

SUPREME JUDICIAL COURT OF MASSACHUSETTS

RFF Family Partnership, LP v. Burns & Levinson, LLP

465 Mass. 702 (2013) · Decided July 10, 2013

SUMMARY

The Massachusetts Supreme Judicial Court held that confidential communications between a law firm's attorneys and designated in-house counsel concerning a malpractice claim by a current client may be protected by the attorney-client privilege. The court established conditions for protection, including designation of in-house counsel, lack of involvement in the underlying client matter, no billing of the time to the client, and confidentiality. The court affirmed a protective order shielding the communications from discovery and rejected the asserted fiduciary and current-client exceptions on the facts presented.

CASE DETAILS

COURT	Supreme Judicial Court of Massachusetts
WRITING FOR THE COURT	Gants, J.
JURISDICTION	Massachusetts
DECIDED	July 10, 2013
DISPOSITION	affirmed
PROCEDURAL POSTURE	RFF appealed an interlocutory protective order entered in its legal-malpractice action that permitted the defendant law firm and its attorneys to assert attorney-client privilege over communications with the firm's in-house counsel. A single justice of the Appeals Court granted leave to pursue the interlocutory appeal under G. L. c. 231, § 118, and the Supreme Judicial Court transferred the appeal to itself.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	RFF Family Partnership, LP v. Burns & Levinson, LLP, Michael MacClary, Francis Perkins

TOPICS

attorney client privilege

privilege

discovery dispute

civil procedure

commercial litigation

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether confidential communications between a law firm's attorneys and the firm's designated in-house counsel concerning a malpractice claim by a current client are protected from disclosure to that client by the attorney-client privilege.
2. Whether Massachusetts should recognize a fiduciary exception or current-client exception that would defeat the privilege in this setting.
3. What conditions must be satisfied for the attorney-client privilege to protect communications between a law firm's attorneys and its in-house counsel regarding the firm's response to a current client's malpractice claim.

HOLDINGS

1. Confidential communications between a law firm's attorneys and the firm's designated in-house counsel concerning how to respond to a malpractice claim by a current client are protected by the attorney-client privilege, even when the communications are intended in part to defend the law firm against the client's allegations.
2. The privilege applies only if the law firm has designated in-house or ethics counsel to represent the firm; that counsel has not worked on the client matter or a substantially related matter; the consultation time is not billed or charged to the outside client; and the communications are made and kept confidential.
3. The court declined to decide whether Massachusetts should adopt a fiduciary exception to the attorney-client privilege, but held that the exception would not apply to the communications at issue because they were made for the law firm's own defense and were not paid for by RFF.
4. Massachusetts does not adopt a current-client exception that would automatically defeat the attorney-client privilege for communications between a law firm's attorneys and its in-house counsel after a current client threatens malpractice litigation.
5. Protecting the firm's communications with in-house counsel does not relieve the firm of its duty to provide the client with full and fair disclosure of material facts and appropriate legal advice.

KEY QUOTATIONS

"The classic formulation of the attorney-client privilege, which we indorse, is found in 8 J. Wigmore, Evidence § 2292 (McNaughton rev. ed. 1961): '(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.'" (707-708)

"A fact is one thing and a communication concerning that fact is an entirely different thing." (716)

“In law, as in architecture, form should follow function, and we prefer a formulation of the attorney-client privilege that encourages attorneys faced with the threat of legal action by a client to seek the legal advice of in-house ethics counsel before deciding whether they must withdraw from the representation to one that would encourage attorneys to withdraw or disclose a poorly understood potential conflict before seeking such advice.” (722)

“For the privilege to apply, four conditions must be met.” (723)

“Because each of the four conditions was either properly found by the judge or undisputed in this case, we affirm the judge’s partial allowance of the B&L defendants’ motion for a protective order to enable them to preserve the confidentiality of privileged attorney-client communications between the law firm and its in-house counsel regarding how B&L should respond to RFF’s notice of claim and draft complaint.” (724)

FACTUAL BACKGROUND

RFF retained Burns & Levinson to investigate title, conduct due diligence, prepare loan documents, and foreclose a mortgage securing a \$1.4 million commercial loan. After another mortgage holder challenged the priority and validity of RFF's foreclosure, RFF's counsel sent Burns & Levinson a notice of claim alleging malpractice and demanding indemnification. Attorneys who had worked on RFF's matter consulted David Rosenblatt, the firm's designated ethics and risk-management counsel, about how to respond; Rosenblatt had not worked on RFF's matter, the communications were confidential, and the time was not billed to RFF. RFF later sued and sought discovery of those communications.

PROCEDURAL HISTORY

RFF sued Burns & Levinson, LLP, and two of its attorneys in the Superior Court for legal malpractice, negligent misrepresentation, and intentional misrepresentation. During discovery, the defendants sought a protective order concerning communications with the firm's designated in-house ethics and risk-management counsel about RFF's malpractice notice. The Superior Court judge granted the protective order in part, and the Supreme Judicial Court affirmed that order.

DISPOSITION

affirmed

CASES CITED

- Commissioner of Revenue v. Comcast Corp., 453 Mass. 293, 303 (2009)
- Upjohn Co. v. United States, 449 U.S. 383, 389-396 (1981)
- Suffolk Construction Co. v. Division of Capital Asset Management, 449 Mass. 444, 448-450 (2007)
- Clair v. Clair, 464 Mass. 205, 215-216 (2013)
- Hunter, Maclean, Exley & Dunn, P.C. v. St. Simons Waterfront, LLC, 317 Ga. App. 1, 12-23 (2012)
- Hertzog, Calamari & Gleason v. Prudential Insurance Co. of America, 850 F. Supp. 255, 255 (S.D.N.Y. 1994)
- TattleTale Alarm Systems, Inc. v. Calfee, Halter & Griswold, LLP, U.S. Dist. Ct., No. 2:10-cv-226, slip op. at 1, 9-10, 18 (S.D. Ohio Feb. 3, 2011)

- United States v. Mett, 178 F.3d 1058, 1063-1065 (9th Cir. 1999)
- United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2321-2322 (2011)
- Riggs National Bank of Washington, D.C. v. Zimmer, 355 A.2d 709, 711-712 (Del. Ch. 1976)
- Garvy v. Seyfarth Shaw LLP, 966 N.E.2d 523, 535 (Ill. App. Ct. 2012)
- Koen Book Distributors v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C., 212 F.R.D. 283, 285-286 (E.D. Pa. 2002)
- Hendrickson v. Sears, 365 Mass. 83, 90 (1974)
- Chambers v. Gold Medal Bakery, Inc., 464 Mass. 383, 392 (2013)
- Philadelphia v. Westinghouse Electric Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962)
- In re SonicBlue, Inc., U.S. Bankr. Ct., No. 03-51775, slip op. at 12 (N.D. Cal. Jan. 18, 2008)
- In re Sunrise Securities Litigation, 130 F.R.D. 560, 597-598 (E.D. Pa. 1989)
- In re Teleglobe Communications Corp., 493 F.3d 345, 368-369 (3d Cir. 2007)
- Eureka Investment Corp. v. Chicago Title Insurance Co., 743 F.2d 932, 938 (D.C. Cir. 1984)
- Cold Spring Harbor Laboratory v. Ropes & Gray LLP, U.S. Dist. Ct., No. 11-10128, slip op. at 3-4 (D. Mass. July 19, 2011)
- Asset Funding Group, LLC v. Adams & Reese, LLP, U.S. Dist. Ct., No. 07-2965, slip op. at 9 (E.D. La. Nov. 17, 2008)
- Burns ex rel. Office of Public Guardian v. Hale & Dorr LLP, 242 F.R.D. 170, 173 (D. Mass. 2007)