IADC Committee Newsletter

PROFESSIONAL LIABILITY

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This month's newsletter discusses recent Supreme Court decisions from Massachusetts and Georgia upholding the attorney-client privilege, under certain circumstances, when an attorney consults with the firm's in-house counsel for legal advice for the lawyer's own benefit, as opposed to for the client's benefit. These decisions constitute a significant change in the law of attorney-client privilege.

Are a Lawyer's Communications with the Firm's In-House Counsel Privileged?

Massachusetts and Georgia Say Yes, Provided Certain Conditions Are Met

ABOUT THE AUTHOR

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ABOUT THE COMMITTEE

The Professional Liability Committee consists of lawyers who represent professionals in matters arising from their provision of professional services to their clients. Such professionals include, but are not limited to, lawyers, accountants, corporate directors and officers, insurance brokers and agents, real estate brokers and agents and appraisers. The Committee serves to: (1) update its members on the latest developments in the law and in the insurance industry; (2) publish newsletters and Journal articles regarding professional liability matters; and (3) present educational seminars to the IADC membership at large, the Committee membership, and the insurance industry. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

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On July 10, 2013, the Massachusetts Supreme Judicial Court became the first court of last resort in any jurisdiction to rule on the issue of whether communications between a lawyer in a law firm and another lawyer in the same law firm, acting as counsel to the firm, about a current client are privileged from disclosure to that client in a subsequent legal malpractice action. RFF Family Partnership, LP v. Burns & Levinson, LLP, 465 Mass. 702, 723 (2013). One day later, the Georgia Supreme Court followed suit. St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C., 746 S.E.2d 98, 108 (2013). In reaching these holdings, both courts rejected the reasoning adopted by many lower courts across the country in declining to apply a privilege in these circumstances. More significantly for practitioners, both courts conditioned the protection of the privilege on the existence of four predicate factors, discussed in more detail below. Law firms and their lawyers should be familiar with these four-part tests, so that they are in a position to claim the privilege if they find themselves having to defend against a malpractice claim.

The Pre-2012 Landscape

Before the RFF and St. Simons decisions, a majority of trial courts across the country had declined to apply the attorney-client privilege to communications between a lawyer and a firm's in-house counsel concerning a current client. Some of these courts relied upon a "fiduciary exception" in refusing to uphold the privilege. See, e.g., Burns ex rel. Office of Public Guardian v. Hale and Dorr, LLP, 242 F.R.D. 170, 173 (D. Mass. 2007). The "fiduciary exception" to the attorney-client privilege arises when a fiduciary seeks advice from an attorney not for the fiduciary's own benefit, but for the benefit of the person to whom the fiduciary duty is owed. Courts have held that in these circumstances, the attorney-client privilege between the fiduciary and her lawyer does not bar disclosure of the legal advice to those for whose benefit the advice was obtained. See U.S. v. Jicarilla Apache Nation, 564 U.S. ___, 131 S. Ct. 2313, 2321 (2011). The exception is inapplicable, however, when the fiduciary obtains legal advice for her own benefit, using her own funds. See id.

In Burns, a Massachusetts federal district court misapplied this exception to order the production of privileged communications with a law firm's in-house counsel. 242 F.R.D. at 173. In that case, a client sued a Massachusetts law firm for allegedly mismanaging its funds. The court concluded that because the law firm owed fiduciary duties to its client, the firm should not be permitted to withhold from the client information pertinent to her claim against the law firm. Id. The court ignored the fact that the consulting lawyer was not obtaining the advice for the client's benefit, and the fact that the client did not pay for the advice rendered. Other decisions subsequently followed this flawed reasoning, and reached similar conclusions. See, e.g., Cold Spring Harbor Lab. v. Ropes & Gray, LLP, 2011 WL 2884893 (D. Mass. July 19, 2011).

Other lower courts declined to uphold the privilege on the basis of a so-called "current client" exception. See, e.g., Asset Funding Group, LLC v. Adams & Reese, LLP, 2008 WL 4948835 (E.D. La. 2008); Thelen Reid & Priest, LLP v. Marland, 2007 WL 578989 (N.D. Cal. 2007); Versuslaw, Inc. v. Stoel Rives, LLP, 111 P.3d 866 (Wash. Ct. App. 2005); Bank Brussells Lambert v. Credit Lyonnais (Suisse), 220 F. Supp. 2d 283 (S.D.N.Y. 2002); In re Sunrise Securities

Litigation, 130 F.R.D. 560, 595-97 (E.D. Pa. 1989). These courts concluded that the in-house counsel's rendering of advice as to a current client's matter created a conflict of interest with the firm's duties to the client, and that this conflict "vitiated" the privilege, requiring production of the privileged communications.

The Trend Shifts In Favor of the Privilege

In 2005, Elizabeth Chambliss, a Professor of Law at the New York Law School, published an influential article in the Notre Dame Law Review that criticized the application of the "fiduciary" and "current client" exceptions to the attorney-client privilege. Chambliss, The Scope of In-Firm Privilege, 80 Notre Dame. L. Rev. 1721 (2005). Professor Chambliss highlighted the salutary effect on law firms of having in-house counsel available to ensure the firm's compliance with applicable ethical standards, and the practical problems that follow when communications between a lawyer and in-house counsel are not protected by a privilege. Professor Chambliss argued for broad protection of these communications, as such protection:

[W]ould encourage firm members to seek early advice about their duties to clients and to correct mistakes or lapses, if possible, to alleviate harm. Broad protection of in-firm privilege also would encourage law firms to pursue internal investigations where questions of misconduct arise. Finally, broad protection of communication with in-house counsel would encourage law firms to invest in and formalize the role of firm counsel, which in turn would promote compliance with professional regulation.

Id. at 1724.

Beginning in 2011, a few courts rejected the reasoning of those courts that had declined to uphold the privilege, holding that neither the "fiduciary exception" nor the "current client" exception justified the compelled disclosure of communications between a lawyer and in-house counsel concerning a current client matter. See Garvy v. Seyfarth Shaw LLP, 966 N.E.2d 523 (Ill. App. Ct. 2012); Tattletale Alarm Systems, Inc. v. Calfee, Halter & Griswold, LLP, 2011 WL 382627 (S.D. Ohio Feb. 3, 2011). These courts held that once the basic requirements for application of the attorney-client privilege were satisfied, neither the firm's fiduciary duty to its client nor its continuing representation of the client constituted a recognized exception to the protection of the privilege.

The Massachusetts and Georgia Cases

In November 2012, a Massachusetts trial court judge held that the privilege applied to communications concerning a current client between real estate lawyers at a Boston law firm and the partner then in charge of risk management. RFF Family Partnership, LP v. Burns & Levinson, LLP, C.A. No. 12-2234-BLS1 (Ma. Super. Nov. 20, 2012). The judge acknowledged that his ruling was contrary to the weight of authority on the issue across the country, as discussed above, but he concluded that the more recent cases of Garvy and Tattletale, also discussed above, "have it right." Id. at 8.

The Massachusetts Supreme Judicial Court affirmed, holding that the communications were protected by the attorney-client privilege, and that no exception applied. 465 Mass. at 723. In reaching its holding, the court outlined a four-factor test that must be met by the law firm before the communications will be protected. First, the

law firm must have designated an attorney within the firm to represent the firm as in-house or risk management counsel. Second, the in-house counsel must not have performed any work on the client matter at issue, or any substantially related matter. Third, the time spent by the attorneys in consultations cannot be billed to the client. Fourth, the communications must be made and kept in confidence. Id. at 703, 723.

The court specifically rejected the argument that the law firm should not be permitted to take advantage of the privilege unless, prior to the consultation, the firm either had withdrawn from the representation or obtained the client's informed consent to the consultation. Id. at 712-13. The court concluded that such a rule would be impractical and disadvantageous to both the law firm and the client, as it could lead to abrupt and unnecessary withdrawals, delays in seeking ethics advice, or an absence of candor on the part of the lawyer seeking advice. The court further noted that application of the privilege would have no effect on the client's ability to discover the facts relating to the firm's representation of the client, as those facts would be fully discoverable, nor would application of the privilege limit the client's ability to prove that the firm's actions, before and following the in-house consultation, constituted a breach of the firm's duties to the client. Id. at 716.

One day after the Massachusetts decision came down, the Georgia Supreme Court followed suit, upholding the privilege and articulating its own four-factor test. St. Simons, 746 S.E.2d at 108. The St. Simons court held that the attorney-client privilege applies to communications between a law firm's attorneys and its in-house counsel provided that: (1) there is a genuine attorney-client relationship between the firm's lawyers and in-house counsel; (2) the communications in question were intended to advance the firm's interests in limiting exposure to liability, rather than the client's interests in obtaining sound legal representation; (3) the communications were conducted and maintained in confidence; and (4) no exception to the privilege (such as the crime-fraud exception) applies. Id.

In its decision, the Georgia Supreme Court noted that, questions of privilege aside, "thorny ethical issues remain for law firms in handling the conflict of interest that arises when they perceive a current client is considering legal action against them." Id. at 106, n. 4. The court emphasized that its opinion addressed only the evidentiary questions of privilege and work product, and its conclusion that the potential existence of an imputed conflict of interest was not a persuasive basis for abrogating the attorney-client privilege. Id. The court encouraged "those interested in the resolution of these ethical issues" to explore options (including amendments to the Georgia Rules of Professional Conduct) to allow law firms and attorneys "to effectively defend themselves against potential malpractice claims while remaining compliant with their ethical obligations." Id.

As of the time of writing this article, no other state supreme courts have ruled on the issue addressed in RFF and St. Simons. The Oregon Supreme Court, however, is scheduled to hear argument on the same issue on November 4, 2013, Crimson Trace Corp. v. Davis Wright Tremaine, LLP, Case No. S061086. In that case, the Oregon Supreme Court has been asked to overturn a ruling from the lower court, declining to apply the privilege. If the Oregon Supreme Court affirms the lower court decision,

creating a split in authority among state supreme courts, we likely will see more privilege challenges from former clients in those states without appellate authority on the issue.

Practical Implications for Law Firms

The RFF and St. Simons decisions have implications for all law firms, even those without offices in Massachusetts and Georgia. First, a law firm of any size should have at least one lawyer designated to act as the firm's in-house counsel, risk management counsel, or ethics counsel, whatever designation is preferred. If possible, the firm also should have a lawyer designated to act as "backup" in-house counsel, in the event the primary in-house attorney has worked on the particular client matter at issue. Second, the firm should notify its attorneys in writing of the designation of primary and backup in-house counsel. Attorneys should be directed to consult with in-house counsel about any ethical or liability concerns related to current client matters, and to bill any time related to such consultations to the law firm, rather than to the client. Attorneys also should be directed to maintain notes or other documents related to such consultations, whether in paper or electronic form, in a file separate from the client file. Lawyers should be cautioned against seeking advice from in-house counsel on substantive aspects of the client representation, to avoid a finding that the consultation involved a "mix" of privileged and non-privileged communications. Finally, lawyers should be reminded of the need to keep the communications confidential. In most circumstances, this will mean that the communications should be shared only with those who have a role in the firm's risk management process, such as the firm's managing partner or the firm's executive committee.

Notably, on August 12, 2013, the American Bar Association House of Delegates adopted ABA Resolution 103, which urged all federal, state, and local governmental bodies to recognize that a lawyer's consultation with in-house counsel is protected by the attorney-client privilege. It will be interesting to see whether the ABA also moves towards a proposal to amend the Model Rules of Professional Conduct to clarify that a lawyer's ability to defend herself against a malpractice claim, already recognized in Model R. Prof. C. 1.6(b), extends to the ability to consult with in-house counsel without fear that the client later will claim that such a consultation constituted a violation of the professional rules.

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