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Newsletters

Lawyers' Professional Liability Update - March 2010

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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 Ya-hoo! 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.

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.

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

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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."

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