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Minnesota Legal Ethics

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Released as a free ebook by the Minnesota State Bar Association, *Minnesota Legal Ethics* is a comprehensive guide to legal ethics in Minnesota, written by well-known ethics attorney William J. Wernz.

Updates that will be incorporated into future editions, as well as commentary on topics of particular interest to ethics in Minnesota are posted here.

November 2013: Developments in Intra-Firm Privilege

Nov 01, 2013

Editor's Note:

Guest authors sometimes write posts for this blog. This month, we are delighted that a leading ethics and legal malpractice lawyer, Chuck Lundberg, has (with the assistance of Aram V. Desteian (Aram Desteian is a fourth-year student at William Mitchell College of Law and is a candidate for the JD Degree in January of 2014; he has accepted a position as an associate at Bassford Remele after he passes the bar exam.) provided a thoughtful post. The

subject is very timely – several recent appellate court cases upholding the application of the attorney-client privilege to law firm communications related to client malpractice claims. The privilege analysis in these cases is in part based on the ethics rules.

New Developments in the Law Governing Privilege for Communications with Firm Counsel

by Charles Lundberg and Aram V. Desteian

Summary

When a lawyer believes she may have committed malpractice in connection with a client's matter and consults with her firm's ethics counsel about what to do, are those conversations privileged? Several recent appellate decisions suggest a dramatic shift in favor of preserving the "intra-firm privilege."

The Traditional View

The overwhelming majority of courts that originally addressed the issue denied attorney-client privilege protection for an attorney's communication with in-house ethics counsel regarding a potential malpractice claim where at the time of the communication the interests of the law firm and the client were in conflict. ((*See, e.g. E-Pass Tech., Inc. v. Moses & Singer, LLP*, 2011 WL 3794889 (N.D. Cal. Aug. 26, 2011); *Asset Funding Group, LLC v. Adams & Reese, LLP*, 2008 WL 4948835 (E.D. La. Nov. 17, 2008); *Koen Book Distribs. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 F.R.D. 283 (E.D. Pa. 2002); *In re Sunrise Sec. Litig.*, 130 F.R.D. 560, 595 (E.D. Pa. 1989). For an exhaustive list of case law and articles on the in-firm privilege, see Freivogel on Conflicts (linked here).)) Later decisions reached the same result through a more nuanced approach, holding that when the firm knows or reasonably should know that a current client has a potential malpractice claim against the firm, the privilege is not available unless and until the firm so advises the client and either the client consents to continuing representation in the matter or the representation is terminated.

Allowing clients to gain discovery of communications with firm counsel produced far-reaching consequences for attorneys seeking ethics counsel from within their own firm. Judicial denial of the intra-firm privilege has been vigorously criticized by scholars and practitioners alike.

A Typical Situation

A hypothetical shown in the Note below (which may be opened and closed) illustrates the issue:

HYPOTHETICAL:

Lucy White owned New Deal, Inc. She hired Fred Knox, a partner in the Knox law firm, to assist in acquiring an 80% interest in a local health care business, Clean Vistas Health Co. Knox advised White and negotiated the material terms of the

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investment. He prepared the initial draft of the definitive agreement between New Deal and Clean Vistas. After extensive negotiations, the parties executed the agreement.

Within a year the relationship between New Deal and Clean Vistas deteriorated. Clean Vistas filed suit against New Deal and White. Citing provisions drafted by Knox, Clean Vistas asserted that the agreement was ambiguous and unenforceable. In response to the suit, Knox referred White to his litigation partner, Howard Hopkins. Hopkins met with White and advised that Clean Vista's claims were without merit.

During discovery, Clean Vistas sought to depose White regarding formation of the agreement. While Hopkins was preparing White for her deposition, something she said made him wonder if Knox had indeed made a mistake in the drafting. Hopkins spoke with firm general counsel George Carlson regarding the potential conflict that might arise, as well as the potential malpractice claim that might follow. Carlson advised Hopkins that lawyers often wonder about whether they have made mistakes, but there is no disclosure obligation unless and until an opinion is formed that a mistake has been made.

After extensive discovery, Hopkins filed a motion for summary judgment, which the court denied. Surprised, Hopkins conducted further research into the provisions of the contract and began to believe that New Deal did in fact have a potential malpractice claim against Knox and the firm. Hopkins spoke again with firm general counsel George Carlson regarding the potential malpractice claim. Carlson instructed Hopkins not to disclose the potential claim to the client until he could conduct additional investigation into the issue. New Deal and Clean Vistas conducted unsuccessful settlement discussions without a disclosure. During initial trial preparation, Carlson informed Hopkins that he should disclose the potential conflict prior to trial. Hopkins immediately disclosed the potential conflict to White, who indicated that given the short time to trial, she wanted Hopkins to continue his representation of New Deal.

At trial, the court found that provisions of the agreement were ambiguous and unenforceable and ordered rescission of the contract. A short time later, Clean Vistas was acquired by Mega Health Corp., resulting in the loss of several million dollars in profits from New Deal's rescinded investment. After consulting with a plaintiff's legal malpractice attorney, White and New Deal sued Knox and the firm, serving a complaint alleging breach of fiduciary duty, legal malpractice, breach of contract and conflict of interest. The complaint was accompanied by a discovery request, which sought to discover any communications between Hopkins and Carlson regarding the malpractice issue. Are the communications between Hopkins and Carlson discoverable by White and New Deal in their malpractice claim against the firm?

In denying the intra-firm privilege, most courts relied on two primary doctrines: the fiduciary-duty ((The fiduciary-duty exception was originally created in the trust context to cover instances where a trustee obtained legal advice to guide administration of a trust. *See United States v. Jicarilla Apache Nation*, 564 U.S. ---, 131 S.Ct. 2313, 2321 (2011). This exception allows the beneficiary to discover discussions between the trustee and the trustee's counsel because the beneficiary is the attorney's true client, not the trustee. Courts have applied similar reasoning in the context of a legal-malpractice claim, arguing that discovery is warranted because of the attorney's fiduciary duties to the client.)) and current-client exceptions to the privilege. ((The

current-client exception allows a client to discover communications between an attorney and in-house ethics counsel when the communications pertain to the client's own adverse claims against the attorney. *See, e.g. In re SonicBlue Inc.*, 2008 WL 170562, at *8-9 (N.D. Cal. Jan. 18, 2008). Once a client threatens to bring a claim against a firm, the firm's imputation under Rule 1.10 means the firm is simultaneously representing the client and the firm in potentially adverse claims. Proponents argue that this dual representation of adverse parties violates Rule 1.7 of the Model Rules and should preclude application of the attorney-client privilege.))

Courts' New View

Since March of 2012 however, three appellate courts have rejected these arguments and found the attorney-client privilege operative. ((*RFF Family P'ship v. Burns & Levinson, LLP*, 991 N.E.2d 1066 (Mass. 2013); *St. Simon's Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.*, 746 S.E.2d 98 (Ga. 2013); *Garvy v. Seyfarth Shaw LLP*, 966 N.E.2d 523 (Ill. App. Ct. 2012).)) These decisions have all prevented a client from discovering a firm's internal communications regarding a potential malpractice claim. Recently the Supreme Courts of Massachusetts and Georgia, following an appellate court in Illinois, have noted that neither law nor policy supported limiting or precluding the attorney-client privilege in such circumstances. Although the focus and analysis of the three appellate courts varied, they uniformly rejected both the fiduciary-duty and current-client exceptions. Both the Massachusetts and Georgia courts offered standards to determine when the intra-firm would apply.

The first major break in the line of cases denying the privilege was the Appellate Court of Illinois' decision in *Garvy v. Seyfarth Shaw, L.L.P.* ((966 N.E.2d 523 (Ill. App. 2012).)) The court heard and rejected arguments for discovery of privileged communications under both the fiduciary and current-client exceptions. Regarding the fiduciary-duty theory, the court stated that the exception was not adopted in Illinois and that even if it had been, it would not apply because the communication in question pertained to an adversarial proceeding between the fiduciary and the client and not the firm's representation of the client itself. The court also rejected the current-client exception, stating that Rules 1.4 and 1.7 of the Illinois Rules of Professional Conduct expressly allow an attorney to secure confidential legal advice regarding compliance with ethics rules.

Following the Illinois appellate decision, two state Supreme Courts issued decisions on the issue. In *RFF Family Partnership*, the Massachusetts Supreme Court engaged in a detailed analysis of the attorney-client privilege, the purported exceptions, and the practical challenges of conflict situations as they arise in real life. The court held that the attorney-client privilege should apply as long as: (1) the firm designates, at least informally, a lawyer or lawyers within the firm to serve as in-house or ethics counsel; (2) where a current outside client threatens litigation, the in-house counsel must not have worked on the underlying client matter in question; (3) the time spent in communication with in-house counsel may not be billed to an outside client; and (4) the communications must be kept confidential.

In *St. Simon's Waterfront*, the Georgia Supreme Court came to a slightly different conclusion. Although the court acknowledged that important ethical questions are implicated by a potential conflict of interest, it noted that an attorney's ethical obligations under the Rules of Professional Conduct are "not directly bearing on privilege law." ((746 S.E.2d at 108.)) The court ultimately decided the attorney-client privilege should be applied similarly in all

circumstances and analyzed the case under its traditional standard. ((*Id.*))

Advice for the Future

Moving forward, attorneys confronted by a potential malpractice claim continue to face the additional hurdle of determining whether their communication with in-house ethics counsel is discoverable. Although these recent appellate cases indicate that courts are moving away from limiting the privilege, there is sufficient conflicting case law to suggest the question has not been finally answered. With such uncertainty, law firms are well served to take a few practical steps to protect their interests. Most importantly, each firm should designate a lawyer or lawyers to serve as the firm's ethics counsel. Additionally, firms should circulate an internal loss prevention memo. The memo should contain three provisions to: (1) direct attorneys to speak immediately with ethics counsel in person as soon as a potential conflict is discovered; (2) advise the attorney to not discuss the potential conflict with the client until the firm ethics counsel has authorized such a disclosure; and (3) explain when the attorney's fiduciary duty and ethical obligations require communication with a client regarding a potential malpractice claim. ((*See* MN Lawyer Professional Responsibility Board, Op. 21 (2009) (discussing a lawyer's ethical duty to consult a client about the lawyer's own malpractice); *see also Leonard v. Dorsey & Whitney L.L.P.*, 553 F.3d 609, 629 (8th Cir. 2009) (stating that the Minnesota Supreme Court "would not hold a lawyer liable for failure to disclose a possible malpractice claim unless the potential claim creates a conflict of interest that would disqualify the lawyer from representing the client."))) Taking these minimal steps results in greater protection for attorneys and firms in preventing the discovery of intra-firm discussions regarding ethical obligations towards current clients.