

Who Said What to Whom and Who Gets to Know About It?

Attorney-Client Privilege and Experts

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The Supreme Court of the State of New York Appellate Division: Second Judicial Department, in a March 3, 2009 Decision & Order, opined on the relationship among an expert, the law firm and the client. The issue to be decided was whether the plaintiff could "...compel the production of specified documents claimed by the defendants to be confidential attorney-client communications." (*Stuart M. Sieger, et al., respondents, v Louis Zak, et al., appellants*, Index No. 19978/05)

[Editors Note: The New York Supreme Court, Appellate Division, is the intermediate appellate court in New York. The Appellate Division hears appeals from the New York Supreme Court, which is the state's general trial court. Decisions by the Appellate Division may be appealed to the state's highest court, the New York Court of Appeals.]

The plaintiffs were two minority shareholders and the defendant was the majority shareholder and CEO of Company PSI. The two minority shareholders held approximately 33% of the stock and the majority shareholder held approximately 67%. The minority shareholders wished to sell their interest. PSI executed an engagement letter and retained the services of [Expert], a business consultant, who was to make value recommendations to the Board of Directors. The plaintiffs ultimately sold their stock to the majority shareholder as an individual, based, in part, on [Expert's] information. The majority shareholder sold the Company the following year for a far greater value.

"The plaintiffs commenced the instant action alleging that [majority shareholder], with the assistance of [Expert], fraudulently misrepresented the actual value of the plaintiffs' stock and concealed various communications received from investment bankers indicating a higher value than that disclosed to the plaintiffs prior to the sale of their interests."

During discovery in this case, the plaintiffs tried to have defendants produce certain documents and communications that defendants viewed as subject to the attorney-client privilege. The communications were between the corporate attorneys and the [Expert] about the buyout transaction.

"The Supreme Court granted the plaintiffs' motion in part, rejecting their contention that the subject documents were not confidential attorney-client communications, but determining that the plaintiffs nevertheless were entitled to disclosure of some of the documents based upon the crime-fraud exception to the attorney-client privilege. We affirm the order insofar as appealed from, but on a different ground."

“Here, all of the communications that the defendants claim are privileged were made by and between [Expert] and attorneys employed by PSI, or were shared with [Expert].”

“Although communications between a corporation’s attorneys and employees acting on behalf of that corporation can be protected by the attorney-client privilege..., the communications listed on the defendants’ second privilege log were principally made on behalf of [majority shareholder], in his individual capacity. With respect to any communications that may have been made on behalf of the corporation, to the extent that [Expert] could have been considered an agent of the corporation for certain purposes, he was not an agent for the purpose of making the subject communications...”

“The documents listed on the defendant’s third privilege log concern e-mail communications among [Expert], [majority shareholder], and present defense counsel, regarding [Expert’s] obligation to comply with the subpoenas served upon him by the plaintiffs. The defendants did not claim that [Expert] was a client of present defense counsel, nor did they allege that, at the time the communications were made, [Expert] was still serving as an agent of PSI, which had been sold prior to the commencement of this action.”

“Accordingly, the defendants failed to establish that any of the documents they were directed to produce were confidential attorney-client communications subject to the attorney-client privilege.”

“In light of our determination, we need not reach the issue of whether the Supreme Court properly directed the defendants to produce the subject documents pursuant to the crime-fraud exception to the attorney-client privilege.”

The Court cited various court cases concerning the attorney-client privilege and presented the following factors and issues, which we have extracted, in large part verbatim (citations are omitted):

- The attorney-client privilege fosters the open dialogue between lawyer and client that is deemed essential to effective representation
- Since the attorney-client privilege constitutes an obstacle to the truth-finding process, the protection claimed must be narrowly construed, and its application must be consistent with the purposes underlying the immunity
- Although the scope of the privilege is to be determined on a case-by-case basis, some general principles apply
- The privilege belongs to the client and attaches if information is disclosed in confidence to the attorney for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship
- No attorney-client privilege arises unless an attorney-client relationship has been established
- Communications made between a client and counsel which are shared with a third party generally are not privileged

- The burden of proving each element of the privilege rests upon the party asserting it