs where a party voluntarily injects either a factual or legal issue into the case, the truthful resolution of which requires an examination of the confidential communications.

For more information, please contact [Terrence P. McAvoy](#) or your regular [Hinshaw](#) attorney.

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