Keeping the Privilege: What the Stock Decision Means for Clients and the State of the Intra-Firm Privilege

By Tyler Maulsby

I. Introduction

Just before the July 4th weekend, the First Department became the first appeals court in New York to address whether communications between lawyers and their firms' General Counsel are protected by the attorney-client privilege. In *Stock v. Schnader Harrison Segal & Lewis LLP*,[1] the First Department held that such communications are protected as privileged, overturning a lower court decision that had made waves in the professional responsibility community.

The intra-firm privilege issue is of huge importance both to lawyers and clients alike. It raises fundamental questions that are central to the lawyer-client relationship and, to an extent, pits the rights of lawyers against the rights of clients. Specifically, it answers a crucial question: whether a law firm is like any other business that can protect communications between employees seeking legal advice and the company's in-house counsel, or whether the equation somehow changes because the employees seeking advice are themselves lawyers who are acting in the course of representing a client?

II. The Trial Court's Decision

Stock initially retained Schnader, Harrison, Segal & Lewis ("Schnader Harrison") to represent him in his departure from MasterCard International, Inc. ("MasterCard"). According to Stock, the firm failed to advise him that his departure would significantly accelerate the expiration date of certain stock options worth approximately $5 million. The options expired and Stock, on Schnader Harrison's advice, brought an arbitration against MasterCard and its plan administrator to recover the value of the lost options.

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The arbitration against MasterCard (and underlying litigation) was unsuccessful, and Stock sued Schnader Harrison for malpractice. In the course of discovery, Stock sought 24 documents reflecting communications the Schnader Harrison partner had with other lawyers at the firm, including the firm's General Counsel. Schnader Harrison argued that these documents were protected from disclosure under the "intra-firm" attorney-client privilege. The trial court disagreed, holding that the documents were discoverable under the "fiduciary exception" to the attorney-client privilege. According to the court, because Schnader Harrison, as Stock's law firm, was a fiduciary with special obligations to Stock, Stock "ha[d] a right to disclosure from his fiduciaries of communications that directly correlate to his claims of self-dealing and conflict of interest."[2]

III. The First Department's Decision

The First Department unanimously reversed, holding that the fiduciary exception did not apply and the communications at issue were privileged. The court reasoned that when the Schnader Harrison attorneys sought the advice of the firm's General Counsel, they were doing so not to discharge any fiduciary duty to Stock, but rather to "receive appropriate legal counsel about their [personal] ethical duties."[3] Thus, the Court held, "for the purposes of the in-firm consultation on the ethical issue, the attorneys seeking the general counsel's advice, as well as the firm itself, were the general counsel's real clients."[4]

The court noted that Stock was not billed for any of the time spent consulting with the firm's General Counsel and the General Counsel "never worked on any matter for [Stock]."[5] In other words, the court treated the consultation with the firm's General Counsel the same as if the firm's lawyers had sought the advice of outside counsel, which the court noted would also have been privileged. As a result, the Court held New York's version of the "fiduciary exception" to the attorney-client privilege—which had mainly been applied to trustees in the past—did not apply here.

The court also declined to adopt the "current client" exception to the attorney-client privilege.[6] (Under the "current client" exception, a law firm cannot claim privilege for internal communications relating to the client's representation, including consultations with the firm's in-house counsel, that occurred while the representation was ongoing–at least until the client is aware that it is adverse to the law firm.[7]) The court ruled that the "current client" exception would create unworkable results for both the client and the law firm and observed that courts across the country, as well as the American Bar Association, had recently rejected this exception.[8]

IV. A Rising Tide

The *Stock* decision aptly demonstrates the evolution of the law surrounding the intra-firm privilege. The lower court's ruling rejecting the intra-firm privilege was consistent with the earlier line of cases on the issue, as well as the New York federal cases which had addressed it.[9]

The First Department's decision represents a recent pivot by several courts in favor of the intra-firm privilege. These cases by and large conclude that there is no reason why the privilege should apply to discussions about potential malpractice liability between lawyers in a law firm and outside counsel but not apply to discussions between lawyers and their firm's in-house General Counsel.[10]

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Both the NYSBA Committee on Professional Ethics and the ABA Standing Committee on Ethics and Professional Responsibility have also issued opinions which concluded that lawyers are ethically permitted to seek advice from their law firm's General Counsel about potential malpractice liability.[11] While neither opinion specifically addressed the attorney-client privilege (which is an issue of substantive law and thus outside of the jurisdiction of these committees), both run contrary to the earlier line of cases which rejected privilege assertions based on the idea that a lawyer was conflicted from seeking in-house advice about potential malpractice exposure while also representing the underlying client.

V. Conclusion: Some Practical Takeaways

Though *Stock* makes the intra-firm privilege enforceable under certain circumstances, it is important to understand that the decision does not create a blanket privilege for any communication between lawyers in a firm about a firm client, or even communications between lawyers and their firm's General Counsel. Instead, the decision provides helpful guidance and holds that a communication is more likely to fall within the privilege if it meets the following criteria:

- The advice relates to the lawyer's own ethical or legal obligations concerning the matter;
- The time spent communicating with in-house General Counsel was not charged to the client;
- The attorney providing the legal advice is someone who is not directly involved in the underlying client-matter;
- The purpose of the communications with law firm General Counsel are clearly identifiable; and
- The event of a malpractice claim, if the law firm refrains from putting the communications with the in-house General Counsel "at issue."

Though not specifically discussed in the decision, a claim of privilege would also likely be affected by whether the communications with the law firm's General Counsel were kept confidential between the attorneys who needed to know the substance of the communications or if the communications were widely disseminated. Also significant would be the fact that lawyer who is consulted has the title "General Counsel," or at the very least plays that role in the firm (or has been designated to play that role in the particular case). Finally, privilege claims get easier when any adversity between the firm and the client is known to the client, particularly when the client has his or her own counsel.

From a client's perspective, it is important to understand the scope of the *Stock* decision and the contexts in which it may apply. As discussed above, not every internal communication with the law firm's General Counsel is *per se* privileged and any claim of privilege should be supported by the above factors. That being said, when assessing a potential legal malpractice claim, clients intending to use their lawyers' internal communications in order to prove liability now have a much harder job ahead of them.

Endnotes

1. 2016 NY Slip Op. 05247 (1st Dep't 2016).
2. *Stock v. Schnader Harrison Segal & Lewis LLP*, No. 651250/2013, 2014 WL 6879923 at *2 (Sup. Ct. N.Y. Co. Dec. 8, 2014).
3. *Stock*, 2016 NY. Slip Op. 05247 at *7.
4. *Id.* at *1 (citations omitted).
5. *Id.* at *2.
6. *Id.* at *12-13.
7. *See, e.g., Bank Brussels Lambert v. Credit Lyonnais [Suisse], S.A.*, 220 F. Supp. 2d 283 (S.D.N.Y. 2002).
8. *Stock*, 2016 NY. Slip Op. 05247 at *12.
9. *See, e.g., Bank Brussels Lambert*, 220 F. Supp. 2d at 286–88 (applying New York law and rejecting assertion of privilege on the grounds that lawyers' internal discussions about potential malpractice liability created an inherent conflict between the firm's interests and those of the client); *see also Koen Book Distrib. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo*, 212 F.R.D. 283, 283-85 (E.D. Pa. 2002); *VersusLaw, Inc. v. Stoel Rives, LLP*, 111 P.3d 866, 878 (Wash. 2005) (citing cases).
10. *See, e.g., St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.*, 293 Ga 419, 427-429 (Ga. 2013); *RFF Family Partnership, LP v. Burns & Levinson, LLP*, 465 Mass. 702, 713-716 (Mass. 2013); *Garvy v. Seyfarth Shaw LLP*, 359 Ill. Dec. 202, 215 (Ill. App. Ct. 2012).
11. *See* NYSBA Comm. on Professional Ethics Op. 789 (Oct. 26, 2005); ABA Formal Op. 08-453 (2008).

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