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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.

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Update on the In-Firm Privilege

Dec 04, 2014

Editor's Note: Guest authors sometimes write posts for this blog. This month, we are once again delighted that a leading ethics and legal malpractice lawyer, [Chuck Lundberg](#), is (with the assistance of [Aram V. Desteian](#), a Bassford Remele associate) updating an important attorney-client privilege topic last addressed here in their November 2013 blog on this site, "2013 Development in Intra-Firm Privilege."

In Minnesota, both state and federal district courts have upheld the privilege for intra-firm attorney-client communications. *See Jj Holand, Ltd. v. Fredrikson & Byron, P.A.*, Civ. No. 12-3064 ADM/TML (D. Minn. July 17, 2014)

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(order affirmed in *JJ Holand, Ltd. v. Fredrikson & Byron*, 2014 WL 5307606 (D. Minn. Oct. 16, 2014)); *Coloplast A/S and Coloplast Corp., v. Spell Pless Sauro, P.C.*, Civ. No. 27-CV-12-12601 (Minn. Dist. Ct. Nov. 22, 2013). Nationally, the Oregon Supreme Court joined with the supreme courts of Georgia and Massachusetts to become the third high court to explicitly uphold the intra-firm attorney-client privilege. See *Crimson Trace Corp. v. Davis Wright Tremaine, L.L.P.*, 326 P.3d 1181 (Ore. 2014).

The Minnesota Cases – Adoption of the RFF Family Partnership Approach to the Intra-firm Privilege

The past year has brought significant development in the law of the intra-firm privilege in Minnesota. Cases involving the intra-firm privilege have been heard in both state and federal district courts. In each instance, the court upheld the privilege relying heavily on the Massachusetts Supreme Court's decision *RFF Family P'ship, L.P. v. Burns & Levinson, L.L.P.*, 991 N.E.2d 1066 (Mass. 2013). The decisions in *JJ Holand* and *Coloplast* suggest that the reasoning in *RFF Family P'ship* – with its four-part test for the protection of intra-firm communications¹ – provides a persuasive guide to courts confronting the question of the intra-firm privilege for the first time.

In *JJ Holand*, U.S. Magistrate Judge Tony Leung conducted a thorough analysis of the policy underlying the attorney-client privilege and its application to intra-firm communications. Following this analysis, Judge Leung denied the plaintiff's motion to compel and adopted the *RFF Family P'ship* four-part test for upholding the intra-firm privilege. ("The Court agrees with the interpretation of the *RFF Family* and *Coloplast* courts . . .") In his decision, Judge Leung noted that "[a]n interpretation that would deny a law firm and its attorneys the protections of the attorney-client privilege unless the law firm withdrew from the representation or obtained the consent of the client might well work against the interests of both the client and the law firm." Judge Ann Montgomery affirmed Judge Leung's order over the plaintiff's objection.

In *Coloplast*, malpractice plaintiffs sought discovery into internal email exchanges between the defendant law firm's attorneys and the firm's general counsel. At the time of the emails, the law firm was still representing the plaintiffs in the underlying matter, but a change of counsel was "imminent." In denying the plaintiffs' motion to compel, Judge Philip Bush of the Hennepin County District Court relied heavily on *RFF Family P'ship*. In so holding, Judge Bush reasoned that "given the persuasive reasoning and the thorough analysis by the Massachusetts Supreme Court and the lack of any Minnesota authority on the issue, this Court fully ascribes [sic] to *RFF* as governing whether the communications . . . are protected by the attorney client privilege."

Crimson Trace – A Statutory Approach to Preserving the Intra-firm Privilege

Although the Oregon Supreme Court's decision in *Crimson Trace* makes it the third state to recognize the intra-firm privilege, the court's reasoning in preserving the privilege differed from the prior decisions in Georgia and Massachusetts. Rather than focusing on the policy underlying the attorney-client privilege, the Oregon Supreme Court's decision in *Crimson Trace* is one of pure statutory construction.

In *Crimson Trace*, the plaintiff alleged that the defendant law firm had prepared a defective patent application and sued for malpractice. During discovery in the malpractice action, plaintiff sought to discover all internal

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communications between the firm's attorneys regarding possible conflicts of interest between plaintiff and its counsel. The firm refused, arguing that the attorney-client privilege attached to communications between the attorneys and the firm's general counsel. The district court compelled disclosure by applying the fiduciary exception to the attorney-client privilege and holding that the firm's "duties of candor, disclosure, and loyalty . . . precluded [the firm] from asserting the attorney-client privilege to its internal communications.

On appeal, the Oregon Supreme Court reversed. The attorney-client privilege in Oregon is established by its evidence code.² In reviewing the district court's application of the fiduciary exception, the Oregon Supreme Court simply applied the elements in the code to the communications at issue. The court concluded that the communications satisfied the required elements for the privilege to attach, and because the evidence code did not include a "fiduciary exception," held that the district court erred in applying the exception. The court's holding concluded that "OEC 503(4) was intended as a complete enumeration of the exceptions to the attorney-client privilege. Insofar as that list does not include a 'fiduciary exception,' that exception does not exist in Oregon"

Conclusion

The decisions discussed above and in last year's blog all address intra-firm communications. Discovery of law firms' communications with outside counsel is seldom sought.

While the law regarding the intra-firm privilege is far from settled, these recent decisions expand the growing number of courts that have recognized an attorney's ability to have privileged communications with in-firm counsel. Moreover, as the recent Minnesota decisions demonstrate, the Massachusetts Supreme Court's decision in *RFF Family P'ship* has proved persuasive to courts deciding the intra-firm privilege as a matter of first impression.

[1] In *RFF*, the Massachusetts Supreme Court held that the intra-firm privilege applies as long as the following elements are met: (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.

[2] See OEC 503.

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