MASSACHUSETTS Lawyers Weekly
MASSLAWYERSWEEKLY.COM
Part of the BRIDGETOWER MEDIA network
FEBRUARY 17, 2022

Accidentally disclosed draft letter must be returned

BLS: attorney-client privilege not waived

By Eric T. Berkman

A Superior Court judge has ruled that the attorney-client privilege shielded the accidentally disclosed draft version of a letter that was potentially material to a litigant's defense in a shareholder freezeout suit.

Plaintiff Hugo Van Vuuren, founder of Xfund, a venture capital fund, sued co-founder Patrick Chung, alleging Chung froze him out of the fund while sabotaging his immigration status. The case settled.

Van Vuuren also sued defendant Lowenstein Sandler, a New Jersey law firm that Chung brought in as Xfund's corporate counsel, alleging Lowenstein Sandler's complicity in Chung's scheme.

When Lowenstein Sandler moved to dismiss, its counsel attached to its supporting memorandum what it reportedly believed was an unsigned copy of a termination letter it sent Van Vuuren several years earlier that purportedly backed up its theory that Van Vuuren's claims were time-barred.

Lowenstein Sandler's counsel actually attached, however, a draft letter that had circulated between the firm's attorneys and Chung. The draft apparently differed materially from the letter Van Vuuren had received. Van Vuuren viewed the draft as helpful to his case.

In opposing Lowenstein Sandler's motion to compel return of the draft letter, Van Vuuren argued that the firm waived any privilege as to the draft letter.

Judge Kenneth W. Salinger, sitting in the Business Litigation Session, disagreed.

"The confidential communication of the draft letter by Lowenstein to its client, to inform private discussions of legal strategy, is protected by the attorney-client privilege," Salinger wrote. "Though the draft does not contain legal advice, that is beside the point. Any confidential communication between attorney and client, in either direction, is privileged if it [i]s made for the purpose of obtaining or giving legal advice — whether the communication conveys legal advice or not."

The 10-page decision is *Van Vuuren v. Lowenstein Sandler LLP, et al., Lawyers Weekly No. 09-004-22.*

Van Vuuren v. Lowenstein Sandler LLP, et al.

THE ISSUE: Did the attorney-client privilege shield the accidentally disclosed draft version of a letter that was potentially material to a litigant's defense in a shareholder freezeout suit?
DECISION: Yes (Suffolk Superior Court/BLS)
LAWYERS: Jason C. Spiro of Spiro Harrison, Red Bank, New Jersey; Scott Heidorn of Bergstresser & Pollock, Boston (plaintiff)Denis M. King and Richard M. Zielinski, of Goulston & Storrs, Boston; Brian Flaherty, John P. Johnson Jr. and Leigh Ann Benson, of Cozen O'Connor, Philadelphia (defense)

SWORD AND SHIELD?

Van Vuuren's lead counsel, Jason C. Spiro of Red Bank, New Jersey, asserted that Lowenstein Sandler intentionally, not accidentally, attached the draft letter concerning what he described as its "secret and unlawful efforts" to sabotage Van Vuuren's immigration status behind his back and was now raising the attorney-client privilege to suppress such evidence.

"We believe this is an improper attempt to use privileged commu-

Boston attorney **Vincent J. Pisegna** said he thought the judge's description of the types of writings protected by the privilege went too far.

nications as sword and shield, particularly as they continue to rely on their advice to Xfund and Mr. Chung in their motion to dismiss," Spiro said.

Richard M. Zielinski of Boston, one of Lowenstein Sandler's attorneys, declined to comment.

However, Boston civil litigator Stephen D. Riden said he was pleased by the court's acknowledgement that lawyers are humans and humans make mistakes.

"I think every practitioner has had that 'Oh, no!' moment when they fear they have accidentally produced privileged information and are worried they have done lasting damage to a client," Riden said. "It happens all the time, but what this court is saying is that one mistake isn't going to open the door into discovery of protected privileged communications."

Jonathan D. Plaut of Boston, who handles attorney malpractice cases, said the practice of turning over unsigned versions of letters and documents invariably creates the risk of inadvertently producing drafts the lawyers had shared with their clients, which are confidential.

"Lawyers would be wise to do away with most of their large file cabinets, and instead save PDFs of the signed versions of their letters," Plaut said. "Any unsigned letter or document should be viewed as a draft, and incomplete, and should not be produced. Unsigned letters are, almost by definition, not final versions."

Boston attorney Vincent J. Pisegna said he thought the judge's description of the types of writings protected by the privilege went too far.

"He says that basically any document given by a lawyer to a client or by the client to a lawyer in furtherance of obtaining legal advice is subject to the attorney-client privilege," Pisegna said, emphasizing that there are many situations when confidential documents are otherwise discoverable and such documents are not protected simply because the client sent them to an attorney for legal advice.

"Despite what [the decision] says, that can't be what it means because it would render the privilege too broad," Pisegna said.

Matthew T. LaMothe of Salem said he was struck by the decision's suggestion that a defendant's advice-of-counsel defense does not constitute a blanket waiver of the attorney-client privilege.

"Attorneys have had the general idea that claiming the advice-of-counsel defense opens yourself up to the obligation to produce attorney-client communications," he said. "This decision reinforces that a waiver would be limited to what's been put at issue."

INADVERTENT ATTACHMENT?

Van Vuuren, a South Africa citizen living in Massachusetts, co-founded Xfund with Chung in 2014.

According to the plaintiff, Chung soon began abusing his authority by engaging in self-dealing, usurping Van Vuuren's management role, and harassing an employee.

When the plaintiff raised his concerns, Chung allegedly made retaliatory threats against his immigration status, in response to which the plaintiff apparently reported Chung to the fund's limited partner advisory committee.

"Attorneys have had the general idea that claiming the advice-of-counsel defense opens yourself up to the obligation to produce attorney-client communications. This decision reinforces that a waiver would be limited to what's been put at issue."

In February 2016, Chung hired Lowenstein Sandler to represent Xfund as corporate counsel, allegedly without authority to do so. According to the plaintiff, Chung did so for purposes of freezing him out.

On March 4, 2016, Lowenstein Sandler sent the plaintiff's personal

attorney a letter purporting to terminate him and stating that due to his termination, "no Xfund Entity will be authorized to sponsor Mr. Van Vuuren's visa on an ongoing basis," though the letter did not specify any specific action it would take regarding his visa.

The plaintiff further alleged that Lowenstein Sandler attorney Marie DeFalco and Chung conspired to keep him from returning to the U.S. when he took an overseas trip. Specifically, he claimed that, among other things, they made false statements to immigration authorities that he had forged Chung's signature on his visa application, which led to the revocation of his visa and the September 2016 denial of his entry back into the U.S. after a trip to South Africa to visit family.

It apparently took two years for Van Vuuren to gain reentry to the U.S., during which time he was allegedly unable to pursue his career in the VC industry.

The plaintiff ultimately settled claims he brought against Chung and, in July 2021, sued Lowenstein Sandler and DeFalco in Superior Court alleging fiduciary and Chapter 93A violations for their alleged role in his separation from Xfund and the revocation of his visa.

The defendants moved for dismissal both on the substance of his claims and on statute of limitations grounds, arguing that his claims began to accrue as early as March 4, 2016, when he received the termination letter.

When filing the defendants' memorandum in support of their motion, attorneys from Philadelphia firm Cozen O'Connor, which Lowenstein Sandler hired in anticipation of litigation, attached what they allegedly believed was an unsigned copy of the letter but what was really a draft version that had circulated between Chung and Lowenstein Sandler before the March 4 letter was sent.

The draft version allegedly contained language removed from the final version.

The plaintiff, in opposing the motion to dismiss, attached the final version and argued that the deletion of the language supported his claims.

The defendants then moved to compel the return of the draft letter, arguing it was privileged.

In objecting, the plaintiff asserted that the draft letter did not constitute a communication to Xfund or Chung, who Lowenstein Sandler asserted were its clients, but a letter to Van Vuuren's former counsel.

Additionally, he contended that the draft letter did not contain confidential legal advice.

Meanwhile, the plaintiff argued that the defendants intentionally attached the draft letter in a failed attempt to pass it off as a final version, and that they waived any privilege by placing the letter at issue and making it part of their defense.

PROTECTED BY PRIVILEGE

Salinger rejected the plaintiff's contention that because the draft letter contained no legal advice, it was not a protected attorney-client communication.

"The rule advocated by Van Vuuren, that confidential drafts shared between attorney and client are no longer privileged once a document is put into final form and sent to a third party, would substantially erode the attorney-client privilege," the judge wrote.

Additionally, Salinger said, the privilege was not Lowenstein Sandler's to waive, since the privilege belongs to the client — in this case, Chung and Xfund.

Meanwhile, Salinger found that Lowenstein Sandler did not waive Xfund's attorney-client privilege by arguing in support of its motion to dismiss that Xfund was legally obligated to notify immigration authorities that Van Vuuren was no longer employed at Xfund.

"[E]ven if Lowenstein could somehow waive Xfund's privilege by putting the substance of its legal advice to Xfund at issue in this case, such a waiver would be limited to 'what has been put at issue;' it would not constitute 'a blanket waiver of the entire attorney-client privilege,'" the judge wrote, quoting the Appeals Court's 2010 decision in Global Investors Agent Corp. v. National Fire Ins. Co. of Hartford.