Appellate Division Reaffirms Well-Settled Precedent in Refusing to Assume Attorney-Client Privilege for Individual Shareholders in Closely Held Corporations

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January 22, 2024

What You Need to Know

- A recent New Jersey Appellate Division opinion serves as a reminder of the distinction between an attorney's representation of a corporate entity, including a closely held corporation, and its individual shareholders in terms of what is considered confidential and privileged communications under the law.
- The appeal arose out of a discovery dispute involving documents that contained attorney-client communications and whether those documents should be produced in litigation.
- The Appellate Division opinion reaffirmed the well-settled legal precedent that when a corporation retains an attorney, that representation is "distinct from its directors, officers, employees, members, shareholders, or other constituents."

Generally speaking, attorney-client privilege protects against the disclosure of confidential communications between a client and a lawyer that are related to the provision of legal advice or assistance. A recent New Jersey Appellate Division opinion, however, serves as an important reminder of the distinction between an attorney's representation of a corporate entity, including a closely held corporation, and its individual owners, officers, and directors in terms of what is considered confidential and privileged communications under the law.

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In the matter of *Royzenshteyn v. Pathak*, decided on January 2, 2024, the Appellate Division reaffirmed well-settled law by issuing an opinion that reinforces the distinction between an attorney's responsibilities to a corporate entity as opposed to an individual shareholder. The appeal in this case arose out of a discovery dispute involving documents that contained attorney-client communications and whether those documents should be produced in litigation.

Specifically, the issue in *Royzenshteyn* concerned who controlled the attorney-client privilege of communications between two plaintiff shareholders of a closely held corporation, Onyx Enterprises Int'l Corp. (Onyx) and the law firm McCarter & English (McCarter).

As the Appellate Division explained: "The central and controlling issue on this appeal is whether McCarter had represented Onyx and plaintiffs individually in the 2015 transaction. That question involves factual determinations concerning the scope of McCarter's representation and application of the facts to the law governing attorney-client relationships and privileges."

Put simply, the issue was whether the two shareholders, individually, could invoke the attorney-client privilege to prevent the production of attorney-client communications or whether the privilege belonged solely to the corporate entity.

Ultimately, the Appellate Division agreed with the trial court's finding that McCarter represented only the corporate entity Onyx, and not the corporation's shareholders, either individually or jointly with Onyx. As such, since the two shareholders did not have the attorney-client relationship with the law firm individually, the shareholders could not invoke the attorney-client privilege to prevent the production of the attorney-client communications. Additionally, since Onyx waived the attorney-client privilege, the communications were permitted to be produced to the other parties.

A key takeaway for closely held corporations and their individual shareholders in the Appellate Division's *Royzenshteyn* opinion is further clarified in New Jersey Rule of Professional Conduct (RPC) 1.13(a), which states that when a corporation retains an attorney, the attorney normally represents "the [corporation] as distinct from its directors, officers, employees, members, shareholders, or other constituents." Neither the RPCs nor case law provide for any exceptions to this rule simply because the corporation is closely held, and the Appellate Division has expressly declined to create one here.

Please contact the author of this Alert with questions concerning the issues associated with this case, or to discuss your specific circumstances.

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