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Traub Lieberman Attorneys Stephen D. Straus and Andrew N. Adler Obtain Court Ruling Permitting Discovery of Adversary's Privileged Communications with His Former Attorneys

Related Attorneys: Stephen D. Straus

Traub Lieberman Straus & Shrewsberry LLP attorneys Stephen Straus and Andrew Adler obtained a court decision holding that their clients' adversary waived attorney-client privilege.

Traub Lieberman was defending their clients (a law firm and its partner) in a legal malpractice action. Plaintiff had sought defendants' advice about how to escape from an onerous royalty obligation. Defendants had suggested a strategy by which plaintiff would securitize loans to the relevant entity and then foreclose on the entity's assets. Defendants believed this procedure would furnish plaintiff a viable, if somewhat risky, means to eliminate the royalty obligation once the assets were sold at auction. Unbeknownst to defendants at the time of their advice to plaintiff, plaintiff decided to seek a "second opinion" from another law firm not only about the benefits and perils of this "foreclosure option," but also about the relative merits of the entity trying to discharge the royalty obligation through bankruptcy.

In a detailed memorandum, the non-party law firm advised in favor of bankruptcy and against the foreclosure option. Plaintiff, however, decided to pursue the foreclosure, and the individuals who lost their royalties successfully sued plaintiff and his entities in an underlying action. In the malpractice litigation, plaintiff attempted to blame defendants for this outcome.

Plaintiff claimed that he inadvertently produced the non-party firm's privileged memorandum in his 7300-page document production in the malpractice action, despite the warning at the top of the memo's first page stating, in bold typeface, "PRIVILEGED ATTORNEY-CLIENT WORK PRODUCT." Traub Lieberman subpoenaed the non-party firm, and plaintiff brought an order to show cause for a protective order, seeking to quash the subpoenas and prevent depositions of the relevant partners at such law firm.

In a comprehensive Decision and Order, the court denied plaintiff's motion and ordered the depositions to proceed. The court agreed with four of Traub Lieberman's arguments for waiver of attorney-client privilege. First, the court ruled that plaintiff forfeited the privilege by not taking reasonable steps to prevent disclosure of the memorandum. In particular, according to the court, the warning at the top of the memo "indicates that this is not the type of document that could slip through" a reasonable, systematic document review methodology.

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Secondly, plaintiff also waived privilege by failing to promptly assert it. It took plaintiff's counsel over a month to object after Traub Lieberman marked the subject memorandum as an exhibit at plaintiff's deposition. Thirdly, withholding the privileged communications would have prejudiced defendants, who already relied upon the memorandum in conducting depositions.

Finally, the court concluded that privilege was waived under the so-called "at issue" doctrine. Pursuant to that doctrine, waiver occurs "where the client places the subject matter of the privileged communication in issue or where invasion of the privilege is required to determine the validity of the claim or defense of the party asserting the privilege, and application of the privilege would deprive the adversary of vital information."

In this case, defendants intended to prove that plaintiff's reliance on the "second opinion" reduces or eliminates defendants' alleged liability: Plaintiff had been sharply warned not to pursue the foreclosure route, by a lawyer who, unlike defendants, specializes in bankruptcy law. Thus, Traub Lieberman's clients were able to invoke key defenses, such as informed consent — defenses that require inquiry into the concurrent advice proffered by the non-party law firm.

Plaintiff contended in his motion that he did not abandon the privilege since he allegedly chose defendants, rather than the non-party firm, to conduct the actual foreclosure about a year after the memo's creation. However, the court once again concurred with Traub Lieberman's position, declaring that the fact that plaintiff acted on the legal advice later rather than immediately makes no difference to the "at issue" analysis as applied to the instant facts. The court did not reach Traub Lieberman's fifth argument, that plaintiff waived privilege due to his allegedly ongoing abuse of process.

For a copy of this Decision, please contact Andrew Adler.