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In the Heat of Dealmaking, Beware of **Waiving Attorney-Client Privilege**

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Litigators are very attuned to the questions presented by attorney-client privilege. Deal lawyers may not be as attuned. Let's say you are locked in a hot and heavy battle to rescue a distressed company or broken deal. One party has defaulted or is on the verge of defaulting, default notices have been fired across the bows, and everyone is exploring how best to gain an advantage as the project or company proceeds towards restructuring. Your client is attempting to build a coalition of investors or at least parties with a commonly shared interest in order to accomplish this restructuring.

In that process, your client wants to tell these other parties that "counsel has advised" that they take a certain action. He or she has asked you, the deal lawyer, if it's ok to tell the investors that. What do you say? Is it ok for your client to reveal, merely, that legal advice has been given and that your client is thus going to take a particular action? Or is there a greater risk? Has your client just potentially waived his or her attorney-client privilege and thus made everything related to the subject matter of the disclosed advice discoverable in later litigation?

The attorney-client privilege is recognized as the oldest of the common-law evidentiary privileges. Once asserted, it operates to cloak the communication between the attorney and his or her client with absolute immunity and prevents the disclosure of the substance of that communication (with some recognized exceptions since nothing, truly, is absolute in the American legal system).

The reasoning for the privilege is clear and well understood: Society encourages totally open communication between an attorney and his or her client in order for the attorney to be able to give legal advice after full knowledge of all the relevant facts. Disclosure of those communications would chill that process.

The privilege, however, is not absolute. For instance, the mere

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communication of facts from a client to an attorney is not privileged. The communication to be privileged has to be, instead, for the "purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship." *Rossi v. Blue Cross & Blue Shield,* 71 N.Y.2d at 592-93.

The privilege does not belong to the attorney rendering the advice. Rather, the privilege belongs to the client receiving the advice, and it is the client who must assert that privilege (usually by and through counsel), and it is the client who can waive that privilege. And once it is waived, it is not just waived for the particular document in question. Rather, it appears to be waived for all documents or communications *pertaining to the subject matter* at issue.

Justice Jeffrey Oing, in the Commercial Division (Supreme Court, New York County) considered a scenario not too dissimilar from that laid out at the beginning of this article. *Siras Partners v. Activity Kuafu Hudson Yards*, 2017 NY Slip Op. 31216(U) (S. Ct. NY Co. June 5, 2017). The movants asserted that the following email from one party to a third-party investor constituted a waiver of the attorney-client privilege:

"It is concluded by legal counsels that we have no choice but buying the note from UBS immediately to clean up the mess at Hudson Rise. Otherwise, all the equity we invested is at risk to be wiped out."

Justice Oing held that this short email, reproduced in the trial court's opinion, provided a "detailed description of specific legal advice and the course of action given to him by his attorneys, which he voluntarily divulged to a third party." As a result, Justice Oing ordered not just that the underlying advice by counsel, referenced in the email, had to be produced but that "any communications and documents pertaining to the subject matter" of the communication now had to be produced.

The Appellate Department, First Department, recently affirmed Judge Oing's decision and order and held that the disclosure by a party to a third-party investor of advice the party received from his counsel was sufficient to waive the attorney-client privilege as to other documents pertaining to the subject matter of that advice. *Siras Partners v. Activity Kuafu Hudson Yards*, 2018 NY. App. Div. LEXIS 85 (1st Dept. Jan. 4, 2018).

Implicitly, the trial court and the appellate court appear to have held that there was no common interest between the client and the third-party investor, as both courts cited to the Court of Appeals decision in *Ambac Assur. v. Countrywide Home Loans*, 27 N.Y.3d 616 (2016) in ordering the disclosure. The Court of Appeals held that the common interest doctrine is an exception to the waiver of the attorney-client privilege by disclosure to a third party. Under the common interest doctrine, if the disclosing party and the third party share a common legal interest and the communication is made in furtherance of that common interest, and (crucially under New York law) the communication related to actual or potential (pending or anticipated) litigation, then the disclosure to the third party is not a waiver. (The law may be applied differently in federal courts).

Deal counsel must be alert, when advising clients about sharing legal advice with parties with whom the client believes he or she shares a "common interest" (in the example above—working out a troubled real estate project), that the common interest exception to the waiver is only going to apply if there is current or anticipated litigation on the horizon. Without that litigation gloss, the privilege is waived. "[C]lients who share a common legal interest in a commercial transaction or other common problem but do not reasonably anticipate litigation" will not be able to claim the common interest doctrine exception. *Ambac*, 27 N.Y.3d at 628. Presumably, although not addressed, the *Siras Partners* courts made the determination that at the time the email was sent, litigation was not in the offing and any shared commercial interest was insufficient.

To return to our opening scenario, the deal lawyer needs to remind the client not to disclose the attorney's legal advice and make clear that if the client persists in doing so, they risk expensive motion practice later with the likely full disclosure of everything related to the subject matter of that disclosed advice. Even in the heat of the deal, don't let the client unknowingly waive his or her attorney-client privilege.