

Overriding the attorney-client privilege in nonlegal malpractice cases

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While the attorney-client privilege is usually waived when a former client sues an attorney for malpractice, there are also circumstances in which nonclients seek to pierce the privilege. This sometimes occurs in connection with the defense against professional negligence claims even though the attorney involved in the underlying events has not been sued by the client.

This expert analysis will examine scenarios and provide guidance where professionals such as insurance producers, certified public accounts, architects or engineers may seek to compel the production of relevant information contained in privileged communications between an attorney and the plaintiff suing them.

New Jersey's rules — and legal authority on the issue of implicit and explicit waiver — serve as a guide. The manner in which New Jersey courts address this topic may differ from how it is addressed in other jurisdictions.

Nearly all courts, however, provide for judicial review where a party seeks to compel disclosure of attorney-client privileged information by asserting that the privilege has been waived.

Importantly, many jurisdictions recognize some form of implicit waiver when a party has placed attorney-client privileged communications "at issue" in litigation.¹

WHY SEEK PRIVILEGED MATERIALS?

As in any negligence action, a plaintiff asserting professional malpractice must prove duty, breach and proximate causation.

When a professional is sued for negligence and seeks to obtain privileged communications between the plaintiff and the plaintiff's attorney, the typical contested issues relate to the concept of reliance. Aside from duty, reliance is a central tenet of professional negligence claims.

The professional may argue that the malpractice claim fails because the plaintiff did not rely on the professional's advice or work product. The goal is to show — from the privileged attorney-client communications — that the plaintiff instead relied on the advice of others or made an independent decision.

In other words, the goal is to demonstrate a lack of proximate causation. More often than not, a professional liability claim against a professional such as a CPA, architect, engineer or

insurance broker involves other professionals who may not be the direct target of the plaintiff's lawsuit but whose knowledge and "communications" with the plaintiff may be critical to the defendant's case.

Discovery procedures permit an attorney, under certain circumstances, to explore whether the plaintiff indeed relied upon the advice of these other professionals, with the goal of showing there was no reliance on information provided by the defendant in the case.

This discovery may show that the plaintiff rejected the defendant's advice or work product outright or — the home run — that the plaintiff relied on the advice or work of a different professional.

Many jurisdictions recognize some form of implicit waiver when a party has placed attorney-client privileged communications "at issue" in litigation.

In professional negligence actions involving complicated transactional matters, plaintiffs frequently retain multiple professionals in different fields. It is in this context that discovery requests and disputes will focus on attorney-client privileged communications. The plaintiff, who has sued the CPA or other professional, tries to block discovery that may be relevant to the professional's defense against the malpractice claim.

Under these circumstances, two competing public policy interests are placed in conflict: the interest in protecting attorney-client communications thus strengthen the attorney-client relationship, and the interest in promoting a search for truth and protecting the right of a party to properly defend itself.

We will now examine how New Jersey courts address these competing concerns and how an attorney, defending a professional client in such a situation, can ensure that they can access the discovery needed to defend their client against misplaced reliance claims.

THE ATTORNEY-CLIENT PRIVILEGE VS. THE NEED FOR THE TRUTH

While the attorney-client privilege is to be respected, it "is neither absolute nor sacrosanct."² New Jersey law recognizes that "the

privilege results in suppression of evidence and to that extent is at war with the truth.¹³

As a result, the privilege can be "overridden to compel disclosure, even in the absence of an explicit statutory or traditional categorical exception," the New Jersey Supreme Court ruled in *Kinsella v. Kinsella*.¹⁴

In the context described here, counsel representing the defendant professional in a negligence case may seek to compel disclosure and override the attorney-client privilege to promote the court's truth-seeking function and to permit a proper and full defense against the professional negligence claim.

New Jersey appellate courts have recognized the validity of this proposition by noting that a plaintiff "should not be permitted to establish a claim while simultaneously foreclosing inquiry into relevant matters. ... Rigid adherence to the letter of the privilege under these circumstances would promote suppression of the truth."¹⁵

Thus, when defending a professional client against a negligence claim, you will be able to seek — provided circumstances warrant and certain preconditions are met — attorney-client privileged materials and information that are relevant to the underlying events in dispute.

HOW, WHEN AND WHY THE PRIVILEGE MAY BE OVERRIDDEN

In New Jersey, under *In re Kozlov*,⁶ to override the attorney-client privilege and get the discovery needed to defend your professional client, you must demonstrate that there is a legitimate need for the evidence, the evidence is relevant and material to the issue before the court, and the information cannot be obtained from a less intrusive source.

The latter two requirements are self-explanatory. If the privileged materials you seek are not relevant, they will not be disclosed. Likewise, if that information can be obtained from nonprivileged source, it will not be disclosed. Most often, the focus of inquiry is the "need" requirement.

Establishing legitimate need

Concerning the "need" prong of the analysis, the New Jersey Supreme Court recently explained, "Together, *Kozlov* and *Kinsella* establish the narrow circumstances, apart from the express exceptions in the rules, under which the 'need' prong can be satisfied [triggering the disclosure of privileged information]: (1) where a constitutional right is at stake, or (2) a party has explicitly or implicitly waived the privilege."¹⁷

In our context, a constitutional right is unlikely to be at stake, as this issue arises most frequently in the context of a criminal case where a party is faced with the deprivation of their liberty.

In professional negligence suits seeking monetary damages, defendants commonly assert that disclosure of relevant and privileged materials is warranted because the privilege has been waived.

Implicit waiver

New Jersey recognizes the implicit waiver of the attorney-client privilege "where the plaintiff has placed in issue a communication which goes to the heart of the claim in controversy."¹⁸ A plaintiff puts privileged materials into issue and subjects them to disclosure "when confidential communications are made a material issue by virtue of the allegations in the pleadings."¹⁹ Thus, a court will examine a plaintiff's pleadings and claims against the professional and compel disclosure if there are privileged communications that go to the heart of those matters.

Many New Jersey appellate court decisions have thus required disclosure. One such example is *Blitz v. 970 Realty Associates*.²⁰

Attorneys defending professional clients should examine all nonprivileged discovery for explicit waivers, which would allow them to attack the plaintiff's claims.

In *Blitz*, the court considered a claim that a plaintiff was induced to enter into a contract of sale for property as a result of a defendant's misrepresentation of facts regarding environmental contamination. The plaintiff consulted with attorneys regarding environmental laws and the advisability of entering into the agreement to purchase the property.

The state appeals court held that New Jersey law "compelled disclosure of communications otherwise protected by the attorney-client privilege to the extent they were pertinent to the question of reasonable reliance."

As the plaintiff claimed that the defendants had "falsely represented the environmental condition of the premises," and as plaintiff alleged it had reasonably relied on such representations, the plaintiff implicitly waived the attorney-client privilege with respect to its communications with counsel during negotiations which bore on such reliance when it brought its action.

As *Blitz* shows, in transactional negligence cases, the concept of implicit waiver can provide an avenue to obtain privileged materials to support the defense of a professional client.

By way of further example, assume you are representing a CPA and the plaintiff claims reliance on the CPA's financial projections and statements when choosing to close a complex business transaction or property deal. Assume the plaintiff claims that the CPA's projections or statements were inaccurate and that the deal went south.

If the plaintiff was represented by counsel in connection with the transaction that is the subject matter of the accountant malpractice claim, counsel for the CPA may argue that the plaintiff entered into the transaction not in reliance on the CPA's advice but rather on the advice of their counsel — who has not been sued.

In this example, counsel for the CPA could argue that the client did not proximately cause the damages of which the plaintiff complains and that the question as to reliance — which goes to the heart of the plaintiff's claims — supports the disclosure of the privileged communications.

The notion that a party to a business or real estate transaction would rely on their counsel to confirm material information is supported by a line of New Jersey legal authority. Indeed, counsel in a real estate transaction has a duty to "advise their clients of all observable defects, deficiencies and imperfections of the title."¹¹

When a party to a transaction relies on the expertise of its attorneys, it cannot sustain a claim sounding in misrepresentation against the other party to the transaction on that same subject matter.¹² Thus, if you are able to prove, through the disclosure of privileged materials, that the plaintiff relied on their attorney and not your client, you may be able to win summary judgment at the conclusion of discovery.

Explicit waiver

Generally, a client waives the attorney-client privilege by revealing an attorney-client communication to a third party.¹³

Once a party chooses to disclose privileged communications, it explicitly waives the privilege with respect to "related privileged information pertaining to the same subject matter," according to *Weingarten v. Weingarten*.¹⁴ Similarly, once a party voluntarily waives a privilege, it irrevocably waives the right to refuse to testify about the disclosed matter.¹⁵

Attorneys defending professional clients should examine all nonprivileged discovery for explicit waivers, which would allow them to attack the plaintiff's claims.

For instance, a plaintiff may have disclosed in an email to a third party the contents of an attorney's advice and discussions on a topic that is highly relevant to your client's claims and defenses.

If so, you can and should argue that the plaintiff has explicitly waived the privilege on the topic discussed and press your entitlement to pursue discovery about those very same topics pursuant to the holding in *Weingarten*.

The considerations you face in the case of implicit waiver apply equally here. For example, if nonprivileged materials show that the plaintiff discussed the purportedly actionable statements of your insurance producer client with their attorney, it may be possible to show that the plaintiff, in fact,

relied on the attorney's advice and not the advice of your broker client.

Further, if it can be shown that the plaintiff believed it was protected from environmental risks in a real estate deal because of provisions its attorneys negotiated into the contract, a dispositive motion may be available to refute allegations that your engineer or environmental consultant client's purportedly bad advice or substandard performance caused the plaintiff's alleged damages.

Again, the focus is reliance — or more specifically, that the plaintiff's claim of reliance on your professional client in the environmental evaluation of the property is a ruse.

CONCLUSION

If you are called upon to defend a professional in a malpractice case, you should explore all available avenues of discovery when seeking to refute a claim that is or appears to be premised on reliance.

The defense against a professional negligence claim against a CPA, architect, engineer or insurance producer often intersects with a plaintiff's receipt of professional legal advice during the underlying transaction or event.

Do not undermine a client's defense by failing to challenge an assertion of privilege. As discussed, the protection is strong but not sacrosanct.

Seeking disclosure of material information that is relevant to the client's defense remains a polestar of our obligation as defense counsel. Indeed, as noted, if the privileged information is relevant to your client's defense and directly relates to the matter that the plaintiff has placed in dispute, you are likely entitled to that information in discovery.

Hopefully, the concepts addressed here will provide some guidance on how to navigate the waters to override the attorney-client privilege and to obtain discovery that provides an effective defense against professional liability claims premised on reliance.

NOTES

¹ See, e.g., *Garfinkle v. Arcata Nat'l Corp.*, 64 F.R.D. 688 (S.D.N.Y. 1974) ("Privilege may be waived if the privileged communication is injected as an issue in the case by the party which enjoys its protection."); *Orco Bank NV v. Proteinas Del Pacifico SA*, 577 N.Y.S.2d 841 (N.Y. App. Div. 1992); *Hayes v. Ricard*, 93 S.E.2d 540 (N.C. 1956); *United States v. Bilzerian*, 926 F.2d 1285 (2d Cir. 1991); *United States v. Jones*, 696 F.2d 1069 (4th Cir. 1982); *Hearn v. Ray*, 68 F.R.D. 574 (E.D. Wash. 1975).

² *Hedden v. Kean Univ.*, 82 A.3d 238 (N.J. Super. Ct. App. Div. 2013).

³ *United Jersey Bank v. Wolosoff*, 483 A.2d 821 (N.J. Super. Ct. App. Div. 1984).

⁴ 696 A.2d 556 (1997).

⁵ *Arena v. Saphier*, 492 A.2d 1020 (N.J. Super. Ct. App. Div. 1985).

⁶ 398 A.2d 882 (N.J. 1979).

⁷ *State v. Mauti*, 33 A.3d 1216 (N.J. 2012).

⁸ *Kinsella*, 696 A.2d at 568-569, quoting *Developments in the Law, Privileged Communications*, 98 HARVARD L. REV. 1450, 1637-38.

⁹ *Wolosoff*, 483 A.2d at 823. See also *Weingarten v. Weingarten*, 560 A.2d 1243, 1247-1248 (N.J. Super. Ct. App. Div. 1989) ("It is clear that the wife did waive that privilege in this case by the very institution of these proceedings. ... She claims that she relied on the information supplied by her husband when preparing for settlement. Thus, logically, the husband would be entitled to explore the existence of such evidence as may enable him to demonstrate that she did not rely on that information or that she may be estopped from claiming such because she told her attorney to stop searching for other information about his assets. Such matters obviously are relevant and material to a[ny] consideration of the issues raised by the wife's motion to vacate the divorce judgment.").

¹⁰ 557 A.2d 1386 (N.J. Super. Ct. App. Div. 1989).

¹¹ *Berman v. Gurwicz*, 458 A.2d 1311 (N.J. Super. Ct. Ch. Div. 1981) (citing *Toth v. Vasquez*, 65 A.2d 778 (N.J. Super. Ct. Ch. Div. 1949)).

¹² *Id.* ("It cannot be said that these plaintiffs relied on any misrepresentations or concealments of the defendants respecting the lease; they relied upon counsel and therefore cannot recover on a theory of fraud.")

¹³ *O'Boyle v. Borough of Longport*, 94 A.3d 299 (N.J. 2014) (citing *Stengart v. Loving Care Agency Inc.*, 990 A.2d 650 (N.J. 2010)); RESTATEMENT (3D) OF THE LAW GOVERNING LAWYERS § 79 (2000) ("The attorney-client privilege is waived if the client, the client's lawyer, or another authorized agent of the client voluntarily discloses the communication in a nonprivileged communication.").

¹⁴ *Weingarten*, 560 A.2d at 1247.

¹⁵ See, e.g., *State v. Baluch*, 775 A.2d 127 (N.J. Super. Ct. App. Div. 2001).

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