



Alerts

New York Recognizes Attorney-Client Privilege Regarding Consultations with Firm's General Counsel

July 13, 2016

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Stock v. Schnader Harrison Segal & Lewis LLP, ___ N.Y.S.3d ___, 2016 WL 3556655 (2016)

Brief Summary

A New York appellate court reversed the trial court's decision to compel disclosure of communications between attorneys who sought the advice of their law firm's in-house general counsel. In doing so, the court declined to adopt what has been termed by many courts as the fiduciary and current-client exceptions to the attorney-client privilege.

Complete Summary

Defendant was sued by a former client (plaintiff), arising out of its prior representation of plaintiff in negotiating his separation agreement from his former employer. Specifically, defendant negotiated a delay of an excise period for certain unvested stock options to allow plaintiff's interest in those options to vest, but allegedly failed to inform plaintiff that his termination would accelerate the expiration of his vested stock options. Plaintiff later learned that he allowed his already vested stock options, valued in excess of \$5 million, to expire under the terms of his employment agreement. Defendant commenced arbitration on plaintiff's behalf and filed a lawsuit in federal court, but was largely unsuccessful.

Plaintiff then sued defendant for legal malpractice. Plaintiff sought an order compelling the production of certain emails identified in a privilege log produced by defendant in response to plaintiff's discovery requests. Those emails were between defendant's attorneys who worked on plaintiff's arbitration and the defendant firm's general counsel. The trial court ordered defendant to produce the emails, relying primarily upon the fiduciary exception to the attorney-client privilege.

The primary issue on appeal was whether attorneys who have sought the advice of their law firm's in-house general counsel on their ethical obligations in representing a firm client may successfully invoke attorney-client privilege to resist the client's demand for the disclosure of communications seeking or giving such advice. The court held that such communications are not subject to disclosure to the client under the fiduciary exception to the attorney-client privilege because, for purposes of the in-firm consultation on the ethical issue,

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the attorneys seeking the general counsel's advice, as well as the firm itself, were the general counsel's "real clients." Further, the court declined to adopt the "current-client exception," under which a number of courts of other jurisdictions have held a former client entitled to disclosure by a law firm of any in-firm communications relating to the client that took place while the firm was representing that client.

The court found nothing to suggest that "consultations between a law firm, as client, and its in-house counsel, as attorney are not covered by" the attorney-client privilege under New York law.

Significance of Opinion

This case is significant because it is yet another case upholding the in-firm general counsel privilege, and the court rejected the fiduciary and current client exceptions to the attorney-client privilege.

For more information, please contact [Terrence P. McAvoy](#) or [Michael G. Ruff](#).