

Internal Law Firm E-mail Is Privileged From Discovery by Client in Securities Litigation

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[*In re Refco Securities Litigation*, ___ F. Supp. 2d ___, 2011 WL 497441 \(S.D.N.Y. 2011\)](#)

Brief Summary

The U.S. District Court for the Southern District of New York held, in the context of securities litigation, that a law firm's internal e-mail was privileged under the rule that documents intended solely for internal law office review are excepted from the client's presumptive access to its file.

Complete Summary

In the context of securities litigation, plaintiffs, investors and their investment manager, brought claims against a law firm for legal malpractice and aiding and abetting a breach of fiduciary duty. Pursuant to those claims, the investors and their investment manager sought discovery of an e-mail that had been circulated internally at the law firm and which generally included partners' preliminary thoughts regarding certain clients and matters related to the present litigation. After the investors and their investment manager sought discovery of that e-mail, the court referred all claims against the firm to arbitration. The firm objected to discovery of the e-mail by asserting that it was privileged as an internal law firm communication/lawyer work product (not to be confused with the "anticipation of litigation" work product doctrine). A special master ordered production of the e-mail, notwithstanding the conclusion that it was irrelevant.

On appeal, the district court held that the special master had abused his discretion because the e-mail was both irrelevant and privileged. The e-mail was irrelevant to the securities litigation, the court held, because the law firm was no longer a party to that litigation. Moreover, the e-mail was privileged under New York law, which recognizes

that although clients have presumptive access to the entirety of the client file, there is an exception for documents intended solely for internal law office review. The investors and their investment manager, however, contended that there is an exception to this exception when the client demonstrates a clear need for the document. But the court held that the investors and their investment manager had no clear need for the e-mail because their claims against the firm were not before the court.

Significance of Opinion

This opinion applies New York state law regarding the privilege that attaches to certain internal law firm communications and the effect of that privilege on clients' access to the client's law firm files. Whereas the privilege is usually applied in the context of litigation between attorney and former client, the court here applies the privilege in litigation in which the law firm asserting the privilege is not a party.

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