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Legal Brief

Supreme Court Ruling Shows Limits of Attorney-Client Privilege

By Allen Smith

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Article shortened for space considerations. Full article available at SHRM website (subscription required).

The attorney-client privilege isn't without limits, including limits on when adverse lower court rulings on privilege may be appealed, Justice Sonia Sotomayor's first decision on the U.S. Supreme Court showed.

In a unanimous Dec. 8, 2009, judgment, the court rejected a company's appeal of a lower court order that it compel information about a fired employee's meeting with a company's attorney.

The company had argued that the information was protected by the attorney-client privilege, but the lower court determined that the privilege was waived. The Supreme Court ruled that the company could not immediately appeal the adverse ruling on the attorney-client privilege.

Unlawful Immigration Allegations

Norman Carpenter, a shift supervisor at a Mohawk manufacturing facility in Calhoun, Ga., claimed that he was fired after he e-mailed a member of Mohawk's HR department that he thought the company was employing undocumented immigrants. At the time, Mohawk was a defendant in a pending class-action lawsuit of conspiring to drive down the wages of its legal employees by knowingly hiring undocumented workers in violation of federal and state racketeering laws (*Williams v. Mohawk Indus. Inc.*, No. 4:04-cv-00003-HLM (N.D. Ga. 2004)).

Company officials directed Carpenter to meet with Mohawk's attorney in the Williams case, and the attorney allegedly pressured Carpenter to recant his statements. When he refused, Carpenter claimed, he was fired in violation of 42 U.S.C. §1985(2) and various Georgia laws.

According to Mohawk, Carpenter had "engaged in blatant and illegal misconduct" by attempting to have Mohawk hire an undocumented worker. After the company began an investigation, it retained counsel. Because Carpenter's alleged efforts to cause Mohawk to circumvent federal immigration law violated Mohawk's policy, the company terminated him, it asserted.

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Advice of Counsel

Untangling the Knot—The Crucial First Steps of Divorce

The following is a special, guest article written by Ramzy Halaby

This article is intended to provide some general tips on the steps you should take if you are thinking about filing for divorce in Maryland and is not intended to provide specific legal advice. If you have specific questions

or would like to discuss your options, we encourage you to contact a divorce attorney in your area for a consultation.

The following are five things that you should do if you are thinking about filing for divorce:

1. Separate – In Maryland, the easiest way for a couple to obtain a divorce is to physically separate. Under Maryland law, the parties must reside in separate residences without sexual relations for an entire year, they must both agree that they want to end the marriage, and that there is no reasonable expectation they will reconcile. If you and your spouse both agree to obtain a divorce, you should decide who will move out of the marital residence and begin that process as soon as possible.

2. Identify your assets – In Maryland, any property that is acquired by either party after the marriage (with certain exceptions such as an inheritance or a gift from a third party), is considered “marital property”. If you are beginning the process of divorce, you should make a list of every item of property you brought to the marriage, as well as all items that were acquired by you and your spouse after you were married. Also be sure to identify the assets for which you believe ownership is likely to be disputed.

3. Identify your debts – Just as any property or assets acquired during the marriage is “marital property”, any debts incurred jointly or individually by the parties during the marriage is generally considered “marital debt” for which both parties could be held responsible. Start by identifying major debt such as a home mortgage, home equity line of credit, car loan, credit card debt, or other major loan. You will also need to note in whose name the debts or loans were taken out so that our attorneys can properly advise you.

4. Keep a journal – Particularly in cases in which child custody and/or visitation is an issue, it is a very good idea to keep a detailed journal that includes dates, and specific incidents pertaining to the welfare of your children. Since a journal will most likely be used in court, you should only record the circumstances and dates that are relevant to the issues of custody and/or visitation, and you should try to refrain from including any negative or derogatory opinions or statements about your spouse that you would not want presented in court.

5. Never sign any agreement without speaking to an attorney – I have unfortunately met with clients who, before seeking legal advice, entered into legally binding agreements, either prepared by their spouse or their spouse’s attorney, which contain provisions that they do not fully understand or which are contrary to their interests.

Divorce can be an emotional, stressful and difficult process. Don’t make it harder on yourself by failing to follow the steps above.

Case Studies

The expiration of the Federal Estate Tax and uncertainty regarding its eventual renewal has created an unprecedented situation for the public as well as lawyers and financial advisors. We sat down with Nathan Baker, law clerk, to learn more about this unique situation and its implications.

AWBF Law Newsletter: What led to our current situation regarding the Estate Tax?

Nathan Baker: in 2011, the Federal Estate Tax returns with a one million dollar exemption and a 55% tax rate. The final year of resolution was 2009 and it was not renewed by Congress, as of now at least, there is no Estate Tax. To compensate for this lack of estate tax, there is no step up in basis. Thereby increasing income taxes imposed as taxable estates at a rate of 16% over one million dollars.

AWBF: What are the real world implications? Is there any way for citizens to plan around the ambiguity?

NB: Due to the nature of the tax itself, decisions must be made on a case-by-case basis as each person's situation is different. At a broader level, there are potential legal implications for individual states as many have their own estate tax rates. People who live in Maryland are still subject to the state's estate tax.

AWBF: Has the IRS addressed this potential conflict?

NB: The IRS is in a wait-and-see mode right now. They haven't created any new forms or disseminated much information about the change.

AWBF: What advice can you give clients regarding the Estate Tax situation?

NB: Well, as I mentioned before, each person's situation is unique. I hope none of our clients are involved in an estate situation this year or beyond. I would like to remind people that the Gift Tax is still intact, despite being coupled with the Estate Tax. Gift Tax exclusion amounts will remain at 2009 levels this year, so I would advise anyone planning on making a gift to do it this year, before Congress passes any new legislation.

The Jury Box

This issue, we'd like to hear your opinion on the recent Supreme Court ruling on attorney/client privilege (see the article in this issue's Firm News section). Do you agree with the decision? Will the ruling effect how you interact with your attorney? What are the broader implications of the decision?



Email your thoughts to tlb@awbflaw.com. The readers with the best responses will receive a special gift.

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Carpenter then filed a motion to compel Mohawk to produce information concerning his meeting with the attorney and the company's termination decision. At that point, Mohawk maintained that the requested information was protected by the attorney-client privilege.

A district court agreed that the privilege applied to the requested information, but it granted Carpenter's motion to compel disclosure after concluding that Mohawk had implicitly waived the privilege through its representations in the Williams case.

Mohawk appealed to the 11th U.S. Circuit Court of Appeals, which dismissed the appeal, holding that the district court's ruling did not qualify as an immediately appealable collateral order.

Mohawk appealed to the Supreme Court, arguing in its brief that a meaningful attorney-client relationship is "irreparably destroyed absent immediate appeal" of adverse privilege rulings.

Concerns About Chilling Effect Rejected

The Supreme Court affirmed. Applying the collateral order doctrine set out in the Supreme Court's ruling in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the Supreme Court agreed with the 11th Circuit that "postjudgment appeals, together with other review mechanisms, suffice to protect the rights of litigants and preserve the vitality of the attorney-client privilege."

"Clients and counsel are unlikely to focus on the remote prospect of an erroneous disclosure order, let alone on the timing of a possible appeal," the court stated. "Clients and counsel must account for the possibility that they will later be required by law to disclose their communications for a variety of reasons—for example, because they misjudged the scope of the privilege, because they waived the privilege or because their communications fell within the privilege's crime-fraud exception."

District court rulings on these matters are unlikely to be reversed on appeal, the court added. But "the breadth of the privilege and the narrowness of its exceptions will," the court predicted, "exert a much greater influence on the conduct of clients and counsel than the small risk that the law will be misapplied."

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