

Litigating Claims of Attorney-Client Privilege

BY ROY SIMON

This is a tale of two cities – and an epic battle over a single explosive document. In *Miron v. BDO Seidman, LLP*, 2004 U.S. Dist. LEXIS 22101 (E.D. Pa. Oct. 19, 2004) (not available on Westlaw), the Honorable J. Curtis Joyner of the United States District Court for the Eastern District of Pennsylvania in Philadelphia held that a document known as the Kerekes Memorandum was protected by the attorney-client privilege. A month later, in *Denney v. Jenkins & Gilchrist*, 2004 WL 2712200 (S.D.N.Y. Nov. 23, 2004), the Honorable Shira Scheindlin of the United States District Court for the Southern District of New York held that the very same document was not protected because the attorney client privilege had been waived. This article looks at the two decisions, which illustrate the exquisite complexity of litigation over privileged documents.

Background: Gimme Shelter

In 1999, the Texas based law firm Jenkins & Gilchrist developed a complex tax shelter product known as Currency Options Bring Reward Alternatives (“COBRA”). A taxpayer using COBRA would form a partnership to engage in foreign currency option transactions. By using an artificially high basis for his partnership contribution, the taxpayer could create large losses that Jenkins & Gilchrist claimed would offset the huge capital gains that wealthy investors were taking at the height of the dotcom stock frenzy.

Jenkins & Gilchrist recruited the national accounting firm BDO Seidman (“BDO”) to market COBRA to its wealthy clients. BDO clients who bought the COBRA tax shelter strategy then retained Jenkins & Gilchrist to provide legal advice and opinion letters regarding COBRA. Eventually, BDO (assisted by others) prepared tax returns for these clients reflecting the COBRA losses.

The IRS took a dim view of tax shelter schemes such as COBRA, and in December 1999, the IRS issued a notice indicating that losses arising from transactions “wholly lacking in economic substance” are not properly allowable for Federal income tax purposes. Nevertheless, BDO continued to market COBRA, and Jenkins & Gilchrist continued to issue opinion letters attesting to the validity and legality of the COBRA transactions. In August 2000, the IRS published a Notice entitled “Tax Avoidance Using Artificially High Basis” warning accountants and tax attorneys that “the purported losses arising from certain types of transactions” including plans like COBRA – “are not properly allowable for federal income tax purposes” and the IRS might impose penalties on participants in such transactions.

The Kerekes Memorandum

Alarmed by the new IRS Notice, a BDO partner named Michael Kerekes, who was also a member of BDO’s Tax Solutions Opinions Committee, wrote the memorandum at the center of this story (the “Kerekes Memorandum”). The Kerekes Memorandum was addressed to BDO’s outside counsel (White & Case) and to the other members of BDO’s Tax Solutions Opinion Committee. The memo discussed the effect of the new IRS Notice on COBRA tax shelters and related IRS list keeping requirements. Five months later, the memo somehow fell into the hands of Jenkins & Gilchrist, a co promoter of COBRA but

not BDO's counsel. Eventually, as part of a settlement, Jenkins & Gilchrist provided the memo to lawyers for disappointed COBRA investors who had sued Jenkins & Gilchrist and BDO (and others) for fraud after the IRS disallowed the COBRA losses. One part of the Kerekes Memorandum candidly says that BDO's engagement letters "have been structured not to make clear exactly what services we were providing in return for our fee." The rest of the memo is apparently filled with equally damning information about BDO and the COBRA tax shelter scheme. Consequently, BDO and plaintiffs' lawyers have fought fiercely over whether the Kerekes Memorandum is protected by the attorney client privilege.

As mentioned earlier, the battle over privilege was fought both in *Miron v. BDO Seidman* in Philadelphia and in *Denney v. Jenkins & Gilchrist* in New York. In both cases, the courts assumed that the Kerekes Memorandum was originally protected by the attorney client privilege because it was sent by a BDO partner to BDO's outside counsel. Thus, the key issue was whether BDO had waived its attorney client privilege by sharing the Kerekes Memorandum with Jenkins & Gilchrist, either intentionally or inadvertently.

The Factual Dispute: How Did Jenkins & Gilchrist Get the Memorandum?

"It is well established that the attorney client privilege is waived if the holder of the privilege voluntarily discloses ... any significant part of the communication to a third party or stranger to the attorney client relationship," said Judge Scheindlin in *Denney*. Thus, the party claiming the privilege must show that the attorney client communications "were made in confidence *and have been maintained in confidence.*" *Denney*, 2004 WL 2712200 at *3 (emphasis by the court). BDO therefore had the burden of showing that it had not intentionally disclosed the Kerekes Memorandum to Jenkins & Gilchrist.

Plaintiffs argued that a BDO partner, Robert Greisman, had faxed a copy of the Kerekes Memorandum to Donna Guerin, a lawyer at Jenkins & Gilchrist, because Greisman (according to Ms. Guerin's Supplemental Affidavit) "wanted Jenkins to reconsider the text of opinion letters that it planned to send to those clients that Jenkins had advised who were also clients of BDO" so that Jenkins & Gilchrist would "harmonize" its opinion letters with BDO's communications to common clients of the two firms. Ms. Guerin added that Greisman had sent the Kerekes Memorandum as "part of the backup for his argument," and that she and Greisman had specifically discussed the Kerekes Memorandum by telephone. Plaintiffs contended that BDO's intentional disclosure of the Kerekes Memorandum destroyed the attorney client privilege because Jenkins & Gilchrist was a stranger to the attorney client relationship between BDO and White & Case.

BDO Seidman, however, claimed that it had never intentionally shared the Kerekes Memorandum with Jenkins & Gilchrist. (In fact, BDO suggested that Jenkins & Gilchrist obtained the Kerekes Memorandum through unspecified improper means.) To support this argument, Greisman submitted an affidavit stating, "I do not recall or believe I sent a copy of [the Kerekes Memorandum] to Ms. Guerin or anyone else at Jenkins & Gilchrist." Moreover, Greisman denied ever discussing the Kerekes Memorandum with Ms. Guerin by telephone, and suggested that the release of the Kerekes Memorandum to Jenkins & Gilchrist was "accidental."

Thus, at the most basic factual level, the *Miron* court and the *Denney* court had to choose among three possibilities: (1) intentional disclosure; (2) inadvertent disclosure; or (3) improper acquisition by Jenkins

& Gilchrist. However, BDO did not offer any alternative explanation regarding how Jenkens & Gilchrist acquired the document, and Judge Scheindlin found Ms. Guerin's testimony credible because she had "specific and unequivocal recollections as to the details of her conversations with Greisman" about the Kerekes Memorandum. Moreover, Judge Scheindlin found Ms. Guerin's detailed recollections "more persuasive than Greisman's failure to recall sending or discussing the memo." For these and other reasons, Judge Scheindlin found that Greisman had intentionally faxed the memo to Guerin on January 19, 2001, and had discussed the memo and its contents with Ms. Guerin as well.

In the *Miron* action, the court also observed that the affidavits submitted by the opposing parties were "in direct conflict," but reacted differently to the conflicting stories. The *Miron* court noted that "the detailed and verifiable information in Mr. Greisman's affidavit strongly suggests that he sent no fax to Ms. Guerin on January 19, 2001, the day she claims to have received it." However, the *Miron* court found it unnecessary to "delve into the quagmire of exactly how Jenkens & Gilchrist obtained the Memorandum" because, even if Greisman had intentionally faxed the Kerekes Memorandum to Jenkens & Gilchrist, the disclosure was protected by the common interest doctrine.

The Common Interest Doctrine

Citing *Katz v. AT&T Corp.*, 191 F.R.D. 433, 436 (E.D. Pa. 2000), the *Miron* court said that where parties with "shared interest in actual or potential litigation against a common adversary" share privileged information pursuant to this shared goal, the common interest doctrine preserves the attorney-client privilege with respect to that information. Even if the court accepted Ms. Guerin's assertion that the Memorandum was "not sent in connection with any ongoing litigation," the *Miron* court was nevertheless satisfied that BDO Seidman and Jenkens & Gilchrist were parties with "shared interest in actual or potential litigation against a common adversary." The Memorandum sought legal advice from BDO Seidman's outside counsel in connection with potential litigation and tax liability. At the time the Memorandum was allegedly faxed to Ms. Guerin, both BDO Seidman and Jenkens & Gilchrist faced the same legal issues concerning their standing with the IRS and common clients. Moreover, BDO Seidman and Jenkens & Gilchrist were codefendants in the pending Denney litigation, which concerned similar issues of tax liability. Thus, the *Miron* court was satisfied that "the common interest doctrine would protect the BDO Memorandum's privileged status if the communication between BDO Seidman and Jenkens & Gilchrist were found to be intentional."

Judge Scheindlin reached the polar opposite conclusion. Judge Scheindlin recognized that the common interest doctrine applies where "a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel." In other words, the common interest doctrine applies where "parties are represented by separate counsel but engage in a common legal enterprise." The party asserting the common interest rule (here, BDO) bears the burden of showing that there was "an agreement, though not necessarily in writing, embodying a cooperative and common enterprise towards an identical legal strategy."

Thus, some form of joint strategy is necessary to establish a joint defense agreement, "rather than merely the impression of one side."

BDO's common interest argument failed in several respects. It was not enough merely to show (as the name "common interest" might suggest) that BDO and Jenkens had "interests in common," or to show that they "shared concerns about potential litigation." Rather, BDO had the burden of showing a

“cooperative and common enterprise towards an identical legal strategy.” That is, BDO was required to show “some agreement, whether formal or informal, written or unwritten, to pursue a joint legal defense”—some “meeting of the minds between the parties.” (Emphasis by the court.) In addition, BDO had to show that the particular communication at issue (the Kerekes Memorandum) was disclosed “in connection with the joint legal defense.”

In Judge Scheindlin’s view, BDO had not met either burden. BDO continued to argue that BDO never intended to send the Kerekes Memorandum to Guerin at all, but “BDO cannot argue simultaneously that Greisman did not mean to send the memo, or that if Greisman did intentionally send the memo, BDO did not authorize him to do so, and, at the same time, that BDO sent the memo in connection with a consciously pursued legal strategy.” In this light, Judge Scheindlin found persuasive Ms. Guerin’s explanation that BDO had disclosed the memo to persuade Jenkins to harmonize the language of its client letters with that of BDO’s, rather than to further a joint defense.

Judge Scheindlin realized that her conclusion on the common interest issue contradicted Judge Joyner’s conclusion in *Miron*, but Judge Scheindlin noted (in footnote 48) that Judge Joyner did not have the benefit of Ms. Guerin’s affidavit in the *Denney* case, which for the first time described “the nonlitigation related purpose of the disclosure” (*i.e.*, harmonizing Jenkins & Gilchrist’s opinion letters to common clients). Moreover, even if BDO had believed that it was disclosing the memo in connection with a common legal defense strategy, there had been no showing that Jenkins & Gilchrist believed that it was engaged in any such joint strategy. Indeed, Ms. Guerin “categorically denies” any such understanding. As evidence that no joint strategy existed between BDO and Jenkins & Gilchrist, Judge Scheindlin noted that Jenkins had produced the Kerekes Memorandum to the government and to plaintiffs without invoking the joint defense privilege as to that memo or any other document. Judge Scheindlin found this to be “persuasive evidence” that Jenkins was not aware of any joint defense strategy.

Finally, even if Jenkins & Gilchrist and BDO had both understood that BDO disclosed the Kerekes Memorandum pursuant to a joint defense strategy, BDO still had to show that the communication was given “in confidence,” and that BDO “made reasonable efforts to protect the privilege.” BDO had made no such showing. Ms. Guerin did not recall that Greisman gave her “any indication that the memo was privileged,” and “nothing on the face of the memo indicates that it is privileged.”

Authority to Waive the Privilege

But BDO had an alternative argument. Even if Greisman had intentionally faxed the Kerekes Memorandum to Ms. Guerin, he lacked authority to do so on behalf of BDO, which owned the privilege. BDO based this argument on *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343 (1985), a case discussing which corporate actors are empowered to waive the corporation’s privilege. The Supreme Court noted in *Weintraub* that “the power to waive the corporate attorney client privilege rests with the corporation’s management and is normally exercised by its officers and directors.” Because Greisman was a partner of BDO but not an officer or director, BDO argued that he was without authority to waive BDO’s privilege.

Judge Scheindlin was not persuaded. She noted that *Weintraub* did not expressly limit the power to waive the corporation’s privilege to its officers and directors. In any event Greisman was a partner in BDO, not its employee, and “[w]ell established concepts of partnership doctrine impute the knowledge and actions

of one partner to all others." Thus, Greisman's decision to disclose the memo to Ms. Guerin was imputed to BDO. In any event, Judge Scheindlin believed that Greisman had sufficient authority to waive BDO's privilege.

Yet a thorny sub issue lurked in the background: Did the *Weintraub* holding apply to partnerships, and thus restrict the authority of a single partner to waive the partnership's attorney client privilege? BDO cited a recent state court case, *Shaffer v. OhioHealth Corp.*, 2004 WL 35725 (Ohio Ct. App. Jan. 8, 2004), which cited *Weintraub* for the proposition that "where a corporation, partnership, or other collective entity is the client, the attorney client privilege belongs to the company and not to its employees outside of their employment capacity." BDO also cited two cases holding that the principles of *Weintraub* also applied to partnerships. In *United States v. Campbell*, 73 F.3d 44 (5th Cir.1996), the court stated that the rules regarding the attorney client privilege for corporations apply to partnerships, and the court cited *Weintraub* in holding that the trustee for a bankrupt partnership has authority to waive the partnership's privilege. The court made a similar broad pronouncement in *Meoli v. American Medical Services of San Diego*, 287 B.R. 808 (S.D. Cal. Jan. 9, 2003). But Judge Scheindlin brushed aside these authorities, saying that their "general propositions" were "not controlling of the question at issue here."

That left still another sub issue on the table: Could a single employee, officer or director of a corporation (or partnership) disclose privileged communications to a third party without the express authorization of the entity's management? Judge Scheindlin acknowledged that few cases had addressed this situation, but she cited *Jonathan Corp. v. Prime Computer, Inc.*, 114 F.R.D. 693 (E.D.Va.1987), a case "widely cited in the secondary sources," for the proposition that the privilege may be waived not only by officers and directors, but also by lower level employees, "at least where the corporation authorized the employee's possession of the confidential communication, and the corporation took inadequate steps to prevent the employee disclosing it." Thus, in *Jonathan*, a mere salesman's disclosure of an allegedly privileged memorandum during sales negotiations was sufficient to waive the corporate employer's attorney client privilege. Likewise, in *Moore v. Commissioner of Internal Revenue*, 2004 TNT 22114 (T.C., Nov. 15, 2004), the Tax Court held that an employee of a limited liability company had waived the company's attorney client privilege by disclosing certain documents, whether or not she had explicit authorization to do so. Alternatively, the same court held, the privilege was waived when the employee disclosed the documents without any authority because the employee had "ready access" to the documents and management took no precautions to prevent her from disclosing them. Finally, Judge Scheindlin cited Professor Paul Rice's well known treatise, *ATTORNEYCLIENT PRIVILEGE IN THE UNITED STATES*, § 9:27 (2d ed.1999), for the general rule that "voluntary disclosure of privileged communications to third parties ... by the client or the client's authorized agent destroys both the communications' confidentiality and the privilege that is premised upon it." (Emphasis by the court.)

Yet Judge Scheindlin was still not fully satisfied that she had put this issue to rest, because some courts have held that "even an officer or director may be without authority to waive the privilege when acting in his or her individual capacity, especially in the face of a board or management decision to the contrary." For example, in *United States v. John Doe (In re Grand Jury Proceedings)*, 219 F.3d 175, 185 (2d Cir.2000), the Second Circuit held that when a corporate officer testifies in his individual capacity before a grand jury, he does generally have the power to "waive the corporation's privilege without that entity's consent." In the same case, the Second Circuit also refused to adopt a per se rule that a lone officer's waiver could (or could not) be imputed to the corporation. Instead, the court set out a "fairness" analysis, focusing in particular on whether the officer's disclosure of privileged material was "a deliberate attempt on the part

of the corporation to exculpate itself, as opposed to [the officer's] effort to exculpate himself personally." Applying that authority in *Denney*, Judge Scheindlin found "no question" that Greisman had possessed the authority to waive BDO's privilege regarding the Kerekes Memorandum. Judge Scheindlin said:

Greisman was a partner of BDO. He was a member of BDO's Tax Solutions Opinion Committee, authorized to represent BDO with respect to tax shelters. He was clearly authorized to possess the memo; as a member of the Committee, he was one of the memo's addressees, and in fact the memo credits him with a role in its creation. In sending the memo to Guerin, Greisman was not acting in his individual capacity, but as a representative and agent of BDO, in pursuit of BDO's interests. For these reasons, I conclude that Greisman had the authority to waive BDO's privilege by disclosing the memo to Guerin.

To cover one last base, however, Judge Scheindlin held that the privilege would have been waived even if Greisman had not had authority to disclose it, because "BDO authorized Greisman's possession of the memo, and authorized Greisman to discuss tax shelters" with Guerin, and BDO made "no showing that it took any precautions to prevent Greisman from disclosing the memo to third parties." In fact, the Kerekes Memorandum was "not labelled as either privileged or confidential."

Waiver by Inadvertent Disclosure?

That left one more issue to be decided: If the disclosure of the Kerekes Memorandum was inadvertent rather than intentional, was the privilege still waived? For example, Judge Scheindlin speculated, if either Greisman or his secretary had sent the memo to Ms. Guerin under the belief that it was a different document, or misdirected the memo to Guerin while intending to send it to someone else, would the privilege covering the Kerekes Memorandum have been waived? Yes, without question, said Judge Scheindlin. "I have already credited Guerin's testimony that she discussed the contents of the memo with Greisman in early 2001," said the judge. "Even if Greisman did not intend to send the memo to Guerin, or even if it was not Greisman who sent it, he knew when she discussed it with him that it was in her possession."

To bolster this conclusion, Judge Scheindlin went through the Second Circuit's "standard test," articulated in *Lois Sportswear, USA, Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103 (S.D.N.Y.1985), for determining whether the attorney-client is waived by inadvertently disclosing a document during discovery. Under *Lois Sportswear*, courts look to the following factors:

- "the reasonableness of the precautions to prevent inadvertent disclosure"
- "the time taken to rectify the error"
- "the scope of the discovery,"
- "the extent of the disclosure," and
- "an overreaching issue of fairness"

BDO did not fare well under these factors. It could not show that it had guarded the privilege with appropriate care, because although Greisman knew that the memo was in Ms. Guerin's possession (knowledge also imputed to the partnership), he had never demanded the memo's return, or even informed Ms. Guerin that the memo was confidential and had been sent in error. Indeed, "not only did BDO fail to demand the memo's return in 2001, when it first learned that it had come into Jenkens'

possession; BDO still did not demand its return three years later, even when it knew that Jenkins was producing documents to the IRS and to plaintiffs.” Thus, Judge Scheindlin ruled that any privilege that may once have attached to the Kerekes Memorandum had been waived by its disclosure to Jenkins & Gilchrist.

But life is not simple. Once again, the *Miron* court reached the opposite conclusion. Using factors almost identical to those in *Lois Sportswear*, the *Miron* court held that even if Jenkins & Gilchrist obtained the Kerekes Memorandum without authorization as a result of inadvertent or involuntary disclosure by someone within BDO Seidman, “such a disclosure would not constitute a waiver.” The court reasoned that the Memorandum was addressed to “a limited audience of high level BDO employees and outside counsel, suggesting some degree of precaution in terms of confidentiality.” The extent of disclosures was limited – plaintiffs alleged only that the Memorandum was faxed from BDO to Jenkins & Gilchrist on January 19, 2001, and plaintiffs claimed “no further disclosures” by BDO. Moreover, in numerous courts, BDO had “fought vigorously to preserve the privilege surrounding the Memorandum.” Thus, Judge Joyner found that the “overriding interests of justice would be served” by granting BDO’s motion for return of the Memorandum and by prohibiting the plaintiffs from using or referring to the Kerekes Memorandum in the *Miron* case.

Conclusion: Building or Breaching Multiple Layers of Defense

The saga of the Kerekes Memorandum holds many lessons. For those seeking to preserve the privilege, the main lesson is that defending the attorney client privilege is like defending an ancient walled city – the task calls for building multiple layers of protection. Here, BDO argued that (1) the Kerekes Memorandum was never intentionally shared with any stranger to the attorney client relationship; (2) if it was intentionally disclosed, the person who disclosed it lacked authority to do so; and (3) if the person had authority to disclose it, the disclosure was protected by the common interest doctrine.

Conversely, those seeking to use a privileged document must marshal the facts in painstaking detail to show that each and every layer of defense has flaws. Here, for example, the plaintiffs had to show that (1) the Kerekes Memorandum was intentionally shared with a stranger to the attorney client relationship; and (2) the person who disclosed the document had authority to disclose it, or at least had ready access to the document and was not restrained from disclosing it; and (3) the disclosure was not protected by the common interest doctrine; and (4) if the disclosure was inadvertent, the overriding interests of justice and fairness weighed in favor of finding a waiver.

These are both fact intensive and research intensive issues. Of course, absent a common defense arrangement, the best advice for a party seeking to protect a privileged document is to adhere strictly to the aspirational wisdom of New York’s EC 43: “A lawyer should endeavor to act in a manner which preserves the attorney client privilege” But when mistakes and misjudgments happen, the litigation over the Kerekes Memorandum in both Philadelphia and New York should provide a detailed road map to both sides.

Roy Simon is the Howard Lichtenstein Distinguished Professor of Legal Ethics at Hofstra University School of Law and is the author of SIMON’S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED, published annually by Thomson West.