

## PROFESSIONAL LIABILITY

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### IN THIS ISSUE

*This month's newsletter provides an update on the evolving case law regarding the "intra-firm" attorney-client privilege that may attach to communications between an attorney and in-firm ethics counsel regarding a potential or pending legal malpractice claim by a current client. These recent decisions provide further evidence of a dramatic shift in favor of the intra-firm privilege.*

## The Tide Has Turned:

### An Update Regarding the Evolution of the Intra-Firm Attorney-Client Privilege

#### ABOUT THE AUTHORS



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#### ABOUT THE COMMITTEE

The Professional Liability Committee consists of lawyers who represent professionals in matters arising from their provision of professional services to their clients. Such professionals include, but are not limited to, lawyers, accountants, corporate directors and officers, insurance brokers and agents, real estate brokers and agents and appraisers. The Committee serves to: (1) update its members on the latest developments in the law and in the insurance industry; (2) publish newsletters and Journal articles regarding professional liability matters; and (3) present educational seminars to the IADC membership at large, the Committee membership, and the insurance industry. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article, contact



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*The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

In the September 2013 IADC Professional Liability newsletter,<sup>1</sup> Erin Higgins provided an excellent analysis of two cases in which the Supreme Courts of Massachusetts and Georgia became the first two courts of last resort to uphold the attorney-client privilege for communications between an attorney and in-house ethics counsel regarding a potential malpractice claim. *RFF Family P'Ship, L.P. v. Burns & Levinson, L.L.P.*, 991 N.E.2d 1066 (Mass. 2013) ("*RFF*") and *St. Simons Waterfront, L.L.C. v. Hunter, Maclean, Exley & Dunn, P.C.*, 746 S.E.2d 98 (Ga. 2013) ("*St. Simon*").

Since the Higgins article, several other decisions have followed in upholding the intra-firm privilege, often relying on (or even completely adopting) the reasoning set forth in these foundational decisions. This article will provide an update on the current state of the law on this important issue and a few thoughts on what these most recent decisions mean for practitioners.

#### **Trendsetters: The Decisions in *RFF* and *St. Simon***

As Ms. Higgins noted on page one of her 2013 article, both *RFF* and *St. Simon* analyzed and refused to recognize two "exceptions" to the attorney-client privilege that had been used to preclude the attorney-client privilege from attaching to intra-firm communications regarding legal malpractice claims. These are the so-called fiduciary duty and current-client exceptions. The courts in *RFF* and *St. Simon* both departed from the

trend of applying these exceptions to vitiate the intra-firm privilege and instead each created four-part tests for determining whether an intra-firm communication between an attorney and in-firm counsel was privileged.

Since these decisions, state and federal courts around the country have upheld the intra-firm privilege, evidencing a dramatic shift in the treatment of this important issue.

#### **The Trend Continues: Court Decisions Following *RFF* and *St. Simon***

In early 2014, 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). But, unlike the decisions in *RFF* and *St. Simon*, which relied heavily on policy analysis, the Oregon Supreme Court's decision relied on pure statutory construction to uphold the intra-firm privilege.

*Crimson Trace* arose from allegations of malpractice in the defendants' preparation of a patent application. After hearing the plaintiff's motion to compel, the district court compelled disclosure of intra-firm communications between attorneys at the defendant firm. The district court adopted the fiduciary exception and held that the firm's "duties of candor, disclosure, and loyalty . . . precluded [the firm] from

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asserting the attorney-client privilege to its internal communications.” *Id.* at 1186.

On appeal, the Oregon Supreme Court reversed. Instead of analyzing the policy underlying the attorney-client privilege, the court noted that the attorney-client privilege was codified in Oregon’s evidence code. Therefore, the question was whether the intra-firm communications satisfied the statutory requirements for the attorney-client privilege to attach. The court concluded that the communications satisfied the statutory standard and, because the evidence code did not include a “fiduciary exception,” held that the district court erred in applying the exception. The court’s opinion concluded that “[the statute] 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 . . . .” *Id.* at 1195.

In Minnesota, both state and federal trial courts have upheld the intra-firm privilege in recent opinions. See *JJ Holand, Ltd. v. Fredrikson & Byron, P.A.*, Civ. No. 12-3064 ADM/TML (D. Minn. July 17, 2014) (order affirmed in *JJ Holand, Ltd. v. Fredrikson & Byron*, 2014 WL 5307606 (D. Minn. Oct. 16, 2014)); *Coloplast A/S & Coloplast Corp. v. Spell Pless Sauro, P.C.*, Civ. No. 27-CV-12-12601 (Minn. Dist. Ct. Nov. 22, 2013). Moreover, both courts adopted the four-part test established in *RFF* to determine if the attorney-client privilege had attached to intra-firm communications.

In *JJ Holand*, the Federal Magistrate Judge adopted the *RFF* test in its entirety, stating “[t]he Court agrees with the interpretation

of the *RFF Family* and *Coloplast* courts, and applying that test to the instant scenario, the requested communications are protected from disclosure by the attorney-client privilege.” Civ. No. 12-3064 ADM/TML, at \*11. Similarly, the Minnesota state court denied the plaintiff’s motion to compel after wholly adopting the *RFF* four-part test. See *Coloplast*, Civ. No. 27-CV-12-12601, at \*10 (“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.”)

Not long after the decision in *JJ Holand*, the California Court of Appeals also upheld the existence of the intra-firm privilege after applying a statutory approach similar to the Oregon Supreme Court’s decision in *Crimson Trace*. See *Palmer v. Superior Court*, 180 Cal.Rptr.3d 620 (Cal. Ct. App. 2014). In so holding, the *Palmer* court explicitly rejected the fiduciary duty and current client exceptions, while also providing guidance on how to determine whether an-attorney client relationship exists in the context of an intra-firm communication.

In declining to adopt the fiduciary duty and current client exceptions, the *Palmer* court reasoned that “[a]s the *Crimson Trace* court found in regard to Oregon law, 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.” *Id.* at 362. Therefore, “because the California Evidence Code enumerates eight exceptions to the attorney-client privilege” and the “fiduciary

duty' or 'current client' exceptions are not among them," neither exception existed under California law. *Id.*

But the *Palmer* court continued its analysis, discussing how to determine whether the attorney-client privilege had attached to a particular intra-firm communication. Ultimately, the court held that "while the *RFF* factors are not prerequisites to establishment of an attorney-client relationship under California law, they are among the factors that a trial court may analyze in determining whether an actual attorney-client relationship existed." *Id.* at 636.

In late December 2014, a New Hampshire trial court continued the trend by upholding the intra-firm privilege after lengthy analysis of *RFF* and *St. Simon*. See *Moore v. Grau*, No. 2013-CV-150 (N.H. Sup. Ct. Dec. 15, 2014). The New Hampshire court rejected the fiduciary duty and current client exceptions, and recognized the existence of an intra-firm privilege. However, the court seemingly struggled to adopt a standard for determining whether the intra-firm privilege attached to a particular communication. After a lengthy analysis of the benefits of the four-part tests respectively established in *RFF* and *St. Simon*, the court adopted the *St. Simon* test largely on the belief that the *RFF* test is best suited for application "to very large, multi-office firms with full-time general and/or ethics counsel." The court reasoned that the *St. Simon's* test permitted a more "flexible approach" that would be more easily applied to smaller firms, an important factor given that "[t]he vast majority of New Hampshire law firms are made up of less than three lawyers" and that

"few, if any, are large enough to have full-time in-house counsel." *Id.*

### **Practice Tips: How to (Help) Ensure Your Communications Are Protected**

On page 4 of the prior article, Ms. Higgins provided a summary of the practical implications of the *RFF* and *St. Simon* decisions and the steps firms of all sizes should take to (help) ensure that intra-firm communications are protected. For example, firms should designate least one lawyer as the firm's in-house counsel and one other attorney as a backup. All of the cases decided following *RFF* and *St. Simon* have agreed on the importance of having at least one attorney designated to handle firm ethics and malpractice issues. But the *Palmer* case indicates that ethics counsel must be careful to avoid "deputizing" additional and previously undesignated attorneys to "assist" with particular cases.

In *Palmer*, the ethics counsel of the defendant law firm had "deputized" an attorney to assist with managing the underlying case after the dispute with the client became known. This attorney's "normal role was not as general or ethics counsel to the firm." As a result, the California Court of Appeals held that the attorney-client privilege did not attach to communications between the "deputized" attorney and the firm's attorneys who were working the file in question. The court also noted that the "deputized" attorney also substantively worked on the file, including supervising the preparation of pleadings. These facts were sufficient to permit the former client to discover all conversations

between the “deputized” attorney and attorneys working on the underlying case.

### **Conclusion**

Since the decisions in *RFF* and *St. Simon*, all of the cases that have addressed this issue have been unanimous in upholding the intra-firm privilege. No case has confronted the reasoning of these foundational decisions and rejected it. These decisions indicate that the tide has fully turned toward a pro-lawyer application of the intra-firm privilege.

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