

The background of the cover is a photograph of the Fall River Justice Center. The building is a modern structure with a large, curved glass facade that reflects the sky and surrounding environment. To the left of the building, two flagpoles are visible. The taller one on the left flies the United States flag, and the shorter one next to it flies the state flag of Massachusetts. The sky is overcast and grey. The title 'MASSACHUSETTS LAW REVIEW' is printed in a large, bold, black serif font across the top right. Below the title, the volume and issue information 'VOLUME 95, No. 3' and the publisher 'PUBLISHED BY THE MASSACHUSETTS BAR ASSOCIATION' are printed in a smaller, black serif font, separated by a thin horizontal line.

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CASE & STATUTE COMMENT

When May a Corporation Assert the Attorney-Client Privilege and the Work Product Doctrine Against Its Own Directors?

Chambers v. Gold Medal Bakery, Inc., 464 Mass. 383 (2013)

What happens when important principles of corporate governance—the right of a company to unfettered, confidential legal advice and the responsibilities of a director of a corporation—clash? This is the dilemma addressed by the Supreme Judicial Court in *Chambers v. Gold Medal Bakery, Inc.*¹ In *Chambers*, the court held that a director of a corporation is entitled to corporate information that is protected by the attorney-client privilege and the work product doctrine unless her interests are adverse to the interests of the corporation in regard to the specific matter at issue.²

The attorney-client privilege, and its litigation-related companion, the work product doctrine, are essential components of the attorney-client relationship. The attorney-client privilege applies to communications between an attorney and a client (or a potential client) for the purpose of obtaining legal advice.³ It has been described as “among the most hallowed privileges of Anglo-American law.”⁴ Except in a few limited circumstances, neither the attorney nor the client can be forced to reveal such communications.⁵

The work product doctrine allows attorneys and parties (and those working for them) a zone of confidentiality in which to prepare their cases, and sharply curtails access by others to materials prepared “in anticipation of litigation or for trial....”⁶ Only upon a showing of “substantial need,” and that “he is unable without undue hardship to obtain the substantial equivalent of the materials by other means,” may a party be permitted to obtain his adversary’s work product.⁷ Even in such cases, “mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party” are protected from disclosure.⁸

The attorney-client privilege and the work product doctrine do

not belong only to individuals. Legal entities also enjoy their benefits. As set forth by the United States Supreme Court in *Upjohn Co. v. United States*,⁹ an organization can assert both the attorney-client privilege and the work product doctrine against outsiders to protect (a) communications between a corporation and its counsel and (b) the work of its attorneys (and others acting on its behalf) as they prepare a case.

Corporate directors are charged with the duty of overseeing the corporation. As such, they have a right to inspect the corporation’s books and records.¹⁰ This right is consistent with their duties—absent the ability to review the corporation’s records, they cannot properly fulfill their responsibilities to the corporation.¹¹

What happens then when these important doctrines are in conflict and the organization tries to shield its communications and work product not from outsiders, but from directors of the entity itself? This is the important issue presented in *Chambers*.

Facts

Gold Medal Bakery, Inc. and its sister company, Bakery Products Corporation (collectively “Gold Medal”) were founded by two brothers whose bakery business has become one of the “major suppliers of wholesale bakery products in New England.”¹² Eventually, the families of the two brothers became pitted against one other.¹³ Each side owned 50 percent of Gold Medal’s stock and controlled two seats on Gold Medal’s board of directors.¹⁴ One family, however, took a more active role in the “day-to-day affairs” of Gold Medal.¹⁵

In 2006, plaintiffs (representatives of the less active family), who felt that they were denied information about the business, sent a

1. 464 Mass. 383 (2013).

2. *Id.* at 389-94.

3. See *Hatton v. Robinson*, 31 Mass. 416, 421 (1833); M. Laredo, *The Attorney-Client Privilege in the Business Context in Massachusetts*, 87 MASS. L. REV. 143 (No. 4, Spring 2003).

4. In the Matter of a Grand Jury Investigation, 437 Mass. 340, 351 (2002), quoted in Laredo, *supra* note 3 at 144.

5. Laredo, *supra* note 3 at 145.

6. MASS. R. CIV. P. 26(b)(3); see *Hickman v. Taylor*, 329 U.S. 495 (1947).

7. *Id.*

8. *Id.*

9. 449 U.S. 383 (1981).

10. MASS. GEN. LAWS ch. 156D, §16.05(a) states that “[a] director of a corporation is entitled to inspect and copy the books, records and documents of the corporation at any reasonable time to the extent reasonably related to the performance of the director’s duties as a director, ... but not for any other purpose or in any manner that could violate any duty to the corporation.”

11. It is noteworthy that Massachusetts has been at the forefront of a well-developed body of law in a related area: the rights and duties of shareholders in closely-held corporations (a closely-held corporation is defined as one where there are “(1) a small number of shareholders; (2) no ready market for the corporate stock; and (3) substantial majority stockholder participation in the management, direction and operation of the corporation.” *Donahue v. Rodd Electro-type Co. of New England, Inc.*, 367 Mass. 578, 586 (1975)). These rulings have come in often bitter intra-enterprise (and intra-family) disputes, such as the one in *Chambers*; more akin to divorces than typical commercial cases, they can go on for many years. See, e.g., *Merriam v. Demoulas Super Mkts., Inc.*, 464 Mass. 721 (2013); *Demoulas v. Demoulas Super Mkts., Inc.*, 421 Mass. 501 (1997); see generally, M. Laredo, *Shareholder Duties and Disputes in Closely-Held Corporations in Massachusetts*, 91 MASS. L. REV. No. 3 (October 2008).

12. *Chambers v. Gold Medal Bakery, Inc.*, 464 Mass. 383, 384 & n.4 (2013).

13. *Id.* at 384-85.

14. *Id.*

15. *Id.* at 385.

request to inspect various records to Gold Medal's law firm.¹⁶ When the requested documents were not produced, they filed a lawsuit in 2007 against Gold Medal, seeking the information that was the subject of their inspection request.¹⁷ That case settled a year later, with promises to allow the plaintiffs greater access to the corporation's records.¹⁸

Unfortunately, the settlement did not resolve matters.¹⁹ In 2009, claiming that they "have been frozen out of Gold Medal affairs and denied access to basic information about Gold Medal" (a typical complaint in these sorts of disputes), "the plaintiffs, in their capacity as shareholders and directors" launched a second lawsuit against the corporation and other defendants (a son and grandson in the more active family, the corporation's accounting firm, and the principals of that firm), asserting both "direct and derivative claims."²⁰ The direct claims were based on the allegation that "the individual defendants intentionally kept basic financial information about Gold Medal from the plaintiffs in an effort to conceal wrongdoing," and to allow them to buy out the plaintiffs' shares of stock on less favorable terms; the derivative claims were based on alleged mismanagement of Gold Medal.²¹

The plaintiffs then commenced discovery and sought, among other things, documents from the law firm representing Gold Medal, including billing records, client files, corporate communications, communications with Gold Medal's accountants, and ethical opinions.²² The Superior Court appointed a discovery master who denied the law firm's motion to quash and ordered the production of nearly all of the documents sought.²³ The Superior Court affirmed the discovery master's order.²⁴ The defendants sought interlocutory review of that discovery order,²⁵ and the Supreme Judicial Court granted direct appellate review.²⁶

Analysis

The Supreme Judicial Court held that when a director's interests are adverse to the interests of the corporation, a director can be denied access to confidential information to which she otherwise would have been entitled by virtue of her status as a director.²⁷ Determining whether a director's interests are adverse to the corporation is a case-specific undertaking, involving balancing the director's right (and need) for information about the corporation with

the corporation's right (and need) for confidential legal advice.²⁸ The court stressed that this was a fact-intensive, case-specific analysis and "that no one factor or combination of factors is dispositive" in the determination.²⁹

The court ruled, "on the narrow facts of this case," that the plaintiff directors' interests were sufficiently adverse to the corporation for the purposes of the 2007 case (which resulted in the settlement allowing the plaintiffs greater access to records) and the present case that they were not entitled to the corporation's privileged and work product material.³⁰ In so holding, the court found: (a) "[o]f great significance is the nature and frequency of suit by the plaintiffs against Gold Medal;" (b) "[t]hat the plaintiffs' interests are adverse to those of Gold Medal is further evinced by the plaintiffs' self-interested motive in pursuing both the 2007 and present litigations;" and (c) the plaintiffs were "interested in maximizing the price in the sale of their stock" while "Gold Medal, as a potential buyer, is interested in minimizing the stock price..."³¹

Having decided that the plaintiffs' interests were adverse to the corporation, the court then addressed the scope of materials that could be withheld from them. First, the court noted the importance of separating privileged material from non-privileged material.³² The court cautioned that "[t]he judge or discovery master should take particular care to distinguish Gold Medal's privileged communications with RKMCM [its law firm] regarding the 2007 and the present litigations from the underlying facts of Gold Medal's financial health and status..."³³ The court added: "[t]he judge or discovery master should take particular care not to confuse the limited protections afforded under attorney-client privilege and work product doctrines with the distinct issue of the plaintiffs-directors' ability to access the underlying books and records of Gold Medal in their capacity as Gold Medal directors" under their statutory right to inspect such records.³⁴ The court reminded that even if a director's interests are adverse to the entity, he or she can still receive access to corporate books and records.³⁵ The court left to the trial court (and the discovery master) the task of determining which materials remained protected and which had to be produced.³⁶

In its ruling, the *Chambers* court examined and applied a series of significant legal principles. Perhaps most importantly, the court held that, in certain circumstances, a director of a corporation may

16. *Id.* Interestingly, "[a]t the time of the 2007 lawsuit, the plaintiffs had not yet assumed their seats on the Gold Medal board of directors, so they sued in their capacity as shareholders." *Id.* at 385 n.9.

17. *Chambers v. Gold Medal Bakery, Inc.*, 464 Mass. 383, 385 (2013).

18. *Id.* at 386.

19. *Id.*

20. *Id.* at 385. The defendants later added the corporation's outside counsel as a necessary party to the appeal. *Id.*

21. *Id.* at 386. Direct claims are ones that a shareholder has in his or her individual capacity against fellow shareholders and/or the corporation, while derivative claims are claims that the shareholders bring on behalf of the corporation because those controlling the corporation have refused to cause the corporation to bring them. *See generally*, M. Laredo, *Shareholder Duties and Disputes in Closely-Held Corporations in Massachusetts*, 91 MASS. L. REV. No. 3 (October 2008).

22. *Chambers v. Gold Medal Bakery, Inc.*, 464 Mass. 383, 387 & n.12 (2013). The court in its decision did not provide additional details regarding the nature of the documents. *Id.*

23. *Id.* at 387-88.

24. *Id.* at 389.

25. *Id.* The case makes no mention of why interlocutory review (here apparently

under MASS. GEN. LAWS ch. 231, §118) was appropriate, or the statutory process that was followed. *See Chambers*, 353 Mass. at 385 n.8. It can be assumed that the court granted interlocutory review because, unlike other discovery-related disputes, cases involving the attorney-client privilege often cannot be adequately addressed by appeal after trial.

26. *Id.* at 389.

27. *Chambers v. Gold Medal Bakery, Inc.*, 464 Mass. 383, 394-95 (2013). The court "rejected the defendants' premise that the issue ... is whether the plaintiffs have the power ... to waive the attorney-client privilege on Gold Medal's behalf," holding that the "privilege is not 'waived'" when a person within the group entitled to information simply accesses it. *Id.* at 394 n.28.

28. *Id.* at 393-96.

29. *Id.* at 395-96.

30. *Id.* at 389.

31. *Id.* at 396-97.

32. *Chambers v. Gold Medal Bakery, Inc.*, 464 Mass. 383, 391-93 (2013).

33. *Id.* at 392.

34. *Id.* at 392-93.

35. *Id.* at 391-92.

36. *Id.* at 391.

be denied access to material to which she would otherwise ordinarily be entitled.

In doing so, the court recognized and balanced two important concepts: the need for directors to have free access to corporate information, and the concern that, especially in a closely-held corporation, “the strategic use of attorney client privilege and other protections... [could] hinder a co-director’s access to legal advice,” and thus facilitate a freeze-out of a minority shareholder.³⁷ Yet, weighing against unfettered access is the concern that if a director’s interests become sufficiently adverse to the corporation, allowing that director access to confidential communications interferes with the salutary purpose of the attorney-client privilege: promoting “candid communications between attorneys and organizational clients.”³⁸ The court rejected the plaintiffs’ claim that because they were pursuing derivative claims—claims brought by the plaintiffs on behalf of the corporation—they had “common interests” with Gold Medal that entitled them to access to these materials.³⁹

The court also outlined the parameters of the attorney-client privilege and the differences between the two types of work product—fact and opinion, the latter entitled to much greater protection than the former.⁴⁰ In addition, the court also affirmed the narrow circumstances in which the advice of an accountant may be protected as part of the attorney-client privilege (now a very limited scenario under the Supreme Judicial Court’s ruling in *Comm’r of Revenue v. Comcast Corp.*⁴¹) or the work product doctrine.⁴² This “derivative privilege only applies when an accountant’s presence is necessary for effective communication between attorney and client; it does not apply if what is sought is not legal advice but accounting services, or if the documents were not prepared or obtained because of the prospect of litigation.”⁴³ The court emphasized the fact-specific nature of the inquiry and how much of the relevant decision-making in this area will be made by trial judges confronted with specific issues.⁴⁴

Lessons to be learned and future issues

The *Chambers* court carefully and appropriately balanced significant competing interests: the need for directors to access information with the right of a party to legal advice and to freely prepare its case. Its holding provides some guidance to lower courts but leaves much of the line drawing for the future, to be done by the lower courts on a case by case basis. The fact-specific nature of the inquiries that will have to be made—whether and when parties become adverse, what has been prepared in anticipation of litigation, and

what is truly privileged—assures that parties will need court intervention to answer these questions.

The *Chambers* court also was careful to note that the plaintiffs’ additional status as shareholders did not give them greater rights to access privileged information. Once it was determined that their interests were “adverse to the corporation” the fact that they also were shareholders did not change the result.⁴⁵

If only one lesson can be gleaned from *Chambers*, it is the importance of planning in cases where challenges to the attorney-client privilege and work product doctrine can be anticipated. The moment that corporate counsel sees that a director might end up in an adversarial relationship with his or her client—the entity—it is incumbent upon counsel to act with particular care. For example, consideration might be given to having the other directors retain separate counsel to represent them and let that attorney take the lead in handling the case.

Where possible, counsel for the entity must carefully consider privilege and work product issues *before* embarking on an undertaking. Among the issues to examine are the identity of the client and who might be entitled to the communications. Counsel for the corporation must raise these issues with corporate leadership. Corporate counsel also might consider notifying the adversarial director that since the privilege and work product belong to the corporation, not its individual directors, going forward he or she will be denied access to certain materials on the grounds that there is now an adversarial relationship. While the *Chambers* ruling allows entities to shield attorney-client privileged communications and work product materials from disclosure to their own directors and shareholders in certain circumstances, its emphasis on fact-finding and case-specific decision-making ensures that there will be numerous decisions in this area as courts try to address specific situations involving these issues. The stakes will be high since information contained in privileged communications and work product materials may go to the heart of the issues in dispute and the ability to maintain their confidentiality could have a significant impact on the outcome of a case.

Chambers is a well-reasoned, important opinion for corporate practitioners and business litigators. Its thorough analysis of the attorney-client privilege, the work product doctrine, the rights and duties of directors, and the interplay of these concepts is a helpful addition to Massachusetts case law. Counsel will be well-advised to pay careful attention to its principles and engage in thoughtful planning when faced with such situations in the future.

—Marc C. Laredo

37. *Chambers v. Gold Medal Bakery, Inc.*, 464 Mass. 392-93 (2013). The court limited its analysis to the rights of directors and not the separate rights that the plaintiffs had as shareholders. *Id.* at 392 n.25.

38. *Id.* at 383, 395.

39. *Id.* at 390-91 & 396 n.31 (“the fact that a director-shareholder brings a derivative action against codirectors does not necessarily signal mutuality of interest with the corporation.”).

40. *Id.* at 391 n.22. Fact work product relates to facts gathered by the attorney or a party representative and may be disclosed based upon a showing that plaintiffs “have a substantial need for the material and cannot obtain a sufficient equivalent by other means. *Id.* Opinion work product is the “mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party” and “generally is not open to discovery.” *Id.* (citations omitted).

41. 453 Mass. 293 (2009); see C. Hoffman and M. Baltay, *Maintaining Client*

Confidences: Developments at the Supreme Judicial Court and First Circuit in 2009, BOSTON BAR JOURNAL 20 (Fall 2009). Only where the accountant is “necessary for effective communication between attorney and client”—the so-called “derivative privilege”—will the communications be shielded under the attorney-client privilege. *Id.*; *Chambers*, 464 Mass. at 392 n.23 (2013). The work product doctrine, by contrast, is more likely to provide a source of protection for materials prepared by an accountant, as long as they were prepared or obtained because of the prospect of litigation. *Id.*

42. *Chambers v. Gold Medal Bakery, Inc.*, 464 Mass. 383, 392 at nn.22 & 23 (2013).

43. *Id.* at 392 n.23.

44. *Id.* at 391.

45. *Garner v. Wolfinbarger*, 430 F.3d 1093 (5th Cir. 1970), *cert. denied sub nom.*, *Garner v. First Am. Life Ins. Co.*, 401 U.S. 974 (1971).

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