The Asset Management Industry
SERVING INDIVIDUAL INVESTORS
INVESTMENT COMPANY INSTITUTE

MEMO# 31831

July 1, 2019

District Court Grants SEC Access to Documents an Adviser Claimed Were Subject to the Attorney-Client Privilege

[31831]

July 1, 2019 TO: Chief Compliance Officer Committee
SEC Rules Committee
Small Funds Committee RE: District Court Grants SEC Access to Documents an Adviser Claimed Were Subject to the Attorney-Client Privilege

In a recent case in the U.S. District Court for the Southern District of New York, the SEC sought to compel a registered investment adviser to produce various communications between and adviser and its outside consultant that were created in connection with an SEC exam of the adviser.[1] The SEC also sought production of tax opinions prepared by the adviser's outside tax counsel. The adviser resisted providing the SEC access to the documents claiming they were privileged under the attorney-client privilege and/or work product doctrine. The court ruled that, while two of the documents the SEC sought were privileged and protected from disclosure, the remaining 45 documents were not. The facts of this case and the basis for the court's holding are briefly summarized below.

Background

The adviser retained the services of a compliance consulting firm ("the Consultant") to assist the adviser with its compliance with the federal securities laws. The Consultant offered its clients two types of services – one in which the relationship solely involved consulting on compliance issues and one, which was more expensive, in which the Consultant would provide legal services to the client through a law firm affiliated with the Consultant. Regardless of which type of services the client sought, the services were provided by licensed attorneys who worked for the Consultant. Importantly, for those clients only interested in the Consultant's compliance consulting services, the Consultant expressly disclaimed that it was *not* providing traditional legal services to such clients.[2]

In October 2014, the SEC began an exam of the adviser that, in part, resulted in the SEC alleging the adviser had omitted material information from and made misrepresentations to its clients and prospective clients. According to the court, "throughout the course of the SEC's examination, [the adviser's] in-house counsel sought and received advice from [the Consultant's] compliance personnel, who, although licensed attorneys, were retained [by the adviser] pursuant to an agreement that expressly disclaimed the existence of the

attorney-client relationship."[3] As part of its exam, the SEC sought access to 47 documents that were listed in the adviser's "privilege" log. These communications consisted primarily of communications between the adviser's in-house counsel and an attorney employed by the Consultant who was providing the in-house counsel advice on the SEC examination and exchanges of draft responses to the SEC's information requests.

In addition to seeking the communications between the adviser and the Consultant, the SEC also sought access to two tax opinions the adviser obtained from its outside tax counsel in 2011 and 2013. The adviser resisted producing these opinions claiming they were subject to the attorney-client privilege and/or work-product protection. In considering these opinions, the court noted that, according to testimony, the opinions were intended to be relied upon by the adviser's representatives in their conversations with prospective clients and that such representatives were instructed to let the firm's clients know the conclusions of such opinions – *i.e.,* that products sold by the adviser were not subject to U.S. taxes. These opinions were also shared by the adviser's CEO with the adviser's accounting firm so such firm "could incorporate the opinions' conclusions into [the accounting firm's] advice to [its] clients" regarding the tax status of such investments.

The Court's Holding

The court found that, with two exceptions, *all* of the documents sought by the SEC were not protected by the attorney-client privilege or the work-product doctrine and had to be provided to the SEC staff. With respect to the attorney-client privilege, the court found that, for this privilege to attach, the adviser had to have sought *legal* advice from the Consultant's staff in their capacity as attorneys. Because the adviser had repeatedly opted to retain the Consultant for its consultancy services and not for its legal services, the court found that the adviser could not have a good faith belief that the Consultant's staff were acting in their capacity as attorneys. As stated in the Opinion, "absent circumstances that suggest otherwise, the Court presumes that a communication between a person and a lawyer is not privileged when it follows an unequivocal disclaimer that the latter is not providing legal advice and is not acting in his or her capacity as an attorney. Here, the disclaimers [by the Consultant] were clear, specific, and repeated *ad nauseum.*"[4] While the court found that this presumption could be overcome based on evidence that the relationship between the adviser and the Consultant had evolved to one of attorney-client, there was nothing in the record to indicated this to be the case. The court did find, however, that two communications between the adviser and the Consultant specifically sought legal advice. While such advice was not given, the court found that, because the adviser created these communications in an effort to obtain legal advice, they, alone, were protected by the attorney-client privilege.

The court next considered whether the tax opinions the adviser received from its outside tax counsel were protected by the attorney-client privilege and/or afforded work-product protection. Because these opinions were not prepared in anticipation of litigation, the court found that they do not constitute work product and therefore not protected under the work product doctrine. As regards their treatment under the attorney-client privilege, after considering why the tax opinions had been shared with the adviser's accounting firm, it determined that they were not shared to obtain advice "for purposes of conforming an investment product to federal tax law."[5] Instead, "the only apparent objective was to convince [the accounting firm] to echo the [adviser's] advice to prospective clients."[6] On this basis, the court concluded that the adviser had failed to meet its burden of showing that they were protected by the attorney-client privilege and granted the SEC access to them.

Tamara K. Salmon
Associate General Counsel

Attachment

endnotes

[1] *See Securities and Exchange Commission v. Benjamin Alderson and Bradley Hamilton,* (USDC June 10, 2019) (the "Opinion"), which is attached. The two defendants in this case were the CEO and Area Manager, respectively, of the registered adviser whose records were the subject of this case.

[2] The court described the adviser's choice as follows: "In what appears to have been a penny wise but pound foolish decision, [the adviser] opted for [retaining the Consultant's compliance services], rather than the more expensive law firm engagement" offered by the Consultant. Opinion at p. 4.

[3] Opinion at p. 3.

[4] Opinion at p 9.

[5] Opinion at p. 15.

[6] Opinion at p. 16.