

Attorneys:

- **David P. Atkins**
datkins@pullcom.com
203.330.2103
- **Collin P. Baron**
cbaron@pullcom.com
203.330.2219
- **Thomas F. Maxwell Jr.**
tmaxwell@pullcom.com
203.330.2252
- **Elliott B. Pollack**
ebpollack@pullcom.com
860.424.4340
- **James T. Shearin**
jtshearin@pullcom.com
203.330.2240
- **Marcy Tench Stovall**
mstovall@pullcom.com
203.330.2104

ALERT: New York Appellate Court Recognizes In-Firm Privilege

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David P. Atkins

On June 30, 2016, the New York State Appellate Division for the First Department (Manhattan) issued a significant decision on the scope of the so-called in-firm attorney-client privilege.

In line with a growing trend reflected in decisions from state supreme courts (those in Georgia, Massachusetts and Oregon), as well as from several federal trial courts, the New York intermediate appeals court recognized that "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 [properly] invoke [the] attorney-client privilege to resist the client's demand for the disclosure of communications seeking or giving such advice."

Stock v. Schnader Harrison Segal & Lewis LLP, 2016 WL 3556655 (N.Y. App. Div. June 30, 2016)

The appeal arose from a legal malpractice action in which the defendant law firm sought to withhold from its responses to the plaintiff's discovery requests approximately 24 internal e-mail messages. The messages were sent during the firm's representation of the client in the underlying matter - the prosecution of the client's employment related claims under a separation agreement the firm had helped negotiate.

Each message reflected advice sought from the firm's designated in-house GC from one of three firm attorneys. And, it was undisputed, in each message the firm's GC was asked for advice on "the firm's ethical obligations" – principally, how the firm should respond to a notice from opposing counsel in the employment case that it intended to call one of the firm's attorneys as a fact witness at a forthcoming arbitration hearing.

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Significantly, the demand from opposing counsel in the underlying litigation also included allegations that the firm's own purported mistakes in negotiating the client's separation agreement were the source of the "client's woes."

In reversing the trial court's order granting the plaintiff-client's motion to compel the production of the internal e-mail messages in question, the Appellate Division reached these conclusions:

- (1) it is "preferable, for both firms and clients, to afford consultations with a firm's in-house counsel the protection of the attorney-client privilege, even as against the client, so as to 'encourage firm members to seek early advice about their duties to clients and to correct mistakes or losses, if possible, to alleviate harm'" to the client;
- (2) because the internal communications at issue related to the obligations of the firm's attorneys "as legal professionals" they did not "directly advance[]" the client's "interest in successfully...prosecuting" the underlying employment claims, and therefore did not fall within either the fiduciary exception or the so-called "current client" exception to the attorney-client privilege;
- (3) the privilege should apply even though the communications at issue took place prior to the time "the attorney-client relationship [had] become openly hostile";
- (4) "a consultation by attorneys with their firm's in-house counsel on a purely ethical issue arising from the representation of a current client... [does not] inherently give[] rise to a conflict of interest between the firm and the client"; and
- (5) even if the plaintiff could establish that the internal communications at issue reflected the firm's violation of its duty of client loyalty and conflict-free representation under the Rules of Professional Conduct, such a violation does not warrant forfeiture of an evidentiary "privilege otherwise available under" the law of evidence.

For additional information about the decision, or to discuss how your firm can preserve the attorney-client privilege for in-firm communications, please contact David P. Atkins (datkins@pullcom.com) or Marcy Tench Stovall (mstovall@pullcom.com).

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