When are Law Firm Communications Discoverable? *Intra-Firm Privilege Five Years Later*

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Speakers

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Let's start with a hypothetical…

- Junior attorney is concerned that he has made a serious mistake
- Approaches senior attorney who has the client relationship, but only a small role on the case
- Junior attorney asks the question, "Was this malpractice?"

- **Is that communication privileged?**

How attorney statements can be used against them

- Admissions by attorneys to errors — how unhelpful?
  - Many attorneys are quick to disclose perceived errors to clients
    - Attorneys want to demonstrate honesty to minimize damage to relationship and avoid a malpractice suit

How attorney statements can be used against them

- What if the attorney did not actually make an error?
  - Some attorneys disclose perceived errors either before completing the analysis, or after completing an incorrect analysis

Maybe an unhelpful admission?

- *Vlachos v. Weil*, 31 Misc. 3d 1208(A), 929 N.Y.S.2d 203 (Sup. Ct. 2011)
- Sellers of a business brought legal malpractice claims against two attorneys who represented them in connection with the sale
- They alleged that at the closing, there was a shortfall of $417,926.40
- In their malpractice action, they relied on an email from one of the attorneys, Weil, where he stated that he was at fault for failing to collect all the funds at the closing

Internal firm emails can drive huge malpractice verdicts

- In November 2015, a plaintiff obtained a $200 million jury verdict against a Texas law firm
- The case arose out of a dispute between two brothers over control of a family business. The law firm attorneys represented one brother and initially reached a settlement agreement
- When they ultimately sued to enforce the settlement agreement, a Texas appellate court ruled that it was an unenforceable “agreement to agree.”

Internal firm emails can drive huge malpractice verdicts

- In the subsequent malpractice suit, the unhappy client obtained internal law firm emails
- In one, an attorney emailed to another that the settlement agreement was, “an agreement to agree as a matter of law and as dead on arrival as Princess Di”
- Others were described as “mocking” the client and his “precarious financial position” and showed “profound lack of respect”

Rules of Professional Conduct

- Rule 1.1 (Competence) – "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

- Rule 1.3 (Diligence) – "A lawyer shall act with reasonable diligence and promptness in representing a client."

Rules of Professional Conduct

- Rule 1.4(a)(3) (Communications) – "A lawyer shall keep the client reasonably informed about the status of a matter."

- Rule 1.4(b) (Communications) – "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Rules of Professional Conduct

- Rule 1.6(b)(4) (Confidentiality) – "A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to secure legal advice about the lawyer's compliance with these Rules."
- Rule 1.7(a)(2) (Conflict of Interest) – "A lawyer shall not represent a client if … there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Rules of Professional Conduct

- The intra-firm privilege encourages:
  - Seeking early advice
  - Correction of mistakes if possible

Traditional approach to intra-firm privilege

- Purpose of Attorney-Client Privilege: "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)

Traditional approach to intra-firm privilege

- Traditional View: no attorney-client privilege protection for attorney communications with in-house counsel regarding potential malpractice claims where conflicting interests existed between the client and law firm during communication

Traditional approach to intra-firm privilege

- Exceptions:
  - (1) Fiduciary
    - Originated in the trust law context
    - Based on the principle that the beneficiary of a trust had the right to production of legal advice rendered to the trustee related to the administration of the trust.

Traditional approach to intra-firm privilege

- Exceptions:
  - (1) Fiduciary
    - Does not apply where the fiduciary obtains legal advice for personal benefit, which the fiduciary pays for on their own. *U.S. v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2321 (2011)
    - Many courts have rejected this exception

Traditional approach to intra-firm privilege

- Exceptions:
  - (2) Current client
    - Where a law firm seeks legal advice from its in-house counsel in response to an adverse claim brought by a current outside client, the communications are not protected by the attorney-client privilege. *In re Sunrise Securities Litigation*, 130 F.R.D. 560 (E.D. Pa. 1989)
    - The privilege does not attach to communications or legal advice in which a firm's representation of itself violates Rule 1.7

The modern approach

- *RFF Partnership, LP v. Burns & Levinson, LLP*, 991 N.E.2d 1066 (Mass. 2013); and

- *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.*, 746 S.E.2d 98 (Ga. 2013)

RFF Partnership

- RFF hired B&L to assist in $1.4 million commercial loan secured by first mortgage on piece of property and later foreclosing on the property
- Dispute arose over whether RFF's mortgage was actually first mortgage
- B&L was threatened with litigation relating to the commercial loan by another law firm representing RFF. Attorneys involved in the initial commercial loan consulted with B&L's in-house attorney

RFF Partnership

- When litigation commenced, RFF sought communications arguing that court should follow the "current client" rule
- Court rejected the "current client" rule because it was a "flawed interpretation of the rules" that encouraged "attorneys to withdraw or disclose a poorly understood potential conflict" before seeking any advice

RFF Partnership

- Concluded that privilege existed when:
  - (1) the law firm has designated an attorney or attorneys within the firm to represent the firm as in-house or ethics counsel;
  - (2) the in-house counsel has not performed any work on the client matter at issue or a substantially related matter;

RFF Partnership

- Concluded that privilege existed when:
  - (3) the time spent by the attorneys in these communications with the in-house counsel is not billed to a client; and
  - (4) the communications are made in confidence and kept confidential.

St. Simons Waterfront, LLC

- SSW hired Hunter to draft purchase contract for condo development. Several purchasers later rescinded on contract due to defects in the purchase contract

- SSW informed Hunter it thought Hunter's work was responsible, but Hunter continued to represent SSW while finding replacement counsel

St. Simons Waterfront, LLC

- Hunter's in-house counsel interviewed attorneys on the matter
- SSW sued and sought depositions of attorneys and internal communications

St. Simons Waterfront, LLC

- The court concluded that privilege exists when:
  - (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;

St. Simons Waterfront, LLC

- The court concluded that privilege exists when:
  - (3) the communications were conducted and maintained in confidence; and
  - (4) no exception to the privilege applies.

Following RFF/St. Simons – Statutory Interpretation

- Privilege exists so long as the statutory requirements are met

  - *Palmer v. Superior Court*, 180 Cal. Rptr. 3d 620, 634 (Cal. App. 2014) ("in the absence of a statutory exception, the Firm's ethical duties to its client do not trump assertion of the privilege here")

Following RFF/St. Simons – Statutory Interpretation

- Privilege exists so long as the statutory requirements are met
  - *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 326 P.3d 1181, 1189 (Ore. 2014) (holding that attorney-client privilege applied to intrafirm communications when statutory conditions were met)

Following RFF/St. Simons – Sister Jurisdictions

- Minnesota: both state and federal district courts have issued decisions adopting the four-part test adopted in RFF
  - *Coloplast A/S & Coloplast Corp. v. Spell Pless Sauro, P.C.*, Civ. No. 27-CV-12-1261 (Minn. Dist. Ct. Nov. 22, 2013)
  - *JJ Holand, Ltd. v. Fredrikson & Byron, P.A.*, No. 12-3064 ADM/TML (D. Minn. July 17, 2014), *aff'd JJ Holand, Ltd. v. Fredrikson & Byron, P.A.*, 2014 WL 5307606 (D. Minn. Oct. 16, 2014)

Following RFF/St. Simons – Sister Jurisdictions

- New Hampshire: adopted the *St. Simon* test largely on the belief that the *RFF* test is best suited for application "to very large, multi-office firms with full-time general and/or ethics counsel" and that the *St. Simon's* test permitted a more "flexible" approach that is easier to apply to smaller firms
  - *Moore v. Grau*, No. 2013-CV-150 (N.H. Sup. Ct. Dec. 15, 2014)

Following RFF/St. Simons – Sister Jurisdictions

- New York: adopted the *RFF* test, reasoning that:
  - "Ultimately, it is usually in the interests both of the attorney seeking advice and of the client that the ethical issues be examined by a competent advisor who has been fully informed of all relevant facts, ***with none withheld out of fear that the consultation may not remain private***."
    - *Stock v. Schnader Harrison Segal & Lewis LLP*, 142 A.D.3d 210, 224, 35 N.Y.S.3d 31, 40-41(N.Y. App. Div. 2016) (emphasis added)

Hypotheticals

- Junior attorney is concerned that she has possibly made a serious mistake
- Approaches the firm's ethics counsel, who has another attorney in her office
- Ethics counsel invites the junior attorney in and all three discuss the situation

- **Is that communication privileged?**

Hypotheticals

- Junior attorney is concerned that he has possibly made a serious mistake
- The supervising attorney is not available
- Junior attorney walks down the hall to discuss with a different attorney who is not on the case

- **Is that communication privileged?**

Hypotheticals

Overlapping Representations

The plaintiff, start up software company, alleges that its former CEO conspired with the Defendants, competing software companies, to misappropriate the plaintiff's trade secrets and sabotage its investor negotiations. 3rd party law firm had represented both the plaintiff and defendants for a period of three years, including a brief period of one month after the plaintiff commenced suit. The plaintiff requested communications between the law firm and its Chief Legal Officer relating to the lawsuit and the plaintiff's subpoena.

Hypotheticals

Overlapping Representations

Defendant represented Plaintiff, a provider of radio frequency identification products and services. Defendant provided the company with general intellectual property advice and assistance in drafting, filing, and pursuing certain patent applications related to their product. Representation lapsed for a period of two years, and during partially overlapping periods, Defendant represented a competing company with drafting, filing, and pursing patent applications related to the same product. Plaintiff alleges that it alerted Defendant to potential infringement by its competitor, but that defendant failed to inform Plaintiff of its entitlement to patent protection. In the meantime, competitor had indeed alerted the firm to claims against them. Attorneys emailed in-counsel counsel for the purpose of procuring legal advice about the alert. Plaintiffs moved the court to compel production of the emails, among other things.

Hypotheticals

Loss Prevention Efforts

Defendant represented Plaintiff in patent litigation. The fees on the patent were not paid, resulting in the premature lapse of the patent. Plaintiff alleged that Defendant had assumed responsibility for insuring that the maintenance fees were paid, and its failure to do so was malpractice. Plaintiff asked defendant to produce all documents relating to its representation of plaintiff and the payment of maintenance fees. Defendant withheld over 300 documents, claiming that most—if not all—of the documents were related to its loss prevention efforts after becoming aware that plaintiff might assert a malpractice claim and were thus privileged.

Hypotheticals

Case Law Oversight

Attorney has represented plaintiff in an age discrimination case for over two years. Associate wrote a legal memo regarding the statute of limitations for one of the claims and the Attorney responded with thoughts in a cover memo; Attorney made the decision to delay charging. The court dismissed one of the claims on summary judgement because the statute of limitations expired, decreasing amount of recovery. Attorney then received a letter from a legal clinic on behalf of Attorney's client. The letter cited a case that aligned with the court's ruling and asked whether she was aware of the case. The Attorney sought advice from the Firm's General Counsel, who did 90% of his work as ethics advisor for the firm. Attorney said that he saw the case but didn't think it mattered. General Counsel gave Attorney advice on how to work the matter for appeal. She also asked Attorney to prepare a chronology memo regarding his research, conversations, and legal analysis while the issues were fresh.

Hypotheticals

The Bad Lawyer and the Tax Evader (p. 1)

Lawyer represents a Client, who evades his taxes. In preparation for a lucrative deal, Lawyer told Client that his deals are "above board" and that they would be "fully protected" from the IRS. Months later, the IRS contacted Client about some of Client's transactions; Lawyer assured Client and promised to respond. Lawyer forgot to respond to the IRS. Client then received another notice from the IRS indicating that it planned to assess millions in penalties and to charge him criminally because his lack of response to the initial notice. Client threatened a lawsuit and the Managing Partner of The Firm contacted the firm's General Counsel to begin an investigation.

Hypotheticals

The Bad Lawyer and the Tax Evader (p. 2)

As part of the investigation, General Counsel contacted Associate asking for any documents related to his work with Lawyer. Associate responded with a few documents, but replied that Lawyer told him to destroy the remaining files (which he did). Associate then forwarded the entire email chain to a paralegal. Associate said that he knew lawyer was a bad guy and got him into "deals with a client who's going to jail." Associate billed a few hours to Client for the time it took him to prepare the documents for General Counsel. Months passed and Client sued The Firm for malpractice.

Recommendations

- **Each firm should designate a lawyer to serve as the firm's ethics counsel and one other attorney as a backup**

Recommendations

- **Firms should circulate an internal loss-prevention memo** advising their attorneys to speak immediately with ethics counsel (and not the client) when a conflict or potential malpractice issue is discovered
- The memo should further explain when the attorney's fiduciary duty requires communication with a client regarding a potential malpractice claim

Recommendations

- **Keep it Confidential** – An intra-firm communication must be confidential to be privileged — take appropriate steps to ensure it has the hallmarks of a privileged communication
- **Practical Tip:** initial communications regarding a potential conflict or malpractice issue should be conducted in person or by telephone until in-house counsel has had an opportunity to assess the matter and evaluate the applicability of privilege

Recommendations

- **Do not bill for the conversation –** Billing client for conversation about whether malpractice has occurred removes privilege under RFF Partnership

Recommendations

- **Contact the Office of Lawyers Professional Responsibility**
  - Same-day advice is available by phone on prospective ethics issue (jurisdiction specific)
  - Advisory Opinion
  - Key: call before you take the potentially problematic action

Thank you for attending

Please feel free to contact us regarding this presentation and any related issues:

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