Lawyers for the Profession®

The Lawyers' Lawyer Newsletter

Recent Developments in Risk Management

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Attorney-Client Privilege — Communications With Law Firm General Counsel

Palmer v. Superior Court, 231 Cal. App. 4th 1214 (2014)

Risk Management Issue: Does the attorney-client privilege apply to communications between attorneys and their law firm's general counsel concerning disputes with a current client who later sues the firm for legal malpractice?

The Case: Plaintiff Shahrokh Mireskandari retained the law firm of Edwards Wildman Palmer LLP (the Firm) to represent him in an invasion of privacy lawsuit against the *Daily Mail*, a newspaper based in the United Kingdom. Dominique R. Shelton was the Firm partner in charge of handling the case. In April 2012, the Firm filed a complaint on Mireskandari's behalf in the U.S. District Court for the Central District of California.

The relationship between Mireskandari and the Firm was short lived and, for the most part, contentious. In June 2012, Mireskandari sent Shelton two emails expressing dissatisfaction with the Firm's billings and representation.

In August 2012, the law firm of Greenberg Glusker substituted in as counsel for Mireskandari in the *Daily Mail* case.

During the period June – August 2012, while the Firm was still representing Mireskandari, Shelton consulted with the Firm's attorneys Jeffrey Swope (the Firm's general counsel), and James A. Christman (the Firm's "claims counsel") concerning Mireskandari's complaints. Swope and Christman "deputized" partner Mark Durbin to advise Shelton regarding Mireskandari's complaints and supervise the preparation of pleadings the client wanted the Firm to file on his behalf. The Firm did not bill Mireskandari for any of Swope's, Christman's or Durbin's time.

In August 9, 2013, Mireskandari, represented by the firm of Parker Shumaker Mills, LLP, filed an action for legal malpractice and other claims in state court against the Firm.

In November 2013, Mireskandari's attorneys in the malpractice action deposed Shelton, who in turn invoked the attorney-client privilege and refused to answer several questions. Shelton also refused to produce his communications with the Firm's lawyers acting in their capacity as counsel for the firm.

Mireskandari moved to compel Shelton to answer the deposition questions and produce the documents withheld on privilege grounds. The trial court granted the motion to compel, and the Firm appealed.

On appeal, Mireskandari, relying primarily on federal cases and in what has been denominated the "fiduciary" and "current client" exceptions to attorney-client privilege, argued that a lawyer who counsels another lawyer in the same firm, regarding a current client of the firm, "becomes a lawyer with an impermissible conflict of interest," and when such a conflict exists, the attorney-client privilege must be subordinated to the firm's ethical duties. In other words, a firm's ethical duties trump the privilege and lift the lid on any [potentially] privilege[d] communications relating to the firm's client.

In contrast, the Firm relied on *In RFF Family Partnership, LP v. Burns & Levinson, LLP,* 991 N.E.2d 1066 (Mass. 2013) and *St. Simons Waterfront, LLC v. Hunter, MacLean, Exler & Dunn, P.C.,* 746 S.W.2d 98 (Ga. 2013), where the Supreme Courts of Massachusetts and Georgia, respectively, held that state rules of professional conduct did not govern applicability of the attorney-client privilege (a rule of evidence) and therefore any conflict of interest arising between the firm and the client did not affect the protections afforded to privileged communications.

The Firm also relied on *Crimson Trace Corporation v. Davis Wright Tremaine LLP,* 326 P.3d 1181 (Ore. 2014). There, the Supreme Court of Oregon found that the attorney-client privilege statute enumerated five exceptions to the privilege, but did not include a fiduciary exception. Therefore, that exception did "not exist in Oregon."

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[Editors' Note: These cases were discussed in prior issues of the *Lawyers' Lawyer Newsletter. See* Vol. 19, Issue 4, September 2014 (discussing Crimson Trace) and Vol. 18, Issue 4, September 2013 (discussing *RFF* and *St. Simons).*]

All three state supreme court cases involved malpractice actions in which a former client sought to discover communications between in-house counsel and the lawyers who had represented the client, made while the firm represented the client. All three decisions rejected application of the fiduciary or current client exceptions.

As the *Crimson* Court found in regard to Oregon law, the *Palmer* court stated that in California it is well-settled that the attorney-client privilege is a legislative creation, which courts have no power to limit by recognizing implied exceptions. As such, where an attorney representing a current client seeks legal advice from an in-house attorney concerning a dispute with the client, the attorney-client privilege may apply to their confidential communications. Adoption of the so-called "fiduciary" and "current client" exceptions to the attorney-client privilege is contrary to California law as California courts are not at liberty to create judicial exceptions to the attorney-client privilege.

Moreover, in deciding whether an attorney-client relationship existed, the court relied on the four factors enumerated in *RFF*: (1) the law firm must have designated the attorney within the firm to represent the firm as in-house or ethics counsel; (2) where a current outside client has threatened litigation against the law firm, the in-house counsel must not have performed any work on the particular client matter; (3) the time spent on the in-house communications may not have been billed to the client; and (4) the communications must have been made in confidence and kept confidential. Applying these factors, the court found an attorney-client relationship existed between Shelton and Swope and Christman, but not as to Durbin because he worked on the *Daily Mail* case.

The court was also careful to note that it did not condone or minimize the significance of an attorney's violation of the rules of professional conduct and that it did not express an opinion on whether any breach occurred. It also noted that as a practical matter, it is not a foregone conclusion that an attorney's consultation with in-house counsel in regard to a client dispute will always be adverse to the client. A law firm is not necessarily disloyal or in conflict with a client in seeking legal advice to determine how best to address a potential client dispute, regardless of whether the legal advice is given by in-house counsel or outside counsel.

Other courts have also recently looked at the in-house counsel privilege issue. In *Moore v. Grau,* 2014 N.H. Super. LEXIS 20 (Dec. 15, 2014), an attorney consulted with the law firm's informally designated in-house ethics counsel regarding a client dispute. The Superior Court of New Hampshire, Merrimack County, persuaded by *RFF, St. Simons, Crimson* and *Palmer,* recognized the intra-firm attorney-client privilege and rejected the fiduciary and current client exceptions to the privilege. In doing so, however, the court declined as too rigid the four-part test set forth in *RFF* for determining the existence of an attorney-client relationship. The court instead adopted a more "flexible" balancing approach, allowing the court to find the existence of an attorney-client relationship between the lawyer and the firm where there was no formally appointed in-house counsel, and where the informally designated in-house counsel had recorded a small amount of billing entries in the underlying representation.

On the other hand, in *Stock v. Schnader Harrison Segal & Lewis LLP*, Index No. 651250/13 (Dec. 5, 2014), the New York State Supreme Court, New York County refused to apply the attorney-client privilege to communications between attorneys of a firm and the firm's general counsel regarding the attorneys' anticipated testimony in a legal malpractice suit brought by a former client and possible ethical issues. Rejecting the application of the attorney-client privilege to intra-firm attorney communications, the court ordered the firm to produce former client internal firm communications between the lawyers and general counsel. The court did not distinguish any of the aforementioned decisions from other states in reaching its conclusion. The decision is on appeal. Because the issue appears to be a matter of first impression in New York, law firms will surely be paying close attention.

Risk Management Solution: The decision in *Palmer* rejecting the fiduciary and current client exceptions to the attorney-client privilege signifies an important precedent for any law firm in California where attorneys consult with in-house counsel on issues relating to current client disputes. If the need for in-house counsel arises, law firms may seek to keep communications with in-house counsel privileged by making a formal designation of an in-house attorney, who does not perform work on the particular client matter and who does not bill the client for the time spent on the communications. All such privileged communications must be made for the purpose of obtaining legal and ethical advice and maintained as confidential.

Palmer follows the trend around country in which states are immunizing privileged in-house communications between lawyers and firm risk managers from discovery in later legal malpractice cases. The impact of these cases can be seen in the more recent case *(Moore)* before the New Hampshire Supreme Court. Hopefully, a similar result will be seen in New York as this issue works its way through the appellate process.

Lawyers' Professionalism — Lawyers' Communications With Adversaries — Threatening Professional Discipline

IA Ethics OP 14-02 (Oct. 24, 2014)

Risk Management Issue: Is it unethical to call another lawyer "unethical" or to threaten a lawyer with a bar complaint if the lawyer refuses to alter his or her actions in a matter?

The Opinion: The Iowa Ethics and Practical Guidelines Committee receives inquiries from all quarters of the bar regarding threats, during the course of litigation, of making an ethical complaint. In some cases, the threat of an ethics complaint was used in an attempt to coerce action by an opponent.

The committee began its opinion by reminding lawyers that when they know that another lawyer has committed a violation of the rules of professional conduct there is an ethical obligation to inform the appropriate professional authority of the misconduct. In Iowa (and elsewhere), this rule is mandatory.

Accordingly, any lawyer who is aware of misconduct by another lawyer, must do more than simply identify that misconduct to his or her opponent (call him or her "unethical"), and that attorney cannot use the threat of reporting the misconduct to the appropriate authority for tactical advantage, as he or she is required to report ethical violations. The failure of the opponent who claims an ethical violation to report would be a violation of the rule. In this way, while the threat of reporting an ethical violation is not itself prohibited by the rules, the rules effectively prevent such threats by mandating reporting, rather than making reporting of ethical violations discretionary.

The committee continued by noting that even "warnings" about the "potential" for ethical violations, which are issued as a threat or with ulterior motive to coerce opposing counsel, violate a separate rule in Iowa requiring lawyers to act with professionalism. In Iowa, conduct that may be characterized as "uncivil, abrasive, abusive, hostile or obstructive" violates this rule.

Risk Management Solution: The so-called "snitch rule" which is codified into the American Bar Association Model Rules of Professional Conduct at Rule 8.3(a) requires lawyers to report to the appropriate professional authority other attorneys whose conduct violates the rules if the conduct "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. . . ." The question of whether the alleged violation meets this standard may in some cases permit a lawyer not to report violations of the rules that do not rise to this level. It is a matter of attorney judgment as to whether a report is required unless the lawyer's honesty or trustworthiness is in question.

Attorneys should avoid using the threat of ethics or bar complaints to coerce any type of action from opposing counsel. A review of the local "snitch" rule can illuminate the reporting requirements if an attorney determines that an opponent has violated an ethical rule.

If another attorney attempts to coerce action by a lawyer or law firm with the threat of an ethics complaint, a review of the local rules of professional conduct can help determine whether that threat itself violates the rules due to the failure to make a mandatory report of the claimed misconduct.

Rules of Discovery — Requests for Admissions — Communications With Clients

Crowe et al., v. Tweten, E058311, slip. op., Cal. Ct. App. 4th Dist. (Dec. 29, 2014)

Risk Management Issue: What can law firms do to prevent the filing of incorrect papers with the court?

The Case: While this case is an unpublished decision in California, it nonetheless provides a cautionary tale regarding the risks and potential costs related to denying requests for admissions. This matter arose from a dispute over the distribution of trust assets because of the expiration of the federal estate tax exception (FET) in 2010. During the litigation, plaintiffs denied certain requests for admission and defendant ultimately prevailed by establishing those facts at trial. After trial, defendant sought to recover costs and fees related to proving those issues at trial. The trial court denied this motion, defendant appealed, and the appellate court affirmed in part and reversed in part.

In California (as in most jurisdictions), requests for admission require the responding party to admit or deny the truth of specified matters of fact, opinion relating to fact, or application of law to fact. The purpose of requests for admission is to eliminate the need for proof of undisputed facts so as to expedite trial. When responding to a request for admission, a party has the duty to make a reasonable investigation as to the subject of the request, even into areas where the responding party is without personal knowledge, but where the responding party has available sources of information on the issue.

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In this case, defendants, Leonard and Elaine Tweten, created a revocable trust for their community property estate in 2008. Under the terms of the trust, upon the death of the first spouse, the estate would be divided in half, with a small portion of the deceased spouse's share (as determined by the FET) divided among the children, and with the remainder to be held in a marital trust for the benefit of the surviving spouse.

When Elaine Tweten entered hospice care in 2010, the Twetens' financial advisor informed them that the expiration of the FET altered the intention of their trust. Without the limitation of the FET, the entire portion of the deceased spouse's portion of the estate would go to the children leaving nothing in the marital trust for the surviving spouse. An amendment was drafted to address this issue, and both Twetens signed it.

After Elaine Tweten's death in 2010, her children petitioned the court to invalidate the amendment to the trust on the grounds of fraud, undue influence, forgery, lack of capacity, and invalidity because the signatures were not notarized. Leonard Tweten requested that the court modify or reform the trust so that an amount similar to what the FET would have allowed to go to the children would be transferred to them, and the remainder would be placed in a marital trust.

As litigation progressed, Tweten served 10 requests for admissions on the children related to the authenticity of the signatures, Elaine's capacity to sign the amendment, whether Elaine's signature was not the result of undue influence, and whether Elaine wanted Leonard to receive the majority of her trust assets. The children denied these requests for admissions.

After a bench trial, the court found in favor of Tweten and used its equitable power to modify the trust as requested by Tweten. Tweten then made a post-trial motion to recover costs and fees related to the denied requests for admissions, pursuant to Cal. Code Civ. Proc. § 2033.420. The trial court denied his motion, finding that children had a good faith belief that they would prevail, even though they were proven wrong at trial. Tweten appealed.

The appellate court reviewed the trial court's decision on an abuse of discretion standard. The court evaluated each request based on the following factors: (1) whether the fact sought to be admitted was of substantial importance at the time the request was made; (2) whether the information sought was within the personal knowledge of the responding party; (3) whether the information necessary to respond could have been gained through reasonable investigation; (4) whether the responding party believed in good faith that it would prevail; (5) whether, after the initial denial was made, the responding party offered to admit the fact rather than requiring the propounding party to prove the fact; and (6) whether, at trial, the responding party submitted evidence relative to the admission sought by the request.

The court found that the trial court abused its discretion by denying costs and fees related to four of the ten requests for admission. For those requests, the court found that the trial testimony did not support plaintiffs' position, plaintiffs did not produce evidence to support certain allegations of forgery or undue influence, and plaintiffs' own expert's testimony refuted their denial of a request for admission. For the remaining six requests for admission, the court found that plaintiffs had a "good reason" to deny the request at the time the denial was made and could have reasonably believed that they would prevail on that issue at trial. The court remanded the case to the trial court to determine the costs and fees owed to defendant for the four requests for admission.

Comment: Many lawyers take a cavalier approach to responding to requests for admissions and deny them, particularly when they go to the heart of an issue in a case, or when they directly address an issue for which the opposing party has the burden of proof at trial.

Lawyers should be aware, however, and they should inform their clients, that "cost of proof" sanctions may be imposed where a party denies a request for admission without good cause and the subject of that request is proven at trial by the opposition. The focus of the analysis is what the responding party reasonably believed at the time the denial was made. A party's reasonable belief includes any information that the party could have acquired through a reasonable investigation. Also, once a denial has been made, the attorney for the responding party should carefully monitor any new evidence or information that enters the case and that may change the basis for the denial.

Risk Management Solution: These kinds of mistakes are often made because matters are assigned to and handled by individual lawyers with inadequate, or no, oversight from other members of the practice group. In the absence of a system of regular review by the group or its leaders, firms may consider imposing a "second set of eyes" requirement before significant litigation filings are made — including responses to requests for admission. The mere requirement of this kind of review can prevent cavalier filings, and the actual review can help assure firms — and their clients — that the firm's services are being provided at a consistently high level.