Lawyers' Professional Liability UPDATE

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Privilege

Attorney-Client Privilege Trumps Company's E-mail Policy

Stengart v. Loving Care Agency, Inc., 408 N.J. Super. 54, 973 A.2d 390 (2009)

In summary, despite company policy to the contrary, a former employee's personal e-mails to her lawyer were protected by the attorney-client privilege. Plaintiff, Marina Stengart, sued her former employer, Loving Care Agency, Inc. (Loving Care), for discrimination. Loving Care's lawyer then extracted Stengart's e-mails, including those sent to or from her Yahoo! account, off the hard drive of her work laptop. Some of the e-mails were communications with Stengart's attorneys discussing her plans to sue Loving Care. Stengart's lawyers moved the court to order the return of all such e-mails. The trial court held that Loving Care had a right to the e-mails based on the company's electronic communications policy and that this policy trumped the attorney-client privilege.

The appellate division reversed and held that Loving Care's attorney acted unprofessionally by reading and not returning the e-mails. The court first noted that New Jersey courts will only enforce a unilateral employee policy if it reasonably furthers the employer's legitimate business interests. The court held that Stengart's e-mails did not bear on Loving Care's legitimate business interests. Although a company may have a legitimate interest in knowing how often an employee is attending to personal matters, the court noted, the company does not have a legitimate interest in knowing the content of those personal matters.

The court also held that Stengart's e-mails were protected by the attorney-client privilege because she had done nothing to waive the privilege. The trial court had based its finding of waiver on the fact that Stengart "took a risk of disclosure of her communications and a risk of waiving the privacy she expected," but the appellate court found this reasoning unconvincing.

Finally, the court held that Loving Care's attorney violated New Jersey Rule of Professional Conduct 4.4(b), which requires attorneys not to read documents that appear to have been inadvertently disclosed and to return such documents to whomever sent them. In applying these duties to the lawyer, the court noted that the attorney's good faith belief that the company owned the e-mails was inapposite and held that the lawyer should have let the court decide whether the company's employee policy trumped the attorney-client privilege. The court declined to rule on sanctions for this violation; instead, it opted to let the chancery court determine an appropriate remedy.

Jurisdictions are split when it comes to resolving the tension between the attorney-client privilege and company electronic communication policies. This opinion falls firmly on the side of the privilege, but it is important to remember that these cases often turn on specific facts. For example, the clarity of the policy and the extent to which the employee may have been notified of the policy are likely important factors. *See Scott v. Beth Israel Medical Center*, 17 Misc. 3d 934, 847 N.Y.S.2d 436 (N.Y. Sup. 2007) (employee's communications were not privileged; company policy clearly stated employees had no privacy, and plaintiff was clearly on notice of the policy). Whether Stengart was on notice of Loving Care's policy was disputed, and the court found the meaning and scope of the policy elusive.

Damages

Texas Supreme Court Imposes Strict Criteria for Proving Collectibility

***Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. National Development and Research Corp.*, 299 S.W.3d 106 (2009)**

A Texas-based law firm, whose client, NDR, obtained favorable jury verdicts against Panda entities, was liable for failing to request jury questions as to whether NDR breached a Letter and Shareholder's Agreement with Panda. The error resulted in the loss of a judgment in favor of NDR. In the resulting legal malpractice action, the jury awarded damages for that loss and the attorneys' fees incurred. The law firm challenged the award of attorneys' fees and whether the lost, favorable judgment would have been collectible.

The court undertook a comprehensive analysis of principles determining collectibility, starting from the premise that the analytical focus is the time of or after an enforceable judgment would have been rendered (or subsequent thereto). The court noted that there was no prejudgment writ nor a contention that such a remedy was available. Evidence of collectibility before a judgment is effective lacks evidentiary value unless the defendant's ability to pay was not diminished by the intervening passage of time. Thus, the evidence needs to show that the defendant's financial condition did not change materially during the period before a judgment was effective. Otherwise, prejudgment evidence of collectibility is speculative.

The court stated:

> Generally, then, the amount that would have been collectible in regard to an underlying judgment-provided the judgment is not dormant or preempted-will be the greater of either (1) the fair market value of the underlying defendant's net assets that would have been subject to legal process for satisfaction of the judgment as of the date the first judgment was signed or at some point thereafter, or (2) the amount that would have been paid on the judgment by the defendant or another, such as a guarantor or insurer.

Panda's consolidated financial statements reflected the assets of parties not involved in the litigation, not the company as a distinct legal entity. Panda's ownership of a subsidiary did not entitle it to reach those assets. Evidence of earlier financial payments by Panda did not establish comparable present ability.

As to the attorneys' fees claim, the court held that disgorgement or forfeiture is a remedy for a fiduciary breach; whereas, an award for negligence requires proof of the amount of fees that constitutes the injury. Here, there was causation because the law firm's negligence caused the legal fees. The court rejected legal fees for appealing the adverse judgment, reasoning that success in obtaining a favorable judgment would have required NDR to defend an appeal. Special counsel's being engaged to address the appellate issue regarding the jury charge was a consequence of the negligence, though the award had to be vacated because the amount exceeded what was paid.

Privilege

Mediation Confidentiality Does Not Apply to Private Conversation Between Lawyer and Client

Casesel v. Superior Court, 101 Cal. Rptr. 3d 501 (Cal. App. 2 Dist.)

A client sued his lawyer for an inadequate settlement of only $1.25 million, which resulted from a mediation. The law firm moved *in limine* to exclude evidence of conversations where the lawyer and client were the sole participants, outside the presence of the adverse party and the mediator. Acknowledging the rule of inadmissibility, here the communications were private and not transmitted in the mediation process. Lacking a sufficiently close link between the communications and the mediation, the statutory and policy considerations did not require application of mediation confidentiality to the communications. The court stated: "The parties have cited no California case which addresses the factual circumstances in the instant case, *i.e.*, communications made solely between a client and his attorneys outside the presence of an opposing party, or its attorney, or the mediator, and containing no information of anything said or done or any admission by a party made in the course of the mediation." The court stated that a most important consideration is that mediation confidentiality is not intended to protect lawyer and client from each other and does not relate to encouraging candor in the mediation process.

Jurisdiction

Damage Claim, Not Declaratory Relief, Supports Federal Jurisdiction

Max-Planck-Gesellschaft ZUR Foerderung Der Wissenschaften E.V. v. Wolf Greenfield & Sacks, PC, 661 F. Supp. 2d 125 (D. Mass. 2009)

Plaintiff moved to remand its Massachusetts legal malpractice action against defendant, the law firm of Wolf Greenfield & Sacks, PC, in which damages were alleged because the law firm represented joint clients in the prosecution of the Tuschl I patent application before the United States Patent and Trademark Office (PTO). The client also sought to enjoin the law firm from continuing the prosecution. The court stated that the application of the PTO ethics rules did not invoke federal jurisdiction because they did not preempt the Massachusetts ethics rules. Declaratory relief would require remand for that reason. As to the damage claim, however, the court stated that plaintiff "will have to show that Wolf Greenfield's conflict of interest in the prosecution of the Tuschl I applications proximately caused the PTO to reject in whole, or in part, patent claims sought by [plaintiff]. In other words, it must show that if Wolf Greenfield were conflict-free, the Tuschl patent claims would be stronger." That invoked substantial and necessary questions of patent law.

Discipline

Associate Attorney Disciplined Because Law Firm Took an Improper Legal Fee

Disciplinary Counsel v. Smith, 124 Ohio St. 3d 49, 918 N.E.2d 992 (Ohio 2009)

An Ohio second year associate lawyer was given a public reprimand because his law firm improperly charged a legal fee regarding clients' personal injury protection coverage, which was no-fault and paid directly to the medical providers. The law firm had been sued for legal malpractice and disgorged the legal fees taken on the no-fault payment. The disciplinary action followed. Although the lawyer followed his superior's direction in preparing the disbursement sheet, he was aware of the nature of the coverage and the taking of legal fees. The Ohio Supreme Court found that his following the directions of supervising counsel would not be reasonable reliance under Rule 5.2(b) because he never ascertained whether his superior had determined the propriety of the legal fee. The court stated: "A lawyer's obligations under the ethics rules are not diminished by the instructions of a supervising attorney."

Privilege

California Supreme Court Prohibits *in Camera* Review of Attorney-Client Privileged Communications

***Costco Wholesale Corp. v. Superior Court*, 47 Cal. 4th 725, 219 P.3d 736, 101 Cal. Rptr. 3d 758 (2009)**

The court reviewed the propriety of the trial court's having directed a referee to conduct an *in camera* review of an opinion letter written by outside counsel (Hensley) to a corporate client. The client had requested an opinion as to whether certain of its warehouse managers were exempt from California's wage and overtime laws. Several years later, a class action was brought on behalf of those managers claiming that they were entitled to overtime wages. They sought production of the opinion letter. The referee reviewed and redacted references to opinions, but not "those portions of text involving factual information about various employees' job responsibilities." The California Supreme Court accepted writ review, concluding:

> We hold the attorney-client privilege attaches to Hensley's opinion letter in its entirety, irrespective of the letter's content. Further, Evidence Code section 915 prohibits disclosure of the information claimed to be privileged as a confidential communication between attorney and client "in order to rule on the claim of privilege."

Here, the referee agreed that the letter was a confidential communication between an attorney and client. Its factual contents did not lose the privilege, although the information could be discovered by other means. Although Cal. Evid. Code § 915(b) provides a procedure for *in camera* review of work product under certain conditions, there is no procedure for review of an attorney-client communication.

The court had also disapproved the use of an *in camera* inspection in *2,022 Ranch, L.L.C. v. Superior Court*, 113 Cal. App. 4th 1377, 7 Cal. Rptr. 3d 197 (4th Dist. 2004). That case concerned the protection of communications of insurance adjusters who also happen to be attorneys. The court explained that the trial court should have first determined whether the dominant purpose of the relationship between the insurance company and its in-house attorneys was that of attorney-client or claims adjuster. The burden was on the insurer to establish, as a preliminary fact, that the communications were in the course of an attorney-client relationship. Although the insurer could request an *in camera* review, the trial court could not so order over the corporation's objection. The court stated: "If the trial court determined the communications were made during the course of an attorney-client relationship, the communications, including any reports of factual material, would be privileged, even though the factual material might be discoverable by some other means." If the trial court determines that the dominant purpose of the relationship was not that of attorney and client, the communications would be discoverable. Nevertheless, the insurer could then request an *in camera* review of a specific communication on the premise that it should be protected notwithstanding the general lack of an attorney-client relationship.