

SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

When Communications Concerning a Client Can Be Withheld From the Client

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Sometimes conflicts arise between law firms and their clients that require lawyers within the firms to seek legal advice. Such situations may include instances where firm lawyers become concerned about potential legal malpractice claims. In such situations, firm lawyers may seek advice from another lawyer within their firm about how to handle the issue. In subsequent litigation with the client, however, such communications may not be protected from discovery, particularly where the firm lawyer whose advice is sought has been involved in the representation of the client.

Magistrate Judge Barbara Moses of the Southern District of New York recently addressed this issue in *Bonde v. Wexler & Kaufman*, 2023 WL 8756986 (S.D.N.Y. Dec. 8, 2023).

Wexler & Kaufman PLLC (W&K), a law firm, sought to withhold as privileged communications exchanged among W&K personnel and an outside IT consultant after the firm was sued by a former client, Carl Ulfsson Bonde, for legal malpractice.

The case arose out of a spoofing incident where a cybercriminal duped a W&K lawyer into



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sending the cybercriminal money that belonged to Bonde. In advancing their privilege claim, defendants argued that the withheld communications were made by W&K attorneys acting as general counsel to the firm for the purpose of providing legal advice to the firm and its lawyers in the wake of the spoofing incident. One of the W&K attorneys, however, was simultaneously acting as Bonde's lawyer.

Moses ultimately concluded that defendants had not sustained their burden to demonstrate that the firm lawyers whose advice allegedly was sought were acting as general counsel to the firm in connection with the communications, and she ordered the communications produced.

'Bonde v. Wexler & Kaufman'

Defendants Brett Wexler, a member of W&K, and Evan Teich, an attorney at W&K, represented

Bonde in connection with the sale of his New York City apartment. Bonde had also retained W&K as escrowee for the transaction. In this role, W&K's attorney trust account received the proceeds of the sale when Bonde's apartment closed on Aug. 22, 2022. Shortly after closing, Teich emailed Bonde, copying Wexler, to ask him for wire instructions to transfer the amount due to Bonde from the sale (\$427,872.37). Bonde responded at 2:02 p.m. with wire instructions for his account at HSBC.

Earlier in the day, however, a cybercriminal posing as Bonde had sent Wexler an email asking if the sale had closed. Wexler responded to the cybercriminal at 2:34 p.m. and, shortly thereafter, asked the cybercriminal for wire instructions, apparently not realizing that Teich had earlier requested and received wire instructions from Bonde. The cybercriminal responded with wire instructions for an account at Barclays, and W&K wired the \$427,872.37 to the cybercriminal's Barclays account.

When W&K realized the error, the firm attempted to recall the wire but was unsuccessful. Bonde never received the funds.

Bonde sued W&K, Wexler and Teich for legal malpractice, breach of contract and conversion. During discovery, Bonde sought an order directing defendants to produce the following items that defendants had withheld on the basis of attorney-client privilege: (1) 152 WhatsApp messages exchanged among Wexler, his partner Marc Kaufman, and a W&K paralegal, and (2) two emails both dated August 30, 2022 from Wexler to W&K's outside IT consultant.

After plaintiff moved to compel, Wexler and Kaufman sought to defend the privilege claims on the ground that in connection with these communications, they had "assumed the role

of general counsel" and the communications reflected their advising the firm on possible malpractice exposure, preparing a defense to potential claims by Bonde, and reporting the matter to the firm's insurance carrier. The parties submitted 10 of the challenged communications for *in camera* review.

Bonde argued that the withheld communications should be produced for two reasons: (1) defendants had not substantiated their claim that the withheld communications involved the provision of legal advice to the firm (as opposed to actions undertaken on Bonde's behalf to seek the return of the stolen funds), and (2) defendants were barred from invoking the privilege because ethically Wexler could not act as general counsel to the firm on a matter involving Bonde while simultaneously representing Bonde.

Relevant Legal Principles

Applying New York law, Moses first observed that defendants—the parties asserting the privilege—bore the burden of establishing the privilege, meaning that they had to satisfy three elements with respect to the withheld communications: (1) "the existence of an attorney-client relationship"; (2) that the communications were made "for the purpose of obtaining legal advice"; and (3) "the intended and actual confidentiality of th[e] communication[s]." *Bonde*, 2023 WL 8756986, at *5 (quoting *Bowne of New York City v. AmBase*, 161 F.R.D. 258, 264 (S.D.N.Y. 1995)).

Moses explained that as to the existence of an attorney-client relationship, "[a]n attorney's conclusory statement that a party was his or her client is insufficient." If no documentary evidence exists memorializing an attorney-client relationship, a court must consider "the words and actions of the parties" (quoting *C.K. Industries*

v. C.M. Industries, 623 N.Y.S. 2d 410, 411 (3d Dep't 1995)).

Moses then described additional considerations under New York law that apply when the party invoking the privilege is a law firm that seeks to withhold intra-firm communications from its own client. She explained that New York recognizes the “fiduciary exception” which prevents a fiduciary from invoking the privilege “to block a beneficiary from discovering legal advice that the fiduciary obtained on behalf of that beneficiary.”

In deciding whether the exception applies, the determinative question is whether the fiduciary or the beneficiary is the “real client” of the attorney whose advice is sought—a burden the invoking party must satisfy.

For example, when an attorney seeks legal advice from another firm attorney to assist in advancing the interests of a firm client, the fiduciary exception prevents the attorneys from invoking the privilege to block the client from discovering the communication since the attorney seeking advice was acting as a fiduciary to advance her client’s interests.

If, however, a lawyer is seeking legal advice from another lawyer in her firm concerning “issues of professional ethics or potential malpractice liabilities arising from the firm’s representation of th[e] client,” the fiduciary exception would not apply and the communications could be withheld as privileged, since then the lawyer seeking advice and her firm are the “real clients” (quoting *Stock v. Schnader Harrison Segal & Lewis*, 35 N.Y.S.3d 31, 38 (1st Dep’t 2016)).

Moses also addressed the “current client exception,” which some jurisdictions have held categorically bars law firms from invoking the attorney-client privilege to withhold intra-firm

communications from a firm client during the pendency of the attorney-client relationship between the client and one or more firm lawyers. She observed, however, that the New York Appellate Division, First Department (the only appellate court in New York to address the exception), had declined to adopt it, largely because the firm lawyer who had provided advice to other firm lawyers in that case had never personally represented the firm client (citing *Stock*, 35 N.Y.S.3d at 44).

Application of Legal Principles to ‘Bonde’

In applying the above legal principles, Moses first addressed whether an attorney-client relationship existed among Wexler and/or Kaufman and their firm in connection with the withheld communications. Because she concluded that the current client exception did not apply under New York law, the fact that Bonde remained a client of W&K during the time when the withheld communications were made did not, standing alone, prevent defendants from claiming privilege over the communications.

Moses observed, however, that Bonde’s status as a client of W&K during the period of the challenged communications “significantly undercuts the foundation of the claim” that, in connection with the communications, Wexler and Kaufman were acting as general counsel to the firm as opposed to counsel to Bonde, particularly given that Wexler was simultaneously continuing to personally represent Bonde and to take action on his behalf to try to reverse the fraudulent wire payment.

Moses found it unlikely that Wexler had assumed the role as general counsel to the firm since he could not have represented W&K and Bonde at the same time without violating his ethical obligations to both W&K and Bonde.

Aside from the ethical conflict, which Moses recognized “does not, standing alone, vitiate an otherwise available evidentiary privilege,” she concluded that Wexler and Kaufman had failed to present sufficient evidence to substantiate that either of them had assumed the role of in-house counsel in connection with the challenged communications.

Although both Wexler and Kaufman submitted affidavits asserting that they became general counsel to the firm in response to the Bode wire incident, Moses explained “New York demands more” than such conclusory statements. She observed that the absence of any corroborating evidence of their claimed general counsel role differentiated this case from *Stock v. v. Schnader Harrison Segal & Lewis*, where the First Department concluded that an attorney had served as general counsel to his law firm and the fiduciary exception did not apply.

Because it is defendants’ burden to demonstrate that they became and were acting as the firm’s in-house counsel before the challenged communications were made, without any evidence to corroborate the conclusory statements in their affidavits, Moses refused to give Wexler and Kaufman “the benefit of the doubt” that W&K was their “real client.”

Even though defendants’ failure to establish the existence of an attorney-client relationship between Wexler/Kaufman and the firm was enough to defeat their claim of privilege, Moses went on to analyze the communications produced for *in camera* review. She found that even if a question remained as to whether Kaufman assumed the role as general counsel to the firm

in his communications with Wexler, the *in camera* communications provided “no indication” that “[W&K] attorneys were seeking legal advice from [Kaufman], or that [Kaufman] was providing legal advice in his role as counsel to [W&K]” (quoting *Genesis Merchant Partners v. Gilbride, Tusa, Last & Spellane*, 2021 WL 305780, at *8 (N.Y. Supr. Ct., N.Y. Co. Jan. 28, 2021)).

Moses therefore concluded that defendants also failed to establish that the communications were primarily or predominantly of a legal character. Accordingly, she granted Bode’s motion to compel the production of the challenged communications.

Conclusion

To the extent a potential conflict arises between firm lawyers and a firm client and the firm lawyers seek legal advice from other lawyers within their firm, care should be taken to seek the advice from a lawyer who is not involved in the representation of the client and to memorialize (1) the lawyer whose advice is sought as “general counsel” and (2) the communications with that lawyer as ones where legal advice is being sought to protect firm interests.

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