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The Attorney-Client Privilege's Continued Expansion

The Supreme Court of Oregon has joined the Supreme Court of Georgia and the Massachusetts Supreme Judicial Court in holding that under certain circumstances an attorney representing a current client can confidentially communicate with counsel regarding potential liability to that current client. *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 326 P.3d 1181 (Or. 2014); *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley, & Dunn, P.C.*, 746 S.E.2d 98 (Ga. 2013); *RFF Family Partnership, LP v. Burns & Levinson, LLP*, 991 N.E.2d 1066 (Mass. 2013). Building on the Monograph prepared by the Civil Practice Committee in the *IDC Quarterly*, a discussion is required of this further refusal of another state supreme court to apply the fiduciary-duty exception to the attorney-client privilege. *See* Donald P. Eckler, *et al*., *The Attorney-Client Privilege in Malpractice Claims*, 24.3 IDC Q., M-1 (2014).

It is typical in a legal malpractice action that the claimant (former client) is able to obtain all documents related to the defendant law firm's representation of the claimant in the underlying litigation. In a trend seen across the country, defendant law firms have successfully refused to produce communications between the lawyers involved in representing the claimant in the underlying dispute and the defendant law firm's in-house counsel. The protected communications, which occurred while the law firm was still representing the claimant, regarded advice from the firm's in-house counsel to the attorneys who had allegedly committed malpractice on how to proceed in dealing with a potential or actual claim of malpractice. The defendant law firms have invoked the attorney-client privilege to shield these communications from disclosure. In seeking to obtain these communications, the plaintiffs have asked the courts to apply the fiduciary-duty exception to the attorney-client privilege.

Prior to this recent trend, there was great support for this exception to be applied, and for such communications to be produced. *Koen Book Distrib. v. Powell, Trachman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 F.R.D. 283, 285-286 (E.D. Pa. 2002); *Bank Brussels Lambert v. Credit Lyonnais, S.A.*, 220 F. Supp. 2d 283, 287 (S.D. N.Y. 2002); *SonicBlue, Inc. v. Portside Growth and Opportunity Fund*., No. 07-5082, 2008 LEXIS 181, at *26 (Bankr. N.D. Cal. Jan. 18, 2008); *Thelen Reid & Priest, LLP v. Marland*, No. C 06-2071 VRW, 2007 U. S. Dist. LEXIS 17482 (N.D. Cal. Feb. 21, 2007); *TattleTale Alarm Systems v. Calfee, Halter & Griswold, LLP*, No. 10-cv-226, 2011 U.S. Dist. LEXIS 10412 (S.D. Ohio, Feb. 3, 2011).

The Illinois Appellate Court First District, in *Garvy v. Seyfarth Shaw LLP*, 2012 IL App (1st) 110115, ¶¶ 35, 38, and *MDA City Apartments LLC v. DLA Piper LLP*, 2012 IL App (1st) 111047, ¶¶ 15-17, refused to acknowledge the existence of a fiduciary-duty exception to the attorney-client privilege under Illinois law, and thus, protected attorneys' communications with each other regarding a dispute with a current client. As this trend to protect these type of communications continues to grow, whether by refusing to acknowledge the

fiduciary-duty exception, as did the Illinois courts and the Oregon Supreme Court, or by recognizing the existence of the exception and finding that it did not apply, as did the courts in Georgia and Massachusetts, it is important that attorneys and their firms recognize the issue and prepare accordingly to protect themselves and their firms.

The Supreme Court of Oregon Weighs In

In *Crimson Trace*, 326 P.3d at 1195, the Supreme Court of Oregon reversed the holding of the trial court. Relying upon the language of the codified attorney-client privilege in that state, the supreme court found that the privilege applied to protect communications between the former lawyers of the plaintiff and their in-house counsel, and that the exception did not apply. Davis Wright Tremaine (DWT) was engaged by Crimson Trace to prosecute certain claims related to a patent infringement dispute with LaserMax. *Id.* at 1183. The patent infringement litigation turned poorly for Crimson Trace as counterclaims challenged the validity of the patent claims that served as the basis for suit. *Id*. DWT had prepared the original patent application, and therefore a potential conflict of interest arose between DWT and Crimson Trace. *Id*. at 1183-84. Crimson Trace and LaserMax ultimately reached a settlement of the patent litigation. *Id*. at 1184. That agreement was to be confidential. *Id*. However, DWT, acting as counsel for Crimson Trace, disclosed part of the settlement agreement in a way that implied that LaserMax had conceded liability. *Id*. LaserMax complained, and the court required that the entire agreement be disclosed. *Id*. Crimson Trace then brought a legal malpractice lawsuit against DWT. *Id*.

Once the dispute between DWT and Crimson Trace arose, the lawyers representing Crimson Trace consulted with the Quality Assurance Committee (QAC) at the firm. *Id*. The QAC was a small group of lawyers at DWT that had been specifically designated by the firm as in-house counsel. *Id*. During the course of the legal malpractice claim, Crimson Trace sought the communications between the lawyers who represented Crimson Trace in the underlying litigation and the QAC. *Id*. at 1184-85. Finding that the attorney-client privilege did not apply because of the conflict of interest by the QAC in representing members of the firm in conflict with clients of the firm, and in spite of the fact the communications were kept confidential, the trial court ordered that DWT produce the communications. *Id*. at 1185.

In reversing the trial court's opinion, the Supreme Court of Oregon first addressed whether the attorney-client privilege applied at all to this situation. *Id*. at 1187. Oregon's attorney-client privilege is codified in Oregon Evidence Code Section 503. *Id*. The court viewed its task as determining what the legislature intended in codifying the attorney-client privilege. *Id*. Similar to most states, there are three elements for the attorney-client privilege to apply in Oregon: (1) the communication is between the client and lawyer; (2) the communication was confidential; and, (3) the communication was made for the purpose of obtaining advice. *Id*. The court rejected Crimson Trace's argument that there is a fourth requirement: the reasonable expectations of the parties that an attorney-client relationship existed. *Id*. at 1188.

The court rejected this argument on two bases. *Id*. First, the court stated that there was no support in the statute for such a requirement. *Id*. Second, the court rejected the attempt by Crimson Trace to apply lawyer discipline cases regarding disputes about whether an attorney-client relationship existed, holding that the reasonable expectation of the client as to the existence of a relationship has nothing to do with the issues in this case in which the attorney and client agree that there was an attorney-client relationship. *Id*.

After rejecting the existence of a fourth element, the supreme court turned to the first element of whether there was an attorney and client at all in this case. *Id*. at 1188-89. The court first stated that none of the parties contested that the privilege would have applied if the DWT lawyers had consulted with outside counsel. *Id*. at 1189. The court stated that nothing in the statute could be construed to preclude an in-house lawyer from being an attorney and the lawyer in the same firm as being the client in an attorney-client relationship. *Id*. The court

rejected the argument that allowing attorneys within a firm to be counsel for other lawyers in the same firm would undermine the attorney-client relationship by holding that its interpretation of the statute prevailed over the policy argument. *Id.*

Looking at the second element, whether the communications were confidential, the supreme court held that the communications were confidential despite having been made with lawyers in Washington, who Crimson Trace argued were subject to the more stringent restrictions of Washington law. *Id.* at 1190. The court rejected this argument and relied upon the requirement that Oregon applies its own law to determine evidentiary issues. *Id.*

As to the third element, while acknowledging the trial court's finding that the attorney-client privilege would apply but for the fiduciary-duty exception, the supreme court found that the communications were for the purpose of obtaining legal advice as to the fulfillment of professional responsibilities to Crimson Trace. *Id.* at 1190-91.

Having concluded that the attorney-client privilege applied, the court then considered whether any exceptions to the privilege applied. *Id.* at 1191. After looking at the exceptions to the attorney-client privilege listed in the applicable statute, and determining that none of those applied, the court turned to the fiduciary-duty exception. *Id.* After examining the application of the fiduciary-duty exception in other jurisdictions, the supreme court ruled that because the fiduciary-duty exception was not listed as an exception to the attorney-client privilege in the Oregon statute, which was a complete enumeration of the exceptions recognized in that state, it would not recognize and adopt the exception. *Id.* at 1192-95.

Steps to Take to Protect Communications from Disclosure

To apply these principles for an Illinois practitioner, a review of the applicable Illinois Rules of Professional Conduct is important. Both Rules 1.6(b)(4) and 5.1 permit communications by lawyers in a firm with in-house lawyers. Specifically, Rule 1.6(b)(4) provides an exception to the general confidentiality requirements of Rule 1.6 for a circumstance in which a lawyer seeks "to secure legal advice about the lawyer's compliance with these Rules." Comment 9 to Rule 1.6 provides color to this exception:

> A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

ILL. RULES OF PROF'L CONDUCT R. 1.6, cmt. 9 (2010). Rule 5.1 sheds light on the responsibilities of managing lawyers and firms of all sizes to ensure that the Rules are followed. Comment 3 to Rule 5.1 specifically contemplates the role of in-house counsel:

> Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby

> junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee.

ILL. RULES OF PROF'L CONDUCT R. 5.1, cmt. 3 (2010). These Rules were specifically cited by the Illinois appellate court in *Garvy* and provide the framework for establishing procedures to comply with the Rules and to eliminate or at least mitigate the damage from any disputes with a client.

In addition to looking at the applicable Rules of Professional Conduct and comments, note that Illinois follows the control-group test prior to looking at specific steps to be taken to protect from the disclosure of communications. *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 118-19 (1982). While there is no case on point, erring on the side of caution practitioners should assume that the control-group test would apply with equal force to law firms as it does to other corporations and organizations. Thus, for a law firm to protect communications regarding claims against the law firm in Illinois, the communications must be limited to the decision makers of the law firm and those that directly advise those decision makers.

There are a number of practical suggestions to comport with the requirements of the control-group test. First, any communications regarding the issue should only be shared with the executive level of the firm. Indeed, in identifying the lawyer within the firm from whom advice regarding a conflict is sought, the firm should attempt to identify an individual on the firm's executive committee, or other group charged with making decisions for the firm.

Second, while it is preferable to consult with outside counsel for claims against the firm that may arise (because there is no dispute that communications with outside counsel would be protected), the firm should also identify in-house counsel. The identification of in-house counsel should be communicated to the lawyers in the firm so that the lawyers know from whom to seek advice in the event of a potential or actual claim against the firm based upon a particular attorneys' conduct. This advice could be particularly important in avoiding or mitigating the extent of a claim if such advice is sought early on.

Third, depending on the size of the firm, more than one in-house lawyer should be identified. This safeguard is important because an event could arise in which the designated in-house counsel was involved in the representation of the client and is therefore implicated in the alleged malpractice. If the firm has only designated one in-house lawyer, and that lawyer has a conflict, then the firm could be left without in-house counsel in that situation. Like all representations, an in-house lawyer must be free of conflict before taking on an assignment. Therefore, in drafting a policy to address these issues, backup or secondary in-house counsel should be identified. Further a procedure for identifying a conflict for the designated in-house counsel should be prepared. Because the designated in-house lawyer is likely to be a member of the executive level of the firm, procedures for shielding that lawyer from such communications regarding the defense of the firm should be undertaken if the in-house lawyer has a conflict.

Fourth, the in-house lawyer, or any fees generated by outside counsel, must not be paid by or billed to the client with whom the firm is in conflict. If the client with whom the conflict exists pays for the lawyers to obtain advice, or is even billed for those services, the attorney-client privilege would likely be waived and the fiduciary-duty exception would apply. *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2326 (2011). Keeping a strict demarcation between the representation of the client and the representation of the firm as it relates to the potential or actual claim of the client is the hallmark of maintaining the attorney-client privilege in this very complex and ethically challenging context.

Finally, any communications regarding the dispute with the client must specifically identify that those communications are intended for the purpose of analyzing its own potential liability, and not for the purpose of the client's interests. The easiest way to do this, and to prevent billing the client for these services, would be to open a separate file for the dispute with the client.

These suggestions are applicable to practitioners in Illinois and its limited scope of the attorney-client privilege and the non-codified attorney-client privilege. As illustrated in *Crimson Trace*, where the Supreme Court of Oregon's analysis was entirely reliant on the language of the statute codifying the attorney-client privilege, the source of the privilege is especially important. Firms that have offices in several states, or which are handling a particular case in temporary or *pro hac vice* admission, should consider the possibility of variable applications of the attorney-client privilege in a given situation.

Many states, including all of Illinois' neighbors, Wisconsin, Iowa, Indiana, Missouri, and Kentucky, have codified the attorney-client privilege in a statute. *IADC Multinational Legal Privilege Project-Part III*, IADC (June 2012), http://www.iadclaw.org/assets/1/7/DAngelo_-_Attorney-Client_Privilege_-Addendum_for_States_-_June_2012.pdf. In handling cases in those states, or any state with a codified attorney-client privilege, analysis of the language of that particular codification of the privilege can be useful, and perhaps dispositive, in determining whether the fiduciary-duty exception is included in the exceptions to the privilege.

Firms should also consider whether the state in which they are practicing has adopted the control-group test or the subject-matter test, as that can be instructive as to how a firm should prepare for protecting internal communications in situations where a conflict with a client has arisen. The neighboring states of Kentucky and Iowa have both adopted the *Upjohn* subject-matter test.

As it relates to cross-border communications within a firm related to a conflict with a client, a firm should prepare for a ruling similar to the holding in *Crimson Trace* that the rules regarding privilege in the state in which the malpractice action is brought apply, notwithstanding the rules in another state that may be more or less restrictive. In *Crimson Trace*, the action was brought in Oregon and the lawyers had communication with in-house counsel from Washington. *Crimson Trace*, 326 P.3d at 1190. The plaintiff argued that the more restrictive privilege in Washington should apply. *Id*. The Oregon Supreme Court disagreed. *Id*. Accordingly, if a firm has offices in other states, but designated in-house counsel in Illinois, the firm should be prepared for the other state's rules regarding privilege to apply, and not Illinois' rules.

Conclusion

This is an issue that must be addressed by firms of all sizes and by their insurers. Risk management strategies for law firms should involve taking steps to have confidential communications to mitigate or eliminate disputes with clients, and to avoid conflicts of interest that could increase the liability.

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