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## Another Court Recognizes The Attorney Client Privilege Extends To Internal Law Firm Communications

If you have been following the evolving law on attorney client privilege for internal law firm communications – the subject of our Law Firm Risk Managers' Lunch Forum in April of 2013 – you may be interested to know that on May 30 the Oregon Supreme Court joined courts in other states to hold that the attorney client privilege extends to communications between law firm attorneys and their firm's in-house counsel, including discussions about a client during the course of the representation relating to possible conflicts of interest with the client and possible liability to the client. *Crimson Trace Corp v. Davis Wright Tremaine LLP*, 353 Ore. 430 (May 30, 2014).

The Oregon decision is consistent with last year's decisions in Georgia and in Massachusetts (*St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.* and *RFF Family Partnership, LP v. Burns & Levinson, LLP*) recognizing the attorney client privilege for in-firm communications.

The decision is important because, as in the 2013 Georgia and Massachusetts cases, a state supreme court emphatically rejected the claim that a law firm's fiduciary duties to a client or former client preclude a law firm from invoking the attorney client privilege in response to discovery demands by a dissatisfied former client.

In the Georgia and Massachusetts cases, each state's supreme court construed the privilege as a matter of common law. In the *Crimson Trace* case, the Oregon Supreme Court, by contrast, construed the privilege under the state's *statutory* attorney client privilege.

In its legal malpractice action, the former client sought to compel production of all internal firm communications about the representation, including those relating to the client's unhappiness with the firm's performance. The firm resisted on the ground of the attorney client privilege. The trial court found that certain in-

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firm communications (with three exceptions) were, in fact, protected by the attorney client privilege. But it nevertheless ordered the production of those materials based on the so-called “fiduciary exception” to the attorney client privilege. The trial court deemed the exception applicable because a conflict of interest had developed between the firm and the client. According to the trial court, because of the firm’s “duties of candor, disclosure, and loyalty to . . . its client, the firm was precluded from asserting the attorney-client privilege.”

In a mandamus proceeding, the Oregon Supreme Court flatly rejected reliance on those professional duties to add a new exception to the statutory list of exceptions to the attorney client privilege. It therefore directed the trial court to vacate its order compelling production.

Because the former client argued that attorney client privilege did not apply at all, the Oregon Supreme Court first addressed that threshold issue, concluding that the requested communications (with three exceptions) satisfied all three of the requisite criteria: the communications were (1) between a lawyer and a client; (2) meant to be confidential; and (3) made for the purpose of facilitating the performance of professional legal services.

The client urged the court to adopt a fourth requirement: that the lawyers must have a “reasonable expectation” that an attorney client relationship with in-firm counsel was in place. The client argued that the firm could not satisfy that requirement because, since the Oregon Rules of Professional Conduct prohibit a lawyer from acting adversely to a client, “no lawyer could reasonably expect another member of his or her firm to represent the lawyer in his or her conflict with a current client.” The court rejected that argument for two reasons. First, it found nothing in the statute to support the contention that the privilege depended on the reasonableness of the parties' expectations; and, second, “the reasonableness of the . . . client's expectation of representation is irrelevant when, as in this case, the client and lawyer mutually agree that an attorney client relationship has been formed.”

The Oregon court also rejected the argument, advanced by the Oregon Trial Lawyers Association, that lawyers who seek advice from their in-firm counsel about ongoing representation should not be considered “clients” of the firm because to do so would “condone [the firm's] violation of its duty of loyalty to its current clients and undermine a client's sense of security in frankly communicating with his or her lawyers.” The court was not persuaded that the argument, “essentially one of policy,” should be allowed to guide construction of a statute defining an evidentiary privilege.

The client’s next argument was that even if the communications were privileged, they should nonetheless be fully discoverable under the “fiduciary exception” to the privilege. It maintained the exception was necessary because it “would be ‘absurd’ [to] allow a lawyer to breach his or her duty of loyalty to the client and then ‘compound the conflicts of interest by communicating with other lawyers in his firm . . .’” The court rejected that argument for an obvious reason: to accept it would “conflate ethical considerations with the separate

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issue of the scope of the privilege."

### Lessons For Law Firms

For law firm counsel or risk management partners, the "best practices" lessons to be gleaned from the Oregon court's decision in the *Crimson Trace* case are similar to those from last year's decisions in the *St. Simons Waterfront* and *RFF Family Partnership* cases:

1. Where the firm has in place one lawyer (or group of lawyers) specifically *designated as* the firm's counsel, the fact finder can conclude that a firm attorney's communication with a colleague having that designation amounts to a consultation with a lawyer for the purpose of obtaining professional legal advice. Use of a title such as "general counsel," and the separate tracking of time devoted to risk management or loss prevention activities, strengthen the argument that the relationship between a firm attorney and the firm's in-house counsel was one of attorney and client.
2. Firms should ensure that communications with in-firm counsel reflect an expectation of confidentiality. Such communications should not be included in the client file (hard copy or electronic), and, ideally, would be captioned or otherwise marked "in-firm confidential communication."
3. No firm attorney should bill the client for any time relating to consultations with in-firm counsel about the client's claims (actual or potential) and the firm's defenses.

In addition to the attorney client privilege issue, the Oregon decision also highlights another common risk management predicament for law firms: the so-called "prior work" conflict. In the underlying patent infringement litigation, the client alleged the law firm had two such conflicts: first, the opposing party filed a counterclaim asserting that the patent was invalid because the application, which the law firm had prosecuted, had "deceptively omitted material information"; and second, in moving to file a settlement agreement under seal, the firm's lawyer "did so in a way that disclosed certain details of the agreement and gave the impression that [the other party] had conceded liability, which it had not. . . . As a result, the court . . . imposed a monetary sanction on [the client] for having acted in bad faith."

In the *Crimson Trace* case, the client claims the firm charged it for work that not only had no value, but "was performed in [the firm's] own interest at a time when [it] had a conflict of interest with [its client]."

The lesson: where a law firm's *own* conduct in the representation is subject to challenge, the situation requires careful analysis of whether the firm can continue to provide conflict-free representation. And no representation subject to a prior work conflict claim should continue without full disclosure to the client of the potential conflict *and* the client's consent, confirmed in writing. Too often, continued representation turns ordinary negligence into grounds for a breach of fiduciary duty claim, the type of claim that greatly increases the law firm's exposure (including exposure to punitive damages).

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A copy of the Oregon decision may be found here: <http://www.publications.ojd.state.or.us/docs/S061086.pdf>

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